In Brief

Supreme Court Reinstates Clean Air Standards, Rejects Improper Delegation Challenge

In *Whitman v. American Trucking Ass'ns, Inc.*,[1] the Supreme Court upheld major portions of the Clean Air Act (CAA) and backed away from a clear opportunity to revive the nondelegation doctrine to strike down important environmental regulations.

In May 1999, the Court of Appeals for the D.C. Circuit held that the Environmental Protection Agency's (EPA) interpretation of Section 109 of the CAA constituted an improper delegation of legislative power, sending shockwaves through the environmental and legal communities.[2] The court held that Section 109(b)(1), which instructs the EPA to set primary ambient air quality standards at levels "requisite to protect the public health" with "an adequate margin of safety,"[3] lacked an "intelligible principle" to guide the agency's exercise of authority.[4] Rather than vacate this paramount section of the Act, the court remanded the standards to allow EPA to adopt a limiting construction of the statute (perhaps by adopting a cost-benefit analysis requirement for all revisions of national standards).[5]

In a shocking reversal, the Supreme Court unanimously rejected the appellate court's holding. Writing for the Court, Justice Scalia first held that Section 109 "unambiguously bars cost considerations" from the standard-setting process.[6] The Court specifically rejected the respondent's claim that the terms

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1. 121 S. Ct. 903 (2001).

2. *See* Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) ("*American Trucking I*"), *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999). *See generally* Jeff Brax, Note: American Trucking Ass'ns, Inc. v. EPA, *175 F.3d 1027 (D.C. Cir. 1999), modified on reh'g, 195 F.3d 4 (D.C. Cir. 1999)*, 27 ECOLOGY L.Q. 549 (2000).

3. 42 U.S.C. § 7409(b)(1).

4. The intelligible principle requirement was first and most prominently articulated in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

5. *See American Trucking I*, 175 F.3d at 1038.

6. *Whitman*, 121 S. Ct. at 911.

"adequate margin" and "requisite" left room for the Court to inject cost-benefit analysis into the formula, noting that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions— it does not, one might say, hide elephants in mouseholes."[7] Justice Scalia also unabashedly rejected the respondent's delegation argument, finding that EPA's discretion is bounded by the word "requisite" in Section 109, which in turn "mean[s] sufficient, but not more than necessary."[8] After reviewing cases in which the Supreme Court has found an intelligible principle in such broad statutory language as in the "public interest"[9] and "generally fair and equitable,"[10] Justice Scalia concluded that "requisite" "fits comfortably within the scope of discretion permitted by our precedent."[11]

The only long-lasting note of potential concern for EPA lies in Justice Scalia's assertion that an agency may not cure an unlawful delegation of legislative power by adopting a limiting construction of the statute.[12] Although dicta, this assertion would eviscerate the celebrated holding in *Amalgamated Meat Cutters*,[13] in which Judge Leventhal avoided potential delegation problems by looking to the controlling power of "subsidiary administrative policy."[14] Despite this reservation, however, EPA and the rest of the administrative state have clearly come out ahead. Even if courts do not come to the aid of problematic delegations, the Supreme Court has forcefully announced its unwillingness to revitalize the nondelegation doctrine and to second-guess Congress regarding policy judgments left to agencies executing and applying the law.[15]

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7. *Id.* at 910.
8. *Id.* at 912 (citing Tr. of Oral Arg. in No. 99-1257, p. 7).
9. *See* Nat'l Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943); New York Central Sec. Corp. v. United States, 287 U.S. 12, 24-25 (1932).
10. *See* Yakus v. United States, 321 U.S. 414, 420 (1944).
11. *Whitman*, 121 S. Ct. at 914.
12. *See id.* at 912.
13. Amalgamated Meat Cutters and Butcher Workmen of N. Am., AFL-CIO v. Connally, 337 F. Supp. 737 (D.D.C. 1971).
14. *See id.* at 758-59.
15. *See Whitman*, 121 S. Ct. at 913.