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D. C. Circuit's GE Decision: One Clause Short of a Constitutional Remedy?

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The D. C. Circuit Court of Appeals recently upheld the use of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 106, Unilateral Administrative Orders (UAOs), 42 U.S.C. § 9606, against General Electric's facial constitutional challenge based on due process. However, in a unanimous panel opinion, the court misquotes the Fifth Amendment, stating: "The Fifth Amendment to the United States Constitution provides that 'No person shall . . . be deprived of life, liberty, or property, without due process of law.'" *General Electric Co. v. Jackson*, 2010 U.S. App. LEXIS 13223, at *13 (D.C. Cir. June 29, 2010). What is wrong with this quotation? The Fifth Amendment does not conclude with a period after the phrase "due process of law," but goes on to state, "nor shall private property be taken for public use, without just compensation." U.S. CONST., amend. V.

Now maybe the insertion of a period, rather than an ellipsis (to indicate that another clause of the Constitution exists but has been omitted) is the kind of minutiae that only a legal scholar would care about. Then again, maybe—and that is the point of this article—the court might have decided in GE's favor had it gone on to analyze whether CERCLA section 106 conflicts with the Just Compensation Clause.

General Electric Co. v. Jackson, 2010 U.S. App. LEXIS 13223, at *13 (D.C. Cir. June 29, 2010), decided June 29, 2010, was a facial challenge to the constitutionality of CERCLA section 106, which authorizes EPA—without notice or hearing—to issue UAOs that require potentially responsible parties (PRPs) to undertake an immediate removal action if EPA finds that there is "an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a). CERCLA explicitly denies jurisdiction to federal courts to review UAOs, *id.* § 9613(b)(3), and, if the potentially responsible party refuses to comply with the UAO, it runs the risk that EPA

will conduct the removal action itself and then sue for the costs of the removal action, punitive damages of treble that amount, and penalties of up to $37,500 per day. *Id*. § 9607(b); *see also* Civil Monetary Penalty Adjustment Rule, 73 Fed. Reg. 75,340, 75,346 (Dec. 11, 2008) (adjusting the statutory penalties to account for inflation). GE, the recipient of 68 UAOs, including the Hudson River PCB removal action estimated to cost $1 billion, argued that the potential penalties were so great that, lacking a right to judicial review, a reasonable potentially responsible party had no option but to comply—mooting any meaningful post-deprivation hearing and leaving it with no due process rights.

In ruling that GE's right to defend a post-removal action suit by EPA to recover removal costs, punitive treble damages, and daily fines satisfied the Due Process Clause, the D. C. Circuit did not proceed past the period it had inserted after that clause, and thus it never reached the question of whether CERCLA's UAO scheme violates the Fifth Amendment's next provision—the Just Compensation Clause. Had it done so, GE might well have prevailed and the D. C. Circuit might well have found CERCLA section 106 unconstitutional. (GE had not sought *certiorari* at the time of writing this article.)

The court rejects GE's due process claims

In its appeal, GE asserted that UAOs deprive parties, without a hearing, of two types of property interests protected by the Fifth Amendment: (1) the money they must spend to comply with the order or the daily fines and treble damages they face should they refuse to comply and (2) the stock price, brand value, and financing availability, all of which are damaged when the EPA issues a UAO. In a second claim, GE also asserted that EPA had engaged in a pattern and practice of misuse of UAOs that violates the Fifth Amendment's Due Process Clause.

The court first addressed GE's argument that section 106 of CERCLA, by authorizing EPA to issue UAOs while depriving all federal courts of jurisdiction to review them while the cleanup is in progress, presents a potentially responsible party with a Hobson's choice because statutory daily fines and treble damages "'are so severe that they . . . intimidate [] PRPs from exercising the purported option of electing not to comply with a UAO so as to test an order's validity' via judicial review." *General Electric*, 2010 U.S. App. LEXIS 13223, at *14 (alteration in original). GE's brief relied on *Ex Parte Young*, 209 U.S. 123 (1908), holding that "a statutory scheme violates due process if 'the penalties for disobedience are by fines so enormous . . . as to intimidate the [affected party] from resorting to the courts to test the validity of the legislation [because] the result is the same as if the law in terms prohibited the [party] from seeking judicial [review]' at all." *General Electric*, 2010 U.S. App. LEXIS 13223, at *14 (alteration in original) (quoting *Ex Parte Young*, 209 U.S. 123, 147 (1908)).

Noting that "[a] facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully," *id*. at *12, the court did not comment on the fact that

GE was precluded from asserting an as—applied challenge (with a lower standard of judicial review) precisely because the statutory scheme prohibited it: "No Federal court shall have jurisdiction . . . to review any order issued under section [106]" until the removal action is completed. 42 U.S.C. § 9613(b)(3). To prevail in this facial challenge, then, GE was required to demonstrate "either 'that no set of circumstances exists under which [CERCLA's UAO provisions] would be valid,' or that [those provisions] lack [ ] any 'plainly legitimate sweep.'" *General Electric*, 2010 U.S. App. LEXIS 13223, at *13 (alteration in original). This GE was unable to do.

Turning to the merits, the court held that section 106 did not facially violate the Fifth Amendment because a party refusing to comply with the UAO eventually had a day in court when EPA sued to recover costs and treble damages. *Id*. at *16. At that time, the court said, the party could explain why it had properly refused and why it should not be held liable: "[A] PRP faces daily fines and treble damages only if a federal court finds (1) that the UAO was proper; (2) that the PRP 'willfully' failed to comply 'without sufficient cause'; and (3) that, in the court's discretion, fines and treble damages are appropriate." *Id.*

Surprisingly, the court did not respond to GE's "Hobson's choice" argument—that the penalty for non-compliance was so high that a company could not afford to risk refusal to comply. Neither did the court address EPA's argument that UAOs are used only in emergencies, nor GE's retort that EPA often issues these orders when there is no imminent or substantial endangerment, but merely as leverage to force a company to clean up a site. *Id.* at *18.

GE's second argument, which the court also rejected, was that EPA's issuance of a UAO "immediately tag[s] a PRP with a massive contingent liability, which in turn depresses its stock price, harms its brand value, and increases its cost of financing." *Id.* at *19 (internal quotation marks omitted). Citing *Connecticut v. Doehr*, 501 U.S. 1 (1991), in which the Supreme Court invalidated Connecticut's pre-judgment attachment of real estate statute on due process grounds because it did not provide for a pre-deprivation hearing, GE argued that UAOs also fall short constitutionally because the massive liability represented by the order must be shown on the corporate balance sheet—affecting stock values, brand, and financing costs. Such losses, GE argued, are never recovered in a post-deprivation hearing. The Court of Appeals held instead that these impacts were merely consequential losses resulting from the market's perceptions and the losses are not property interests protected by the Fifth Amendment. *General Electric*, 2010 U.S. App. LEXIS 13223, at *22–26.

Finally, the court rejected out of hand GE's claim that EPA's "enforcement first" policy—by which the agency issues UAOs whenever settlement negotiations fail and the agency's delegation of authority to subordinate regional employees who allegedly issue UAOs in time to comply with internal agency reporting deadlines—constitute a pattern and practice of misuse of UAOs that violates the Fifth Amendment. *Id*. at *44–45.

The missing takings analysis

The Due Process and the Just Compensation Clauses of the Fifth Amendment are, in important respects, complementary. In cases such as *General Electric*, the analysis of only one without reference to the other may well provide an incomplete picture of the property protections afforded by the Fifth Amendment. In fact, the monetary and economic injuries that the D.C. Circuit found insufficient to support a due process claim in *General Electric* may be the very property interests that will support a takings claim. Both money and business value are protected property interests under the Takings Clause, and the economic impact of government action on the property owner is one of the three key factors that determine whether a regulatory taking has occurred.

Under the Just Compensation Clause, courts look primarily at three factors "for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Those three elements are: (1) the economic impact of the regulatory action on the claimant; (2) the extent to which the regulation has interfered with reasonable, investment-backed expectations; and (3) the character of the government action. *Id.* at 124–25. Had the D. C. Circuit subjected CERCLA section 106 to this three-factor takings test established by the Supreme Court, it quite possibly would have found a taking and invalidated the statute.

An excellent example of the takings analysis that the D. C. Circuit could have applied in this case is found in the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which invalidated a statute that assigned to coal companies financial responsibility for the medical coverage of former coal miners based on their former participation in the coal market, in which the court stated:

> Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience. . . .
>
> We believe that the Coal Act's allocation scheme, as applied to Eastern, presents such a case. We reach that conclusion by applying the three factors that traditionally have informed our regulatory takings analysis.

Id. at 528–29.

1. Economic impact of the UAOs on GE

In a takings analysis, economic regulations that impose a severe financial penalty on a company may affect a taking. *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982). The *Eastern Enterprises* court found that this first factor in the regulatory takings analysis weighed in favor of invalidation:

> As to the first factor relevant in assessing whether a regulatory taking has occurred, economic impact, there is no doubt that the Coal Act has forced a considerable financial burden upon Eastern. The parties estimate that Eastern's cumulative payments under the Act will be on the order of $50 to $100 million. . . . Eastern's liability is thus substantial, and the company is clearly deprived of the amounts it must pay the Combined Fund. . . . It is clear that the Act requires Eastern to turn over a dollar amount established by the Commissioner under a timetable set by the Act, with the threat of severe penalty if Eastern fails to comply.

Eastern Enterprises, 524 U.S. at 529 (citations omitted).

That CERCLA section 106 requires a potentially responsible party to shoulder substantial removal costs—as much as $1 billion for GE at the Hudson River site—or run the risk of daily penalties and treble damages if it refuses to shell out those costs, would seem to fall well within the *Eastern Enterprises* court's conclusion that the economic impact of multi-million-dollar payments, coerced by substantial fines for non-payment, weigh in favor of finding that the statute violates the takings clause. Similarly, GE's argument that being on the receiving end of a UAO depresses the company's value, which the D. C. Circuit found irrelevant to the due process analysis, is precisely the kind of economic impact that takings analysis examines:

> [T]he vast majority of takings jurisprudence examines, under *Penn Central's* economic impact prong, not lost profits but the lost value of the property taken. . . . When the Supreme Court has assessed the economic impact of a regulatory taking, it has talked almost exclusively in terms of lost value rather than lost profits.

Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1268–69 (Fed. Cir. 2009), *reh'g denied and reh'g en banc denied*, 2009 U.S. App. LEXIS 24529 (Fed. Cir. May 20, 2009), *cert. denied*, 130 S. Ct. 1501 (2010).

2. Interference with GE's reasonable, investment-backed expectations

The *Eastern Enterprises* court also found that the retroactive reach of the statute, which imposes current financial responsibility for actions occurring decades in the past,

indicates that the statute is a taking because it interferes with the claimant's reasonable investment-backed expectations:

> [T]he Coal Act substantially interferes with Eastern's reasonable investment-backed expectations. The Act's beneficiary allocation scheme reaches back 30 to 50 years to impose liability against Eastern based on the company's activities between 1946 and 1965. Thus, even though the Act mandates only the payment of future health benefits, it nonetheless attaches new legal consequences to [an employment relationship] completed before its enactment.

Eastern Enterprises, 524 U.S. at 532 (internal quotation marks omitted).

That CERCLA operates retroactively, imposing substantial new liabilities today that could not have been anticipated at the time of generation and disposal, is a familiar theme in CERCLA litigation. In GE's case, as in *Eastern Enterprises*, the substantial costs imposed by the statutory scheme upsets GE's settled expectations with respect to products produced and hazardous substances disposed many decades ago—also weighing in favor of finding a taking.

3. Character of the governmental action

Finally, that CERCLA is a comprehensive legislative solution to an important public health and environmental problem does not immunize it from the Just Compensation Clause of the Fifth Amendment for, as the *Eastern Enterprises* court held, legislative solutions might not single out certain companies, unfairly and retroactively, to bear the burden of a public problem:

> That Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits is understandable; complex problems of that sort typically call for a legislative solution. When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised. Accordingly, in the specific circumstances of this case, we conclude that the Coal Act's application to Eastern effects an unconstitutional taking.

Id. at 537.

CERCLA is a comprehensive legislative response to our nation's hazardous substance sites. However, by giving EPA the authority to impose substantial removal costs on parties free of any judicial review before the party incurs either the cost or the penalty for non-compliance with the UAO, Congress singled out parties such as GE to bear a burden that no court has ever adjudicated and which, according to GE, is most unlikely ever to get before a court, given the significant penalty for failure to acquiesce. The character of this legislative action, then, also signals that section 106 should have been analyzed as a taking.

Conclusion

The D.C. Circuit's analysis of GE's constitutional challenge began by misquoting the Fifth Amendment, foreshadowing its truncated constitutional analysis of CERCLA's section 106 UAO provisions. Of course, we do not know if a constitutional challenge based on the Just Compensation Clause of the Fifth Amendment would have prevailed, but it would at least be important to know why the court failed to consider it. As it stands, the D.C. Circuit's decision simply failed to apply that most basic principle of constitutional construction: read on.

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