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THE YEAR IN FEDERALISM

By

Dan Schweitzer*

Americans love lists, and come December every newspaper and magazine in print gives us its top-ten-of-the-year lists. These lists tend to be narrowly focused, however, with an emphasis on such esoteric topics as movies, books, and television. What about federalism? For reasons difficult to fathom, the topic has been ignored by the mainstream media. As a public service, this article will fill that void and set forth the top ten developments in the field of federalism in 2003. To be sure, there is a subjective element to all top ten lists; if you disagree with this list, please go ahead and write your own.

And so, with no further ado:

1. The Commerce Clause or: How the Ninth Circuit Learned To Stop Worrying And Love *Lopez* and *Morrison*. Generally speaking, left-of-center commentators have decried the federalism jurisprudence of the Rehnquist Court. Among the more reviled components of that jurisprudence are the decisions in *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), which resuscitated the notion that Congress' power under the Commerce Clause is not unlimited. It naturally followed, then, that if a judge on the federal court of appeals were to take those decisions and run with them, it would be a conservative judge, say, Judge Luttig of the Fourth Circuit or Judge Smith of the Fifth Circuit.

It was therefore quite a shock to see that three decisions in 2003 holding that applications of federal statutes were unconstitutional because they exceeded Congress' Commerce Clause power all were issued by the Ninth Circuit. And even more of a shock to see that the authors of two of those decisions were Judge Stephen Reinhardt and Judge Harry Pregerson — two of the more liberal judges on what is generally considered the most liberal court of appeals in the nation. The author of the third of those decisions was Judge Kozinski, less of a surprise. All three decisions were well reasoned, faithful applications of *Morrison* and *Lopez*, although the outcomes were far from inevitable.

The first one issued was *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003), in which the court, per Judge Reinhardt and over the dissent of Judge Trott, held that the federal statute which prohibits the possession of child pornography made with materials that have traveled in interstate commerce, 18 U.S.C. § 2252(a)(4)(B), is "unconstitutional as applied to simple intrastate possession of a visual depiction (or depictions) that has not been mailed, shipped, or transported interstate and is not intended for interstate distribution, or for any economic or commercial use." *Id.* at 1133. The United States, in defending this application of the statute, relied principally upon *Wickard v. Filburn*, 317 U.S. 111 (1942), the landmark ruling in which the Supreme Court upheld application of the Agricultural Adjustment Act to crops grown for personal use. In *Wickard*, the Court adopted the "aggregation principle": even if the home-grown product "is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." 317 U.S. at 128.

Judge Reinhardt noted, however, that the Supreme Court in *Morrison* and *Lopez* ruled that the aggregation principle only applies when the activity at issue is plainly commercial in nature. 323 F.3d at 1120. That is not the case here, he found. Whereas *Filburn's* home-grown wheat reduced the demand for commercially-grown wheat, the same could not be said of *McCoy's* pornography. Rather, *McCoy's* possession of a picture of she and her daughter with their genitals exposed "was purely

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non-economic and non-commercial, and had no connection with or effect on any national or international commercial child pornography market.” *Id.* at 1122. Judge Reinhardt noted that some statutes contain “jurisdictional hooks” that require the government to establish specific facts that would ensure the requisite connection with interstate commerce. *Id.* at 1126. The “jurisdictional hook” in §2252(a)(4)(B) — that the camera and film used by McCoy were manufactured outside California—does not do the trick. Pretty much every criminal act imaginable involves some object that was produced outside the state of the crime. If such a “jurisdictional hook” preserved Congress’ power under the Commerce Clause, that power would be limitless. *Id.* at 1126, 1130.

Judge Trott’s dissent criticized the majority for engaging in an “as applied” analysis, an approach he believes the Supreme Court has “ruled out . . . in Commerce Clause challenges.” *Id.* at 1134–35, 1140–41. He concluded that the *Wickard* “aggregation principle” applied: child pornography has “spawned a vast interstate economic market”; regulation of child pornography is, therefore, regulation of economic (commercial) activity. As such, it was perfectly reasonable for Congress to believe that regulation of pornography manufactured intrastate would affect that market. *Id.* at 1140.

Once the Ninth Circuit had adopted the “as applied” approach to the Commerce Clause inquiry, it was inevitable that *McCoy* would not be the last decision of its kind. In November and December 2003, the next shoes fell. In *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), the court held, per Judge Kozinski and over the dissent of Judge Restani (sitting by designation), that Congress lacks power under the Commerce Clause to prohibit mere possession of homemade machine guns. Stewart appears to be a classic American character: a do-it-yourself tinkerer and lover of guns. He managed to fabricate and assemble five machineguns at home. Alas, federal law, specifically 18 U.S.C. §922(o), makes it a crime to possess a machinegun. And the Ninth Circuit had earlier held, in the aptly-named case of *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996), that “§ 922(o) was a valid

exercise of the commerce power because a transfer or sale must have preceded the criminalized possession.” *Stewart*, 348 F.3d at 1134.

But, ruled Judge Kozinski, “[c]ontrary to *Rambo*’s assumption that an unlawful transfer must precede unlawful possession, Stewart did not acquire his machineguns from someone else. . . .” *Id.* Relying on *McCoy*, Judge Kozinski wrote that “by crafting his own guns and working out of his own home, Stewart functioned outside the commercial gun market.” His activities neither increased supply (because he did not attempt to sell the guns) nor increased demand (because “there is no reason to think Stewart would ever have bought a machinegun from a commercial source”). *Id.* at 1138. Judge Kozinski also specifically responded to Judge Trott’s dissent in *McCoy*, stating that it is one thing to permit Congress to regulate even minor components of a large enterprise that has an effect on interstate commerce (as in *Wickard*), and an altogether different thing to permit Congress to “regulate someone with no relation to interstate commerce at all.” *Id.* at 1141. Moreover, he asserted, “the Supreme Court has always entertained as-applied challenges under the Commerce Clause.” *Id.* (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964)).

Finally, in *Raich v. Ashcroft*, No. 03-15481, 2003 WL 22962231 (9th Cir. Dec. 16, 2003), the court, per Judge Pregerson and over the dissent of Judge Beam (sitting by designation), applied the reasoning of *McCoy* to bar the federal government from prohibiting seriously ill Californians from using marijuana for medical purposes. The Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.*, designates marijuana as a schedule I controlled substance that is generally unlawful to possess. California voters, however, passed Proposition 215 “[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would benefit from the use of marijuana in the treatment” of various illnesses. Cal. Health & Safety Code §

11362.5(b)(1)(A). Appellants Monson and Raich wished to take advantage of Proposition 215, Monson by using marijuana she cultivated herself, Raich by using marijuana grown by her two caregivers (appellants John Doe Numbers One and Two). The appellants filed suit seeking, *inter alia*, a declaration that the CSA is unconstitutional as applied to their situation. Although the district court denied their motion for a preliminary injunction, the Ninth Circuit reversed, ruling that the appellants had established a likelihood of success on the merits.

Judge Pregerson distinguished the class of activities engaged in by appellants — “intrastate noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient’s physician pursuant to valid California state law”—from drug trafficking, which earlier cases upholding the CSA had addressed. 2003 WL 22962231 at *5. Appellants’ conduct, he concluded, does not involve “sale, exchange or distribution,” which are “the essential elements of commerce.” *Id.* at *7. For that reason, “*Wickard*’s aggregation analysis is not applicable.” *Id.* Closing the circle, Judge Pregerson further concluded that the link between home-grown medical marijuana and interstate commerce is attenuated. *Id.* at *9.

So, thanks to the Ninth Circuit’s reading of the Rehnquist Court’s federalism jurisprudence, Californians are now secure in their ability to create child pornography, machineguns, and marijuana in their homes, free from federal intrusion. Can there be any doubt that this was the top federalism development of the year?

2. *Nevada v. Hibbs* or: The States Can’t Win Them All. The Supreme Court’s one-two punch of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Congress may not abrogate the states’ sovereign immunity through its Article I powers, but may do so under its Fourteenth Amendment power), and *City of Boerne v. Flores*, 521 U.S. 507 (1997) (devising the “congruence and proportionality” test for determining whether Congress has acted validly under the Fourteenth Amendment), inevitably led to a

plethora of follow-up cases. Numerous federal statutes purported to abrogate the states’ sovereign immunity. Now they each had to be reviewed to determine whether they satisfied the “congruence and proportionality” test and were, therefore, valid Fourteenth Amendment legislation. The first four of those statutes to reach the Court—including such antidiscrimination measures as the Age Discrimination in Employment Act and Title I of the Americans with Disabilities Act—failed the test.¹ The Court’s decision in *Hibbs* broke the states’ winning streak. By a 6–3 vote, the Court held that the family-care provision of the Family and Medical Leave Act (FMLA) is a valid exercise of Congress’ Fourteenth Amendment enforcement power. For the reasons set forth below, that decision was (in my estimation) both wrong and sensible.

The family-care provision of the FMLA requires large employers to give employees twelve weeks of unpaid leave to care for a sick spouse, child, or parent. The United States and respondent *Hibbs* made a very subtle argument as to how this remedied unconstitutional conduct by the states. According to their briefs, the family-care provision enforces the Equal Protection Clause’s prohibition on gender discrimination. The nation as a whole, including state governments, have a long and regrettable history of engaging in gender discrimination. Even with Title VII on the books, Congress considered evidence that gender discrimination in the workplace persisted. For example, many states offered “maternity leave” but not “paternity leave.” The FMLA prevents and remedies that by establishing a gender-neutral, uniform family-leave floor that erodes sex-based employer presumptions and transforms family leave from a “women’s issue” into a routine, across-the-board employment benefit.

That was the argument, and it had one thing working for it and one thing working against it. Working for it is that the Court adopted it hook, line, and sinker — which is pretty much the *best* thing a legal argument can have going for it. Working against it is that its portrayal of what Congress was doing bears virtually no resemblance to reality. Simply put, there is precious little evidence that the Congress that enacted

the FMLA viewed itself as enacting antidiscrimination legislation. Here is what the 1993 Senate Report says in the section addressing the “Need for Legislation”:

The FMLA accommodates the important societal interest in assisting families, by establishing a minimum labor standard for leave. The bill is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare laws, and other labor laws that establish minimum standards for employment.

S. Rep. No. 103-3, at 21–22 (1993). The 1993 House Report repeats that statement verbatim. H.R. Rep. No. 103-8, pt. 1, at 21–22 (1993). The debate surrounding the FMLA was *not* about how to stop rampant discrimination; it was about how to ensure that employees are treated fairly and are given a chance to care for their newly-born children and their sick family members without losing their jobs.

The 1993 Senate Report contains *one* reference to discrimination and it bears mention. One section of the Report is captioned “Equal Protection and Non-Discrimination.” It states:

The FMLA addresses the basic leave needs of all employees . . . not only women of childbearing age. . . . A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. S. 5 [the Senate bill], by addressing the needs of all workers, avoids such risk.

Thus, S. 5 is based not only on the Commerce Clause, but also on the

guarantees of equal protection and due process embodied in the Fourteenth Amendment.

S. Rep. 103-8, at 29 (1993). Once again, the 1993 House Report contains near identical language. H.R. Rep. 103-8, pt. 1, at 29 (1993). That is the entire discussion of gender discrimination in the Senate Report and almost the entire discussion of discrimination in the House Report.²

This is not to suggest that the issue of gender discrimination *never* arose during the almost ten-year battle to enact the legislation. But to the extent gender discrimination was discussed, it was a minor part of the debate — which should not be surprising. The FMLA does not, by its terms, prohibit discrimination; that is what Title VII of the Civil Rights Act of 1964 does. Thus, whereas Title VII (along with the ADA and ADEA) are enforced by the Equal Employment Opportunity Commission and the Department of Justice’s Civil Rights Division, the FMLA’s twelve-week leave entitlement is enforced by the Department of Labor.

Why, then, did the Court accept the United States’ *post hoc* explanation of the FMLA and rule that its family-care provision remedies state violations of the Equal Protection Clause? Two reasons come to mind. First, is the problem of motive. Even if, as argued above, Congress was not motivated by concerns about gender discrimination, it is conceptually very difficult to assess and make use of Congress’ motive.³ Is it enough if two percent or ten percent of the testimony before Congress addressed gender discrimination? And if the Court held that the FMLA was not valid Fourteenth Amendment legislation on account of Congress’ motive, do we want a situation where Congress could cure this by enacting *identical* legislation so long as it explicitly said that it was motivated by gender discrimination?

Second, and more fundamentally, *Hibbs* can be seen as an effort by the Court (or by Justice O’Connor, the key vote) to find the proper balance between ensuring that Congress has the power to protect our nation’s

citizens from states' failure to abide by the Constitution, while also ensuring that Congress' power over the states does not become unlimited. In *Garrett* and *Kimel*, the Court reviewed the ADA and the ADEA with what seemed like heightened scrutiny. This made sense because those laws dealt with subjects as to which state laws are subject only to rational basis review. Laws enacted by democratically-elected state legislatures in those areas are presumptively valid. Hence, Congress (like the courts) has to work hard to overcome that presumption. On the other hand, Congress' effort to remedy state discrimination that is presumptively unconstitutional (like gender discrimination) is properly subject to far less scrutiny — just as the courts can more readily reject as illegal state activity in those areas.

Hibbs can therefore be seen as creating a *deferential* standard of judicial review for Fourteenth Amendment legislation that seeks to remedy state discrimination subject to *heightened* judicial review. That deference led the Court to accept the United States' *post hoc* justification for the statute and to accept the remedy of family-care leave even when there had been no specific showing of state discrimination with respect to family-care leave (as opposed to paternity leave). This seems a sensible approach to Congress' Fourteenth Amendment power, one that accommodates the competing federalism and separation-of-powers interests at play.

Having written at Tolstoyan length on the first two federalism developments on the list, it is now time to be brief.

3. Spending Clause Silence and Defeats. Many have speculated that the next major federalism development will involve the Spending Clause. Thanks to *South Dakota v. Dole*, 483 U.S. 203 (1987), Congress has broad authority to regulate the states by attaching conditions to the states' receipt of federal funds. Moreover, Congress potentially could undo many of the states' recent victories in federalism cases by invoking its Spending Clause power (*e.g.*, by requiring states to waive their sovereign immunity to ADEA suits as a condition of some federal funding).

Naturally, then, the “federalism five” on the Supreme Court will let that stand, right?

In 2003, the answer was no. Last year, the Court denied certiorari in three cases in which federal courts of appeal held that Congress acted lawfully in compelling a state agency, as a condition for receiving any federal funding, to waive its Eleventh Amendment immunity from suits under Section 504 of the Rehabilitation Act. See *Koslow v. Pennsylvania*, 302 F.3d 161 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 1353 (2003); *Robinson v. Kansas*, 295 F.3d 1183 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2574 (2003); *Vinson v. Hawaii*, 288 F.3d 1145 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 962 (2003). And two additional courts of appeal reached the same conclusion last year. *Doe v. Nebraska*, 345 F.3d 593 (8th Cir. 2003); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 344 F.3d 1288 (11th Cir. 2003). The only victory for a state on this issue was in *Pace v. Bogalusa School Bd.*, 325 F.3d 609 (5th Cir. 2003), where the court held that Section 504 was not a valid waiver during the years prior to the Supreme Court's decision in *Garrett*, when a state would not have known that it had any sovereign immunity from disability claims to waive. Even that partial victory was short-lived, however, for the Fifth Circuit granted rehearing *en banc* in the case. 399 F.3d 348.

Nor did the states have any luck challenging other Spending Clause programs in 2003. See *M.A. ex rel. E.S. v. State-Operated School Dist. of City of Newark*, 344 F.3d 335 (3d Cir. 2003) (states accepting funds under the Individuals with Disabilities Education Act waive their Eleventh Amendment immunity); *A.W. v. Jersey City Public Schools*, 341 F.3d 234 (3d Cir. 2003) (same); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003) (upholding Religious Land Use and Institutionalized Persons Act of 2000 against Spending Clause challenge).

4. Preemption Comes to the Fore. Well-publicized battles between states and the Office of the Comptroller of the Currency and the Office of Thrift Supervision regarding the preemption of state consumer protection laws, along with legislative efforts

to preempt state anti-spam laws (which succeeded) and state securities enforcement actions (which did not), made preemption a topic of widespread public debate, commentary, and litigation in 2003. Look for that trend to continue, as business mobilizes to limit pesky regulations by the 50 states in favor of uniform federal legislation.

5. The D.C. Circuit Saves the Arroyo Southwestern Toad. For the readership of this publication, the D.C. Circuit's opinion in *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), rejecting an as-applied Commerce Clause challenge to the Endangered Species Act, may be far more important than the Ninth Circuit's recent Commerce Clause bing. But to me, it's a dog-bites-man story, so it will have to settle for number 5 on the list.

In short: Rancho Viejo hoped to construct a 280-home residential development on a 202-acre site in southern California, but was blocked by the United States Fish and Wildlife Service (FWS), which "determined that Rancho Viejo's construction plan was likely to jeopardize the continued existence of the arroyo southwestern toad"—a species on the Secretary of the Interior's list of endangered species. 323 F.3d at 1065. Rancho Viejo wasn't much pleased with this development, nor was it pleased with FWS's proposed alternative plans. This being America, the company turned to the courts, where it argued that, because the arroyo southwestern toad does not travel outside the state of California, this application of the Endangered Species Act exceeds the federal government's power. A unanimous panel of the D.C. Circuit disagreed.

The key to the court's holding was its conclusion that the first *Lopez* factor — "whether the regulated activity has anything to do with commerce or any sort of economic enterprise" — was satisfied here. *Id.* at 1068 (internal quotation marks and citation omitted). The regulated activity here, the court ruled, "is the construction of a 202-acre commercial housing development," not the taking of the toad. *Id.* at 1068,

1072. (The court stated, and who can dispute, that the Endangered Species Act "does not purport to tell toads what they may or may not do." *Id.* at 1072.) Having started with that premise, the court had little difficulty in concluding that "the relationship between the regulated activity and interstate commerce is [not] too attenuated to be regarded as substantial." *Id.* at 1069. Large commercial housing developments, which use materials and workers from other states, plainly has a significant connection with interstate commerce. *Id.*

Although the D.C. Circuit denied Rancho Viejo's petition for rehearing *en banc*, two judges dissented from that denial. 323 F.3d 1158. Notably, one of them was Judge John Roberts, whose dissent was his first published opinion. He argued that the panel erred in "ask[ing] whether the challenged *regulation* substantially affects interest commerce, rather than whether the *activity* being regulated does so." *Id.* at 1160. He noted that, under the panel's approach, "if the defendant in *Lopez* possessed the firearm because he was part of an interstate ring and had brought it to the school to sell it, or the defendant in *Morrison* assaulted his victims to promote interstate extortion, then clearly the challenged regulations in those cases would have substantially affected interstate commerce, and the facial Commerce Clause challenges would have failed." *Id.* Rancho Viejo has filed a petition for a writ of certiorari with the Supreme Court. It will be interesting to see whether the Court finds Judge Roberts' dissent persuasive enough to merit accepting the case for review.

6. Franchise Tax Board of California v. Hyatt. The field of federalism addresses not only federal-state relations, but also state-state relations. The Supreme Court's decision last Term in *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003), affects states' relationships with their sister states in two important ways.⁴

The case arose out of California's tax assessment of a former California resident who now lives in Nevada. He appealed his assessment through the Cali-

California administrative system, but then filed a separate suit in Nevada state court alleging that the California Franchise Tax Board, through its assessors, committed a slew of torts during the course of the assessment. The Nevada Supreme Court held that the intentional tort claims (but not the negligence claims) could proceed. The Supreme Court granted California's petition for a writ of certiorari, which argued that the Nevada Supreme Court violated the Full Faith and Credit Clause, U.S. Const. art. IV, §1, when it refused to apply a California law that gave absolute immunity to California and its agents from claims arising out of tax assessments.

Dashing California's hopes, the Supreme Court unanimously affirmed, holding that Nevada state courts did not have to give Full Faith and Credit to the California immunity statute. Putting to rest any possibility that the Court will reinvigorate the Full Faith and Credit Clause as a check on state choice-of-law rules, the entire Court agreed that the Clause imposes no limitation whatsoever on a forum state's desire to apply its own law. The nature of this suit made it particularly striking that the Court permitted it to proceed in its entirety (as to the intentional tort claims). Not only was it a suit against another state, but the core of Hyatt's claim was that the Franchise Tax Board has a practice of extorting settlements from former California residents who have moved to Nevada. The Magistrate in the case has therefore allowed Hyatt to take discovery on California's entire tax collection process. This has led to 315 hours of depositions taken by Hyatt's attorneys and 670 document requests from them. And still, the Supreme Court declined to limit the intentional tort action to, for example, torts that were physically committed in Nevada (as opposed to California).

The other noteworthy aspect of the case is that the Court declined to revisit *Nevada v. Hall*, 440 U.S. 410 (1979), in which it held that the Constitution permits a state to be sued by a private individual in another state's courts. It must be noted that California did not ask the Court to overrule that decision (pre-

sumably on the ground that its sovereignty interests are bolstered when its own courts are permitted to apply the state's public policy instead of other states' laws). But a 20-state amicus brief did ask the Court to revisit *Nevada v. Hall*, arguing that the opinion cannot be reconciled with the Court's recent decisions in *Seminole Tribe* and *Alden v. Maine*, 527 U.S. 706 (1999). Although the Court generally does not consider arguments made only by amici, it occasionally does so. The Court's approach in *Franchise Tax Board of California v. Hyatt* at least instructs that the Court is not going out of its way to make new sovereign immunity law.

7. Still More Avoidance of Federalism Issues by the Supreme Court. Those who fear that the current Supreme Court likes nothing more than creating new restrictions on federal power should be relieved by the Court's actions in 2003. Not only did the Court issue two decisions against the states in federalism cases — *Nevada v. Hibbs* and *Franchise Tax Board of California v. Hyatt* — and pass up the opportunity to revisit *Nevada v. Hall*, it also passed up two opportunities to address whether Congress has the power to dictate procedures followed by state courts in actions involving state-law claims.

In *Pierce County, Wash. v. Guillen*, 537 U.S. 129 (2003), the Court unanimously upheld a federal law (23 U.S.C. §409) that not only requires states to compile and maintain extensive records of vehicle accidents and other data to support their applications for federal highway funding, but forbids data "compiled or collected" for that purpose to be subject to discovery or admission into evidence in state or federal courts. One argument pressed by respondent (who sought to obtain such information in discovery) was that "§ 409 violates the principles of dual sovereignty embodied in the Tenth Amendment because it prohibits a State from exercising its sovereign powers to establish discovery and admissibility rules to be used in state court for a state cause of action." *Id.* at 148.

The Court declined to reach that issue, however, on the ground that the Washington Supreme Court had not addressed it.

Meanwhile, in *Jinks v. Richland County, South Carolina*, 123 S.Ct.1667 (2003), the Court unanimously held that the tolling provision of the supplemental jurisdiction statute (28 U.S.C. § 1367(d)) is constitutional as applied to a state's political subdivisions. In reversing the South Carolina Supreme Court, the Court held that § 1367(d) is necessary and proper for executing Congress' power "[t]o constitute Tribunals inferior to the supreme Court," Art. I, §8, cl. 9. Again, the argument was raised that the "tolling rule [is] a regulation of state-court 'procedure,' and . . . Congress may not, consistent with the Constitution, prescribe procedural rules for state courts' adjudication of purely state-law claims." *Id.* at 1672. The Court declined to reach that constitutional issue: "Assuming for the sake of argument that a principled dichotomy can be drawn, for purposes of determining whether an Act of Congress is 'proper,' between federal laws that regulate state-court 'procedure' and laws that change the 'substance' of state-law rights of action, we do not think that state-law limitations periods fall into the category of 'procedure' immune from congressional regulation." *Id.*

8. Jeff Sutton's Confirmation. The Senate's confirmation of Jeffrey Sutton to serve as a judge on the Sixth Circuit proves that making federalism arguments on behalf of states doesn't disqualify one for a federal judgeship.

Conclusion

The only thing better than an end-of-the-year retrospective top **ten** list is an end-of-the-year retrospective top **eight** list. Having reached that magic number, it seems a good time to conclude this article. (Plus, I couldn't think of two more notable events in the field of federalism — but you've probably already guessed that.) On to 2004.

ENDNOTES

1. Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S.666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999).
2. Part 2 of H. Rep. No. 103-8 (1993), which addressed the extension of family and medical leave to federal employees, contains a section titled "History" that discussed past efforts to remedy gender-based employment discrimination and gaps in those efforts.
3. See generally John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).
4. This section of the article is also derived from a presentation by Dan Schweitzer at the American Enterprise Institute on June 27, 2003.

DECISIONS

CERCLA

Tyson Chicken Is “Person in Charge” for CERCLA Reporting Requirements: *Sierra Club, Inc., et al. v. Tyson Foods, Inc., et al.*, No. 4:02CV-73M (W.D. Ky. Nov. 7, 2003)

Background

This lawsuit involves four chicken production operations: (1) The Tyson Operation, in Earlington, Kentucky, owned by Tyson Children Partnership and leased by Tyson Chicken, Inc.; (2) the Adams Operation in Calhoun, Kentucky, owned by the Adams; and (3) two Buchanan Operations, located in Sebree, Kentucky, and owned by Buchanan. Tyson Chicken normally delivers enough chickens to each farm (between 160,000 and 180,000) to fill eight chicken houses and makes an almost daily delivery of feed. Tyson Chicken retains ownership of the chickens and feed while they are at the various facilities. Through its contracts, Tyson mandates that the operators of the facilities adopt recommended management practices and install recommended equipment. Tyson reserves the right to unfettered access to the grower’s property and technical advisors visit the Adams and Buchanan operations on a weekly basis. After approximately fifty days, Tyson picks up the chickens from the facilities.

The issue in this case is whether the defendants failed to report ammonia emissions in violation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA).

The ammonia is produced by decomposing animal waste. After each group of chickens is removed for processing, one or two inches of the litter on the floor of the chicken houses are removed in order to provide a suitable environment for the baby chicks. Approximately every two years, all litter is removed. While the chickens are in the facility, a series of exhaust fans and vents is used to protect the health of the animals.

At this stage of the litigation, both the plaintiffs and defendants have moved for partial summary judgment.

Holding

The court first addressed the issue of standing. The defendants argued that there is no injury in fact that would create standing in the plaintiffs, noting that the only injury that could result from the alleged violation would be that EPA would not have sufficient information to evaluate the need for action. According to the defendants, EPA already has knowledge concerning ammonia releases from chicken houses and is now attempting to ascertain whether there is a reliable emission factor that could be used to determine whether reporting is required. They also argued that the plaintiffs have no evidence of the amount of ammonia released and that, therefore, the claim is purely hypothetical and conjectural. They also questioned the redressability of the plaintiffs’ alleged injury.

The court held that the facts alleged met the injury in fact requirement. The plaintiffs alleged that the emitted ammonia forced them to curtail their outdoor activities. They also alleged that their right to be informed in a timely manner constitutes injury in fact. The court noted that the Supreme Court in *Steel Company v. Citizens for a Better Environment*, 523 U.S.83 (1998), in discussing the purpose of EPCRA, noted that the statute is designed to “inform the public about the presence of hazardous and toxic chemicals.” Thus, even though the Court did not decide whether being deprived of information would be a concrete injury in fact under the statute, the district court determined that, under the facts of the present case, the Supreme Court would find an injury in fact that satisfies the Article III standing requirement.

Addressing the defendants’ argument concerning the speculative nature of the complaint, the court concluded that the plaintiffs were not required, at this stage of the litigation, to prove that the defendants did, in fact, violate the reporting requirements in order to obtain standing.

The court also found that the plaintiffs have demonstrated a causal connection between the alleged injury and the conduct complained of. The defendants contended that the injury that plaintiffs were complaining of was the *release* of the ammonia and not the failure to give notice of the release. Even assuming that to be so, the court noted that the procedures that the plaintiffs wish to enforce — the requirement to notify — are designed to protect persons from exposure to hazardous substances in the environment.

Finally, the court addressed the requirement of redressability, a requirement that ensures the plaintiff will tangibly benefit from the court's intervention. In this case, the plaintiffs are seeking injunctive relief. According to the Court in *Steel Company*, redressability is satisfied when the plaintiff seeking injunctive relief alleges a continuing violation or the imminence of a future violation. In this case, the court could order that the notice be given so that plaintiffs could take the appropriate steps to protect themselves from the releases. Furthermore, the CERCLA and EPCRA notice requirements are designed to enable appropriate governmental agencies to respond to hazardous releases. It is reasonable for the court to assume that, if the appropriate agencies are notified of releases, those agencies will respond to the release. Thus, the court found that the redressability standard is also met.

The defendant argued that there is no generally accepted methodology for estimating the amount of ammonia that chicken production facilities emit. However, the defendants do not cite any authority for their contention that animal production facilities are exempt from the reporting requirements of EPCRA and CERCLA. It is not sufficient for the defendants to argue that EPA has chosen not to enforce the reporting requirements against animal production facilities. Under both statutes, citizen plaintiffs may step in where government authorities have chosen not to enforce.

The plaintiffs contended that, to prove their case, they need only demonstrate that the defendants knew of a

release, not that they knew the release was of a reportable quantity. The court looked at the language of CERCLA:

Any person in charge of . . . an on-shore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such . . . facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center

42 U.S.C. § 9603(a).

According to the court, the language is plain; the defendants must have knowledge that a reportable quantity of hazardous substance was released. However, caselaw and administrative decisions have established that the knowledge may be actual or constructive.

Another issue is whether the separate poultry building in each operation may be grouped together as a CERCLA facility so that the emissions from all of them might be considered a reportable quantity. CERCLA defines "facility" as:

(A) [A]ny building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9).

The defendants argued that, since CERCLA defines “facility” as “any building,” each poultry house is a separate facility. The court held, however, that the entire chicken farm site should be deemed to be one facility. First, it noted that the definition in section 101(9)(B), 42 U.S.C. § 9601(9)(B) specifically defines a facility as “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located” It then noted that courts have consistently interpreted the term “facility” very broadly. For instance, *In Cytec Industries v. B.F. Goodrich Company*, 232 F. Supp.2d 821 (S.D. Ohio 2002), the court stated that the definition of facility will be the entire site or area, including single or contiguous properties, where hazardous wastes have been deposited as part of the same operation or management.” Similarly, the court in *Akzo Coatings, Inc. v. Aigner Corporation*, 960 F. Supp. 1354, 1359 (N.D. Ind. 1996), rejected the argument that each contamination source should be a separate facility, commenting that “ultimately every separate instance of contamination, down to each separate barrel of hazardous waste, could feasibly be construed to constitute a separate facility.”

According to the court, the four operations are operated together for a singular purpose — to produce chickens. Chickens of an identical age are delivered and picked up from the site as a whole. Tyson Chicken’s technical advisors visit the multiple houses during their periodic visits. The court concluded that the four operations constitute a single CERCLA facility.

In reaching this conclusion, the court rejected the defendant’s argument that “facility” for reporting purposes should not be defined in the same way as “facility” for section 107 and 113 purposes. The defendants cited the holding in *Sierra Club v. Seaboard Farms, Inc.*, No. Civ-00-997-C (W.D. Okla. Feb. 5, 2002, July 18, 2002), currently on appeal to the U.S. Court of Appeals for the Tenth Circuit. In that case, also brought by the Sierra Club regarding the CERCLA reporting requirement, the court held that each wastewater lagoon and sow barn was a separate facility under CERCLA, relying on the “any build-

ing” portion of the “facility” definition. However, the court in that case did not address whether the lagoons or barns were “any site or area where a hazardous substance has been deposited . . . or came to be located.” 42 U.S.C. § 9601(9)(B).

Finally, the court determined that the reporting requirement was best served by defining “facility” broadly. The plaintiffs have alleged that facilities such as those involved here release about 235 pounds of ammonia into the environment every day. Under the defendant’s view of the law, there would be no requirement to report since each separate poultry house releases only about ten pounds of ammonia a day. Aggregating the poultry houses together as a CERCLA facility promotes CERCLA’s basic purpose — to protect and preserve public health and the environment.

The court also looked at EPA regulations, noting that a court will normally defer to an agency’s permissible interpretation of the statute. Here, however, the court found that there was arguable support for both the plaintiffs’ and the defendants’ positions and, therefore, deferred to the CERCLA caselaw.

The court also found that EPCRA’s definition of “facility” would encompass each of defendant’s chicken production operations. That definition states that the term “facility” means “all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person).” 42 U.S.C. § 11049(4). The chicken houses at each operation are owned by the same person for purposes of producing chicken. Therefore, emissions on a site-wide basis must be aggregated for reporting purposes.

The court then discussed the defendants’ argument that the emissions were “continuing” and, thus, subject to a reduced reporting requirement under CERCLA and EPCRA. The court noted that the defendants had not met the necessary requirements to classify the releases as continuous under section 103(f)(2) of CERCLA. Under the regulations, both

initial telephone notification and follow-up written notification are required under EPCRA. Therefore, the continuing emissions rules did not apply to the defendants.

Under EPCRA, an exemption for reporting releases is available where the regulated substance “is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate consumer.” 42 U.S.C. § 11021(e)(5). Because the chicken waste is used on other farms for fertilizer, the defendants argued that this exemption is applicable to them. However, the court noted that the gaseous ammonia that is vented from the chicken houses is not used as fertilizer or for another agricultural use. It is vented because it is dangerous to the chickens. Therefore, the agricultural use exemption under EPCRA is not applicable.

Finally, the court addressed the issue of whether Tyson Foods, Inc., and its wholly owned subsidiary, Tyson Chicken, Inc., is a person in charge or operator of the chicken production facilities. The term “person in charge” is not defined in either CERCLA or its implementing regulations. The plaintiffs contended that a “person in charge” under CERCLA includes both supervisory personnel and owners and operators.

The court in *United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989), discussed the term in the context of a criminal action against a supervisor who directed workers to improperly dispose of waste cans of paint and then failed to report releases under CERCLA. After conviction, the defendant appealed, challenging the jury instruction regarding the meaning of the phrase “in charge.” The appellate court noted that this provision of CERCLA was modeled after the reporting requirement section of the Clean Water Act, 33 U.S.C. § 1321(b)(5). In that case, the court commented that the legislative history suggested that Congress intended the CWA section to extend only to persons who occupy positions of responsibility and power. Nonetheless, the court also noted that this does not mean that the CWA provision and the CERCLA provision cannot reach lower-level supervisory employees. It said, “The reporting requirements of the two statutes do not apply only to owners and operators, but instead

extend to any person who is ‘responsible for the operation’ of a facility from which there is a release.” *Id.* at 1554 (citations omitted).

In reviewing the *Carr* decision and the cases cited by the *Carr* court, this court found that the focus of these opinions was on the fact that the person in question “was actively involved in the daily operation of the business,” had “the capacity to make timely discovery of oil discharges,” and had the “power to direct the activities of persons who control the mechanisms causing the pollution.” *United States v. Greer*, 850 F.2d 1447, 1453 (11th Cir. 1988); *United States v. Mobil Oil Corporation*, 464 F.2d 1124, 1127 (5th Cir. 1972). Thus, an owner or operator may not be, per se, a “person in charge.” The determination will depend on the nature and degree of control a person has over the facility at issue.

Under EPCRA, the “owner or operator” of a facility is required to notify authorities of a release. 42 U.S.C. § 11004(a). Although the term “operator” is not defined in EPCRA or in its regulations, the court found it appropriate, given EPCRA’s close connection to CERCLA, to use the Supreme Court’s definition from *United States v. Bestfoods*, 524 U.S. 51, 66–67 (1998):

An operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA’s concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

The court allowed additional discovery time to the plaintiffs concerning Tyson Foods’ motion for partial summary judgment on the issue of whether it is a CERCLA “person in charge” and an operator under EPCRA. The court reminded the plaintiff that, in accordance

with Bestfoods, the inquiry will be directed toward the relationship between the parent corporation and the facility, not between the parent and its subsidiary, Tyson Chicken.

The remaining inquiry is whether Tyson Chicken may be liable for alleged unreported ammonia releases under CERCLA and EPCRA at the Adams and Buchanan facilities. It is clearly a "person in charge" of the Tyson Facility because it "occupies a position of responsibility and power and is in a position to make timely discovery of releases, directs the activities that result in the pollution and has the capacity to prevent and abate the environmental damage." Slip op. at 15. The defendant argued, however, that it merely provides chicks, feed, veterinary services, medication, and technical advice to the contract growers. The only Tyson Chicken employee who has regular contact with the contract grower are technical advisors who are only at the farms periodically and do not stay the whole day. These advisors, according to the defendant, are only present on the farms for a few days during the growth cycle and are thus not in the *best* position to detect, prevent, or abate a release of a substance.

The court disagreed. The standard is not who is in the *best* position; the standard for reporting is that a person is in a position to detect, prevent, and abate a release of a hazardous substance. There may be several who meet that definition at a facility. It is of no moment that the growers may be independent contractors. The inquiry is the relationship between the person sought to be charged and the facility itself. In *Tyson Foods, Inc. v. Stevens*, 783 So.2d 804, 809 (Ala. 2000), the Alabama Supreme Court found that Tyson's control of its growers was so complete that it held an individual that raised hogs for Tyson its "agent."

The court concluded that no reasonable juror could differ on the issue of whether Tyson Chicken is a person in charge of both the Adams and Buchanan facilities. It noted that Tyson Chicken is involved in both facility design (including heating, cooling, and illumination) and equipment specification (including listing approved vendors). If a grower deviates from Tyson's instruction, Tyson reserves the right to refuse

to deliver chicks or seize its property. Its technical advisors monitor the facilities, providing detailed instructions to the growers including the venting of ammonia to avoid buildup inside the chicken house. Some of the information in the advisors' reports detail their inspection of the venting or instructions given to the growers concerning venting. For the same reasons, the court found that Tyson Chicken was also an "operator" under EPCRA, responsible for reporting releases of hazardous substances.

The Tyson Children Partnership, however, is merely a lessor of the land at the Tyson facility and, thus, has no active role in managing the property. As such, it is not a "person in charge" liable for reporting violations. Under EPCRA, the partnership is not an "operator" of the property because there is no evidence that it manages, directs, or conducts the activities at the facility related to pollution. The plaintiff argued, however, that EPCRA clearly requires owners of facilities to report releases of hazardous substances. The court agreed that the partnership clearly owns the land and the buildings on which the Tyson facility is located. However, in *Neighbors for a Toxic Free Community v. Vulcan Materials Company*, 964 F. Supp. 1448 (D. Colo. 1997), the court rejected the plaintiff's argument that a lessor of a railroad tank car leased to Vulcan Materials Company was liable for failing to report a release under EPCRA. It found that it would be unreasonable to require a lessor of equipment to file a report when a toxic spill occurs even though it had no knowledge or ability to do this.

Applying that principle to this case, the court held that a lessor of property who does not have the control over the operations of a facility or knowledge of a release of a reportable quantity of hazardous substance is not subject to the EPCRA reporting requirements. There is a genuine issue of material fact concerning whether the partnership had such knowledge. Therefore, partial summary judgment on the EPCRA owner issue was denied to the defendant but granted on the "person in charge" issue under CERCLA and the "operator" issue under EPCRA.

**Brownfields Amendments Not Retroactive:
United States v. Domenic Lombardi Realty, No.
98-591S (D.R.I. Oct. 17, 2003)**

Background

This lawsuit involves the cleanup of contaminated land in West Greenwich, Rhode Island, now owned by Domenic Lombardi Realty, Inc. The only issue at trial was whether the defendant could take advantage of the innocent landowner defense contained in the third party defense provisions included in the Comprehensive Environmental Response, Compensation, and Liability Act. 42 U.S.C. § 9601(35)(A). One of the issues in contention was whether the Small Business Relief and Brownfields Revitalization Act (Brownfields Amendment) operates retroactively.

Holding

The innocent landowner defense, enacted under the Superfund Amendments and Reauthorization Act (SARA), provides an affirmative defense to landowners who, in good faith, purchase property without knowledge that a release of hazardous substances had occurred there. The provision states that where “an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant” causes the release of hazardous substances, the defense applies. In order to assert the defense, the defendant must demonstrate that the contamination occurred prior to his purchase; that he had no reason to know that the property was contaminated; that the defendant made “all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice; and that, when the contamination was discovered, the defendant exercised due care.” 42 U.S.C. §§ 9607(b)(3); 9601(35)(A)–(B).

The Brownfields Amendment was intended to encourage the purchase and development of brownfield sites by eliminating the fear of CERCLA liability for a potential purchaser. According to the court, under its

provisions, the innocent landowner defense was changed in three significant ways. The “all appropriate inquiry” standard was changed from one that is “consistent with good commercial or customary practice” to one that is “in accordance with generally accepted good commercial and customary standards and practices.” Finally, a party must now demonstrate that it took reasonable steps to stop any continuing release, prevent any future release, and prevent or limit exposure to any previously released hazardous substance. 42 U.S.C. § 9601(35)(B)(i)(II)(aa)–(cc). The government insisted that this is the standard that must be applied even though the current litigation was ongoing when the amendment was passed.

In determining the issue of retroactivity, the court began by looking at the holding in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). There, the Court set out a two-part analysis for determining when a court should apply newly-enacted legislation to a pending case:

When a case implicates a federal statute enacted after the events in suit, the court’s first task is to determine whether Congress has expressly prescribed the statute’s proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280.

It is clear that there is no expressed command regarding retroactive application of the amendments.

Although the government argued that the application of the new standard would not affect the outcome in this case, the court noted that, under the Brownfields Amendment, a defendant must, in addition to complying to the new standards as outlined above, show that it “provided full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility.” 42 U.S.C. § 9601(35)(A). It must also show that it complied with all institutional controls and land use restrictions attached to the land. The court, thus, concluded that the additional requirements would impose new substantive obligations on the defendant. Therefore, it concluded that the Brownfields Amendment should not be applied retroactively.

ESA

Forest Service May Restrict Water Flow in Ditches to Protect Endangered Species: *County of Okanogan et al. v. National Marine Fisheries Service et al.*, No. 02-35512 (9th Cir. Oct. 29, 2003)

Background

The plaintiffs in this lawsuit use water for irrigation from the Skyline Irrigation Ditch and the Early Winters ditch that traverse the Okanogan National Forest. The original permit for the Skyline Ditch was issued in 1903 by the Secretary of the Interior granting permission to the Skyline Ditch Company to construct and maintain a ditch to take water from the Chewuch River. In 1971, the permit was renewed. One of the terms of the permit was that it could be terminated “at the discretion of the regional forester or the Chief, Forest Service.” The permit was renewed in 1979 and 1987. The Early Winters Ditch was first permitted in 1910 to take water from the Early Winters Creek. Again, the permit was terminable at the discretion of the Forest Service. The renewed permits were also terminable at the discretion of the Forest Service. Beginning with the 1971

permit, the Early Winters permits were subject to renewal only if the permittee complied “with the then-existing laws and regulations governing the use and occupancy of National Forest Lands.” Permits for both ditches also noted that the permits conveyed no legal interest in water rights as defined by the applicable state law.

Under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–44, steelhead trout, bull trout, and Chinook salmon have been listed as endangered species. The 1998 permits for the irrigation ditches noted that the consultation process was not yet complete with the applicable agency concerning these species, a requirement of the ESA when a federal permitted or funded activity might affect a threatened or endangered species. When the biological opinions were complete, the Forest Service amended the Skyline Irrigation Ditch permit to require that instream flows on the river be measured and that diversions be limited to maintain certain instream flows. As to the Early Winters Ditch, the biological opinion found that the proposed plan concerning using wells in lieu of surface water diversions during low flow conditions were not likely to jeopardize the protected species.

The plaintiffs brought this suit for a declaratory judgment, alleging that the actions of the federal agencies concerning the renewals of the permits were unconstitutional and exceeded the agencies’ statutory authority. The trial court granted summary judgment in favor of the defendants and the plaintiffs appealed.

Holding

The gravamen of the plaintiffs’ complaint is that the Forest Service does not have the authority to condition the use of the right-of-way in a national forest on the maintenance of instream flows because such restrictions deny them their vested water rights under state law. The more recent permits for both irrigation ditches, however, specifically state that they do not convey water rights and are subject to amendment.

Furthermore, from their inception, the permits provided the government the unqualified discretion to restrict

or terminate the rights-of-way. The Federal Land Policy and Management Act (FLPMA) of 1976, which authorizes the grant of rights of way over public land for ditches, requires that the permit “contain terms and conditions which will . . . minimize damage to . . . fish and wildlife habitat and otherwise protect the environment” and will require compliance with applicable law. 43 U.S.C. § 1765(a). Further authority is given under the National Forest Management Act, the Organic Administration Act (OAA), and the Multiple Use Sustained-Yield Act of 1960 (MUSYA).

The FLPMA does provide that the actions of the Secretary under the act shall be subject to valid existing rights. However, the plaintiffs’ rights-of-way were *always* revocable at the discretion of the federal government. The 1901 act under which the permits were originally granted stated that the permits did not grant vested property rights.

The appellants cited the decision in *United States v. New Mexico*, 437 U.S. 696 (1978), in support of their arguments. That case held that a longstanding “implied-reservation-of-water doctrine” meant that Congress did not intend the federal government, under the OAA and the MUSYA, to reserve water rights for wildlife preservation purposes when it set aside lands for national forests. However, that case did not address the power of the Forest Service to restrict the use of rights-of-way over federal land. This case is not a controversy over water rights; it is a matter of the authority of the Forest Service in permitting rights-of-way over federal land. The court held the Forest Service possessed the authority and, thus, affirmed the district court’s decision.

Federal Facilities

Sovereign Immunity Not Waived for Punitive Damages Under CAA: *City of Jacksonville v. Department of the Navy*, No. 03-10570 (11th Cir. Oct. 28, 2003)

Background

The City of Jacksonville, Florida, brought this action alleging that the U.S. Navy had violated various state and local air pollution regulations at its base in Jacksonville. The complaint did not allege that the violations were continuing in nature. The complaint sought punitive penalties up to \$10,000 per occurrence for each past violation, alleged to be over 250. The Navy removed the case to federal district court and argued that Congress did not waive the federal government’s sovereign immunity with regard to punitive penalties under the Clean Air Act (CAA).

The city argued that the CAA prohibited the Navy from removing the case to federal court and that sovereign immunity had been waived. The court concluded that the case was properly removed. However, it also held that the statute unequivocally waived the federal government’s immunity for punitive damages under the CAA. The court certified its ruling for interlocutory appeal and the circuit court granted the appeal.

Holding

As a preliminary matter, the court addressed the removal issue. The city claimed that section 7604(e) of the CAA implicitly prohibits removal. That section states:

Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court . . . against the United

States . . . under State or local law respecting control and abatement of air pollution.

The court noted that there is no explicit language in this section that addresses the issue of removal. However, the city cited the Ninth Circuit's decision in *California ex rel. Sacramento Metropolitan Air Quality Management District v. United States*, 215 F.3d 1005 (2000), in support of its argument. In that case, the court focused on the language that authorized local governments to obtain remedies and held that, unless the section precluded removal, plaintiffs would not be guaranteed the right to obtain judicial remedies and sanctions in state court. It found that the "any other law" included the removal statute.

The Eleventh Circuit disagreed. Since the removal statute did not authorize the federal government to remove actions to federal court when the CAA amendments were written in 1977, Congress clearly did not intend to preclude removal when sued pursuant to section 7604(e). The court could not find a "clear and manifest" intention to preclude removal.

The city, however, argued that the legislative history of the CAA supports its position. It is clear that Congress wanted to provide assistance to states in enforcing local air pollution laws against federal facilities, but there is nothing to indicate that Congress intended to prevent removal to federal court of such actions. In fact, language expressly forbidding removal was deleted from the final version. The Ninth Circuit assumed that inclusion of this language would have been redundant. The Eleventh Circuit commented that such an assumption was contrary to the Court's holding in *Russello v. United States*, 464 U.S. 16, 23–24 (1983): "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."

The CAA, thus, does not unequivocally prohibit removal. On the other hand, 28 U.S.C. § 1442(a)(1) "explicitly and unambiguously" gives the federal government the right to remove actions when it or its agen-

cies are named as a defendant. Congress has demonstrated that it can unequivocally preclude removal if it so chooses. In the case of the CAA, that intent is not demonstrated. Thus, this action was properly removed to federal district court.

As to the substantive issue in this case, the court noted that the city is seeking punitive penalties for alleged past violations of local air pollution laws. The Navy agreed that, in the case of continuing air pollution violations, it would be subject to coercive sanctions under the CAA. The city argued that punitive penalties are necessary for effective enforcement of local air pollution laws. However, this argument was rejected by the Supreme Court in a CWA case brought by Ohio:

To say that . . . "compliance cannot be . . . accomplished" without such fines is to assume that without sanctions for past conduct a federal polluter can never be brought into future compliance, that an agency of the National Government would defy an injunction backed by coercive fines and even a threat of personal commitment. The position seems almost to ignore the fact that once such fines start running they can be every dollar as onerous as their punitive counterparts; it could be a very expensive mistake to plan on ignoring the law indefinitely on the assumption that contumacy would be cheap.

United States Department of Energy v. Ohio, 503 U.S. 607, 625 (1992).

Any waiver of sovereign immunity must be unequivocally expressed and strictly construed in favor of the sovereign. *See id.* at 615. The city claims that the following language from the CAA waives sovereign immunity with regard to punitive penalties:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal

Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, *shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution* in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program, (C) to the exercise of any Federal, State, or local administrative authority, and (D) *to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.* No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.

42 U.S.C. § 7418(a) (emphasis added).

Although no circuit court has addressed whether this section waives the federal government's immunity from punitive penalties when a state or local government is enforcing its air laws, the Supreme Court has addressed the issue in the context of the CWA whose

language was written to conform to the CAA federal facilities provision. The Supreme Court found that the CWA language did not unequivocally waive immunity from punitive penalties. *See U.S. Department of Energy v. Ohio*, 503 U.S. 607 (1992). It specifically rejected Ohio's argument that the word "sanctions" includes punitive sanctions. It found that the word sanctions "is spacious enough to cover not only what we have called punitive fines, but coercive ones as well, and use of the term carries no necessary implication that a reference to punitive fines is intended." *Id.* at 621.

In that case, the Court found it significant that each time the word "sanction" appears in 33 U.S.C. § 1323(a), it is within the phrase "process and sanction[s]." This is significant because process "normally refers to the procedure and mechanics of adjudication and the enforcement of decrees or orders that the adjudicatory process finally provides." *Id.* at 623. On the other hand, when the statute speaks of subjecting the federal government to substantive "requirements," the word "sanction" is absent. The Supreme Court thus reasoned that Congress was using "sanction" in its coercive sense to the exclusion of punitive fines. *Id.* at 623.

The city argued that the *Department of Energy* Court's reasoning should not be followed in this case because there are material differences between the CWA and the CAA that mandate a different result. It is true that the Court noted that there was a clarifying provision in the CWA that provides that "the United States shall be liable only for those civil penalties . . . imposed by a State or local court to enforce an order or the process of such court." 33 U.S.C. § 1323(a). Since this "clarifying" language is not in the CAA, the city argued, Congress did not intend to limit the federal government's liability to only coercive sanctions. The court disagreed. It noted that the Supreme Court did not use the clarifying language as a basis for its decision, but found only that the language confirmed its conclusion that sovereign immunity had not been waived for punitive damages. According to the court, the only affirmative and unequivocal language indicating the scope of the government's immunity is within

the “process and sanctions” section. The court thus concluded that the CAA does not waive sovereign immunity from punitive penalties.

The city then argued that the express waiver can be found in the CAA’s citizen suit provision, 42 U.S.C. § 7604(e), which provides:

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). *Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from – (1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, . . . against the United States . . . under State or local law respecting control and abatement of air pollution.* For provisions requiring compliance by the United States . . . in the same manner as nongovernmental entities, see section 7418 of this title [the federal facilities provision].

42 U.S.C. § 7604(e) (emphasis added).

The Navy argued that this provision merely acts as a savings clause, providing that the citizen suit provision does not preempt any other available remedy. The court agreed that the first sentence of this provision does act as a savings clause. However, the second sentence is not a savings clause because there was no local remedy to save at the time this language was passed. Instead, this provision, along with the federal facilities section, operates as a waiver of sovereign immunity. However, the court did not find that the

scope of the waiver exceeded that found in the federal facilities section.

The district court relied on a decision by the Sixth Circuit in *United States v. Tennessee Air Pollution Control Board*, 185 F.3d 529 (1999), reasoning that because “remedy or sanction” is not paired with the word “process” as in the federal facilities section, there is no basis to conclude that “remedy or sanction” excludes punitive penalties. *Id.* at 534. The Eleventh Circuit rejected such a broad reading of the phrase. It concluded that it would adhere to the Supreme Court’s rationale that the phrase “remedy or sanction” by itself, “carries no necessary implication that a reference to punitive fines is intended.” *United States Department of Energy v. Ohio*, 530 U.S. at 621. Nor did the court find that the word “any” in front of the phrase “remedy or sanction” has the significance placed on it by the Sixth Circuit and the district court in this case. It based its reasoning on the fact that the Supreme court did not find the term “any” paired with the word “sanction” to be significant in concluding that the federal facilities sections of CWA did not waive federal sovereign immunity from punitive penalties. *Id.* at 622–28.

Looking at the phrase in the context of the statute, the court turned again to the federal facilities provision, particularly since this provision is referenced in the citizen suit provision. That court concluded that, without specific expressed intent from Congress, it would not interpret the broad language of the citizen suit provision to provide a larger scope of waiver of immunity. Congress was aware of the unequivocal language requirement when it amended the federal facilities section of RCRA after the Supreme Court found there to be no express waiver from punitive penalties in that statute. However, Congress has not amended either the CWA or the CAA in response to the Court’s holding in *United States Department of Energy v. Ohio*. Accordingly, the court reversed the district court’s finding that the CAA waives the federal government’s immunity from punitive penalties.

Takings

Taking Claim May Be Based on Flowage Easement: *Ridge Line, Inc. v. United States*, No. 03-5015 (Fed. Cir. Oct. 10, 2003)

Background

Ridge Line owns land in West Virginia on which the largest shopping center and mixed-use commercial development in the state is located. The federal government purchased property adjacent to and uphill from the shopping center to build a U.S. Postal Service facility. Stormwater from both Southridge Center and the postal facility drain into South Hollow (now owned by Ridge Line), lying between the federal government's and Ridge Line's property. After the Postal Service facility was completed in 1993, runoff into South Hollow increased 70 to 150 percent. Ridge Line produced evidence that eighty percent of that runoff was coming from the Postal Service property. The increased runoff caused neighbors downstream to complain of flooding.

In 1993, because of the increased stormwater flow, Ridge Line built a stormwater retention pond. It asked the Postal Service to share in the cost of construction, but negotiations failed and the government did not pay a share of the cost. In 1998, Ridge Line sued the government in the Court of Federal Claims, claiming that the additional water flow constituted a taking by the government of a flowage easement. Ridge Line has also built new, larger stormwater management facilities in South Hollow and, more recently, added additional landfill, covering the original stormwater retention pond and most or all of the portions of South Hollow that it claims were damaged by the erosion caused by stormwater discharged from the Postal Service property.

The trial court found that the government development created at least a seventy percent increase in storm drainage onto Ridge Line's property. However, it also found that this was not sufficient to establish government possession. It also held that no loss of value was shown and that Ridge Line could not prove

damages because it did not produce appraisals of its property before and after the land erosion occurred. It further held that Ridge Line did not suffer a permanent and exclusive occupation that destroyed its possession, use, or disposal of the property. Ridge Line appealed.

Holding

The district court did not address Ridge Line's contention that the taking was the appropriation of a flowage easement by inverse condemnation. Instead, it confined its analysis to whether the government's actions constituted a permanent and exclusive occupation. However, a physical occupation of land need not be permanent or exclusive in order for a taking to occur.

Easements may not be taken without just compensation. See *United States v. Dickinson*, 331 U.S. 745, 748 (1947). In *Dickinson*, the Supreme Court affirmed the trial court's holding that a taking had occurred when the government, in building a dam, raised the water level of a river, taking an easement by inverse condemnation for intermittent flooding of land. *Id.* at 751. The Court also held that a landowner's reclaiming his land did not relieve the government of its liability in originally taking the land. Finally, the Court held that if resulting erosion constituting part of the taking was preventable by prudent means, the cost of the prevention was a proper basis for determining damage.

The trial court cited *Dickinson*, but only in reference to a statute of limitations issue. The appellate court found error in the trial court's requiring Ridge Line to show that its property was "effectually destroyed" or suffered a "permanent and exclusive occupation by the government that destroyed the owner's right to possession." According to the appellate court, *Dickinson* clearly established that intermittent flooding of private land can constitute the taking of an easement. The trial court also erred in stating that Ridge Line suffered no loss of use, possession, or value because the eroded area was later filled and altered. The Court in *Dickinson* specifically stated that if land

erosion caused by a taking is preventable, the cost of the prevention is a proper basis for determining damages. Therefore, the trial court cannot rely on the lack of appraisals as evidence for its conclusion that no damage was proven.

Since inverse condemnation is tied to and parallels tort law, a plaintiff must first establish that the government intended to invade a protected property interest or the invasion is the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Ct. Cl. 1955). Second, to constitute a taking, the alleged invasion must, at least, preempt the owner's right to enjoy his property for an extended period of time as opposed to inflicting an injury reducing the property's value. On remand, then, the district court must determine whether Ridge Line has shown that the increased storm runoff was the "direct, natural, or probable result" of the Postal Service development as opposed to merely an incidental or consequential injury. Second, the court must consider whether the government's interference with Ridge Line's property rights was substantial and frequent enough to rise to the level of a taking. Finally, the court must consider whether the government took from Ridge Line a legally protectable easement interest. This inquiry must be made under West Virginia's "reasonable use" standards. Under that standard, "altering the natural flow or drainage of surface water upon one's land such that the water causes damage to another party is not 'reasonable' merely because the person altering the flow of water sought to protect his or her own property and did not intend to harm any other party." *Whorton v. Malone*, 549 S.E.2d 57, 64 (W. Va. 2001).

In this case, Ridge Line showed that the government shifted some of its stormwater control costs to Ridge Line by covering much of its land with impervious surfaces but failing to build water retention facilities. This caused Ridge Line to build larger, more expensive retention facilities in South Hollow than it would otherwise have had to build. Ridge Line also produced evidence showing that the government devel-

opment aggravated the consequences by concentrating much of the stormwater into five discharge points directed onto Ridge Line's property. Finally, there was evidence that the check dam the government built on Ridge Line's land with its permission was not maintained despite the request of the West Virginia Division of Environmental Protection.

The court thus remanded the case to the trial court for further analysis consistent with its opinion.

CIVIL PROCEEDINGS

Settlements

Air

United States v. Silgan Containers Corporation, No. Civ. S-03-2166 (E.D. Cal. Oct. 15, 2003)

Silgan Containers Corporation has entered into a settlement that resolves allegations that it violated the Clean Air Act at six California can manufacturing plants. Silgan is one of the leading manufacturers of metal and plastic food containers in the United States.

The enforcement action grew out of information that Silgan provided to U.S. EPA after it had conducted an internal audit. Under the settlement, the company will pay a \$659,000 fine and spend \$1.57 million to reduce emissions at its plants. Among the changes being made is the switch to water-based materials and the conversion of one production line from using solvent-based materials to using powder coatings.

[For further information, contact AUSA Robert Mullaney at (415) 744-6491.]

CRIMINAL PROSECUTIONS

Indictments

RCRA

United States v. John V. Finnerty and Patrick J. Deegan, No. SACR03-249 (C.D. Cal. Oct. 29, 2003)

John Finnerty, former president of Remtech Restoration Corporation in Fullerton, California, and Patrick J. Deegan, former manager of Remtech's operations, were recently indicted on charges of violating the Resource Conservation and Recovery Act (RCRA), the Clean Air Act (CAA), and the Comprehensive Environmental Response, Compensation, and Liabil-

ity Act (CERCLA). Remtech's business involved removal of asbestos and lead-containing materials. The defendants are accused of violating RCRA by allegedly abandoning lead-contaminated wastes in drums. The CAA allegation involves dumping 800 bags of asbestos-containing material and the CERCLA violation is for alleged failure to notify authorities of the release of asbestos into the environment.

[For further information, contact AUSA Richard Cutler at (714) 338-3534.]

Water

United States v. Griffin Industries et al., No. CR 303-20 (S.D. Ga. Oct. 20, 2003)

A poultry rendering plant in East Dublin, Georgia, and five of its employees have been charged with one count of conspiracy to violate the Clean Water Act. The indictment alleges that the defendants actively concealed the discharge of pollutants by submitting false documents and diluting groundwater samples.

[For further information, contact AUSA Jeffrey Buerstatte at (912) 652-4422.]

Pleas/Verdicts

Water

United States v. David E. Ortiz, No. 03CR113-M (D. Colo. Oct. 15, 2003)

David E. Ortiz of Grand Junction, Colorado, has been found guilty of violating the Clean Water Act by illegally discharging a de-icing chemical into the city storm sewers. Ortiz was the operator for Chemical Specialties, a company that distills propylene glycol, an aircraft de-icing chemical. In May and June 2002, he discharged industrial wastewater into the city storm sewers that empty into the Colorado River, resulting in fish being killed.

Ortiz faces a maximum sentence of up to four years in prison and a \$100,000 fine.

[For further information, contact AUSA Patricia Davies at (303) 454-0100 or Colorado AAG Brian Whitney at (303) 866-5494.]

Sentences

Endangered/Protected Species

People [California] v. Tamara Andreyevan Bugriyev and Yuriy Stansilavovich Bugriyev, No. 03F04260 (Super. Ct. Sacramento Cty Oct. 28, 2003)

A mother and her son have been sentenced to prison after pleading guilty to charges that they sold roe from white sturgeon throughout California, Oregon, and Washington. Commercial fishing and selling of sturgeon parts or eggs is illegal in California. The roe was mainly sold to members of the Russian community as a substitute for Caspian Sea caviar. Eighteen other defendants were charged with misdemeanor violations.

Both Tamara Burgriyev and her son were sentenced to five years' probation and 150 days in county prison. Sixty days of Ms. Burgriyev's sentence were suspended and she can avoid the remaining ninety days by performing community service. Mr. Burgriyev was ordered to serve sixty days in prison and the remaining ninety on work projects. He was fined \$5,000 with \$10,000 in penalty assessments and his mother was fined \$1,000. Special conditions were also imposed including a prohibition against their possessing any sturgeon or sturgeon parts and an injunction against their coming within 150 feet of certain rivers containing sturgeon.

[For further information, contact Sacramento County DDA Mike Blazina at (916) 874-5873.]

Water

United States v. Continental Engineering and Manufacturing, No. 03-MG-398-AJB (D. Minn. Oct. 30, 2003)

Continental Engineering and Manufacturing, Inc., of Chaska, Minnesota, has been sentenced to pay \$55,000 in fines and restitution for violating the Clean Water Act by dumping waste material into a storm drain which empties into East Chaska Creek and then into the Minnesota River. The former chief executive officer of Continental directed two employees to dump the contents of thirty drums of industrial wastes, including cutting machine oils, into the storm drain.

[For further information, contact AUSA William Koch at (612) 664-5600.]

United States v. Alexander Lapteff and Kenneth Hinkley, No. 03-CR-78-LALL (E.D. Va. Oct. 24, 2003)

Alexander Lapteff and Kenneth Hinkley have been sentenced for violating the Clean Water Act by improperly operating and maintaining the Christchurch School wastewater treatment plant in Christchurch, Virginia. The defendants' failure to run the facility properly caused it to discharge sludge and chlorine into a tributary of the Rappahannock River. Lapteff was sentenced to serve thirty-six months in prison, pay a \$5,000 fine, and serve one year of supervised release. Hinkley was sentenced to serve eleven months' incarceration, pay a \$5,000 fine, and serve one year of supervised release. Hinkley will also surrender his Class I wastewater treatment operator's license.

[For further information, contact AUSA Olivia Hawkins at (804) 819-5475.]