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Environmental Law--Compelled State Administration of Transportation Control Plans under the Clean Air Act Declared Unconstitutional

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RECENT DEVELOPMENTS

ENVIRONMENTAL LAW—COMPELLED STATE ADMINISTRATION OF TRANSPORTATION CONTROL PLANS UNDER THE CLEAN AIR ACT DECLARED UNCONSTITUTIONAL. *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975).

In *District of Columbia v. Train*,[1] the states of Maryland and Virginia, the District of Columbia, and a number of local governments[2] petitioned in the court of appeals for review of certain regulations promulgated by the Administrator of the Environmental Protection Agency (EPA). As required by the Clean Air Act,[3] the Administrator had previously established national primary and secondary air quality standards[4] that the states were compelled to meet.[5] As was mandated by the Act, the various governmental units then submitted state implementation plans (SIPs) to the EPA for approval.[6] The Administrator disapproved portions of the submitted SIPs and pursuant to authority granted under the Clean Air Act,[7] promulgated implementation plans governing the regulation of air quality in the respective states. Included in these regulations were transportation control plans (TCPs),[8] which the Ad-

1. 521 F.2d 971 (D.C. Cir. 1975).

2. The named plaintiffs are all members of the National Capital Interstate Air Quality Region which consists of Montgomery and Prince George Counties in Maryland; Arlington, Fairfax, Loudoun and Prince William Counties, and the cities of Alexandria, Fairfax and Falls Church in Virginia; and the District of Columbia.

3. 42 U.S.C. §§ 1857 *et seq.* (1970).

4. Clean Air Act § 109(b), 42 U.S.C. § 1857c-4(b) (1970). The "primary" standards are those "requisite to protect the public health," while the "secondary" standards are those "requisite to protect public welfare." These standards state the maximum concentrations of pollutants in the ambient air which will be regarded as permissible regardless of the source.

5. Clean Air Act § 107, 42 U.S.C. § 1857c-2 (1970).

6. Clean Air Act § 110, 42 U.S.C. § 1857c-5 (1970).

7. Clean Air Act § 110(c)(2), 42 U.S.C. § 1857c-5(c)(2) (1970).

8. Clean Air Act § 110(a)(2)(B), 47 U.S.C. § 1857c-5(a)(2)(B) (1970). TCPs are an approach designed to discourage automobile use by encouraging alternative modes of transportation. These programs were to include purchase of additional buses and designation of exclusive bus lanes, construction of bicycle paths, and establishment of inspection, maintenance, and vehicle retrofit requirements. 521 F.2d at 979-80.

ministrator argued the states were compelled to enact via state legislation. Should it be found that the Clean Air Act did not grant the authority to compel this legislation, the Administrator contended that at least he could force the states to administer federal transportation control measures. The court of appeals held against the Administrator and found that he had exceeded his statutory authority in requiring state enactment.[9] The court also held that the attempt to compel state administration was an unconstitutional intrusion on state sovereignty.[10]

District of Columbia v. Train is in line with other recent decisions emanating out of the circuit courts.[11] However, those decisions addressed only the issue of whether the statutory authority existed to compel state enactment of TCPs. Although the issue was raised by the Administrator, the previous decisions did not deal directly with the contention that it was permissible to require state administration of the TCPs. *District of Columbia v. Train* addressed that very contention and held it unconstitutional. The decision becomes particularly significant in light of Administrator Train's recent statement that if the Act does not allow the EPA to compel state administration it will mean that "air pollution associated with out existing transportation systems will remain substantially uncontrolled."[12]

Administrator Train relied on recent decisions[13] holding that because air pollution had a significant effect on interstate commerce, a state's public transportation system could be federally regulated as a direct source of pollution.[14] Therefore, it was argued, the federal government could regulate any program or activity engaged in by the state which encouraged use of the automobile and so contributed to air pollution. In the Administrator's opinion a state's lax or nonexistent automobile inspection and maintenance programs contributed to air pollution, and thus could be regulated by the federal Government.[15] Having established the power to impose such programs upon the state under the commerce clause, Train concluded that the Act gave the Administrator the right to require state administration of federally-mandated inspection systems. By requiring state administration the Act

9. 521 F.2d at 986.
10. *Id.* at 992.
11. Maryland v. EPA, 8 BNA Env. Rep. Cas. 1105 (4th Cir. 1975); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975).
12. 6 BNA 1976 Env. Rep. Curr. Dev. 1497.
13. South Terminal Corp. v. EPA, 504 F.2d 646, 677 (1st Cir. 1974); Pennsylvania v. EPA, 500 F.2d 246, 259 (3d Cir. 1974).
14. 521 F.2d at 988-89.
15. *Id.* at 989-90.

avoided massive duplicate federal programs in the attainment of clean air, and " 'cure[d] deficiencies that had resulted from total reliance upon state and local action . . . .' "[16]

In authoring the opinion, Judge MacKinnon conceded that under the commerce clause state transportation systems could be controlled, but refused to extend the clause to require unwilling state administration of federally-promulgated inspection and maintenance programs.[17] Judge MacKinnon confronted the Third Circuit's decision in *Commonwealth of Pennsylvania v. EPA*,[18] which—although addressed to a different issue[19]—held that where a recognized need for increased federal involvement existed, such as in the area of pollution control, the commerce clause would allow "a valid adaptation" of these "federalist principles."[20] Judge MacKinnon rejected this rationale, and relied on prior Supreme Court decisions[21] which articulated the position that even in areas where increased federal involvement was necessitated, the courts still applied the traditional concepts of the commerce clause.

The Supreme Court, in *Maryland v. Wirtz*,[22] faced the issue of federal involvement in the application of the Fair Labor Standards Act.[23] The state of Maryland, along with twenty-seven other states, sought a declaration that the 1966 amendments to the Fair Labor Standards Act[24] were unconstitutional. The Act established a minimum wage and a maximum number of hours that could be worked until overtime wages were paid. Because of the Act's application to state employees, the state argued that it interfered with its sovereign state functions.[25] The Court upheld the Act, only after finding that it produced no significant intrusion upon state powers. The Act only set wage and hour limitations, and in no manner affected the state's ability to function as a sovereign.[26]

16. *Id.* at 991, *quoting from* 38 Fed. Reg. 30633 (1973).
17. 521 F.2d at 992.
18. 500 F.2d 246 (3d Cir. 1974).
19. The Court of Appeals for the Third Circuit was concerned with the constitutionality of requiring states to legislate the EPA-promulgated TCPs into effect. Judge MacKinnon had already dismissed this point as beyond the statutory authority granted by the Act (521 F.2d at 986), and was now concerned with the constitutionality of compelling states to administer the EPA-legislated TCPs.
20. 500 F.2d at 262.
21. Fry v. United States, 421 U.S. 542 (1975); Maryland v. Wirtz, 392 U.S. 183 (1968).
22. 392 U.S. 183 (1968).
23. 29 U.S.C. §§ 201 *et seq.* (1970).
24. Act of Sept. 23, 1966, Pub. L. No. 89-601, 80 Stat. 830 (codified in scattered sections of 29, 42 U.S.C.).
25. 392 U.S. at 193.
26. *Id.* at 193-94.

Several years later, the Supreme Court was again confronted with the issue of federalism in an area of expanding federal participation. In *Fry v. United States*,[27] the state of Ohio challenged the constitutionality of the Economic Stabilization Act of 1970.[28] Ohio contended that application of the Act to its state employees interfered with sovereign state functions,[29] and that the limitations imposed by the tenth amendment upon the commerce power precluded regulation of all state and local governmental employees.[30] Again, although the Court recognized the need in this area for increased federal regulation, the Act was upheld only after finding it to be mildly intrusive of state sovereignty.[31]

The *District of Columbia v. Train* opinion demonstrates that the court of appeals envisioned the transportation control plans as being far more than mildly intrusive. The court held that even if increased federal involvement was required to solve this " 'recognized . . . national health problem,' "[32] to compel unwilling state administration of federal regulations calling for inspection and maintenance systems constituted a drastic invasion of state sovereignty.[33] Such an invasion would allow the Administrator to "commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering . . . a federal regulatory program . . . ."[34]

Although the EPA could not compel administration of federal regulations, the court found that the EPA could require the states to enforce a federal inspection program by providing that the state shall not allow to operate on its streets or highways any noncomplying vehicles.[35] The court emphasized that the certificates of compliance could only be obtained from federal officials or private sources not manned by state personnel.[36] Compelled enforcement did not "commandeer" state personnel and resources as did compelled administration. Judge MacKinnon observed that enforcement activities were presently performed by the states, and requisite enforcement alone omitted the specific manner in which the states were to comply.[37]

27. 421 U.S. 542 (1975).
28. 12 U.S.C. § 1904 note (1970).
29. 421 U.S. at 547.
30. *Id.* at 547-48 n.7.
31. *Id.* at 548.
32. 521 F.2d at 991.
33. *Id.* at 994.
34. *Id.* at 992.
35. *Id.* at 991.
36. *Id.* at 991-92.
37. *Id.* at 991. The court further observed that compelled state enforcement of fed-

It would appear that the *District of Columbia v. Train* ruling is conceptually in line with the Supreme Court's decision in *Train v. National Resources Defense Council, Inc.*,[38] which addressed the variance procedures authorizing individually tailored relief from the general requirements of the Clean Air Act. The issue before the Court in *National Resources Defense Council* was whether the individual states or the EPA had the primary authority to grant these variances. The Supreme Court held that each state should have the primary responsibility in determining how to meet standards of air quality within its boundaries.[39] The opinion suggests that the Court would agree with Judge MacKinnon's analysis, and would hold compelled state administration of TCPs as an unconstitutional extension of the commerce clause.

Solicitor General Robert H. Bork recently announced that he intends to petition for review of this decision.[40] If the Supreme Court grants certiorari and remains consistent with the principles enunciated in *National Resources Defense Council*, the Administrator may be forced to consider alternative means of implementing TCP programs.

In seeking these alternatives, the Administrator most likely will turn to the "carrot and stick" approach used to persuade states to adopt the fifty-five miles per hour speed limit.[41] It has been suggested that under the Urban Mass Transportation Act,[42] transfer of federal highway funds could be conditioned on adoption and enforcement of transportation controls at the state level.[43] Such an alternative should be pursued because it best serves both interests by assuring adoption of the TCPs at the state level, while simultaneously preserving the framework of a federal system.

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eral regulations was a constitutionally accepted tradition. The court cited as an example the Federal Safety Appliance Act which prohibits the use of unsafe equipment on railroads. 45 U.S.C. §§ 1 *et seq.* (1970).

38. 421 U.S. 60 (1975).

39. *Id.* at 86-87.

40. *Supra* note 12.

41. 23 U.S.C. § 154 (Supp. IV, 1974). The receipt of federal highway aid funds are conditioned upon each state establishing a fifty-five miles per hour speed limit upon the public highways within its boundaries.

42. 49 U.S.C. §§ 1601 *et seq.* (1970).

43. 5 ELI Env. L. Rep. 10193, 10196 (1975).