Federalism Constant Issue At High Court

A ll good streaks must come to an end. Justice Kennedy’s remarkable 16-year streak of being on the winning side in virtually every environmental case since joining the Supreme Court is no exception. In Alaska v. EPA, decided in January, it was Justice O’Connor, with Justice Kennedy dissenting, who cast the deciding fifth vote in favor of EPA. The majority ruled that the Clean Air Act authorizes EPA to stop construction of a major stationary source upon the agency’s finding that the state agency permitting authority’s determination of Best Available Control Technology is unreasonable. Justice Ginsburg’s majority opinion displayed an impressive command of the act, including an exigency on the ins and outs of bubbling in attainment areas designated for Prevention of Significant Deterioration.

In many respects, however, Kennedy’s dissent is the more remarkable opinion. Although to most environmental law observers the precise issue before the Court was fairly narrow and of questionable cert-worthiness — whether EPA could challenge a state agency BACT determination through an administrative order of noncompliance — Kennedy perceived the case’s significance in far more sweeping terms. As he saw it, the stakes were no less than the viability of cooperative federalism in environmental law. The majority, he contended, had effectively “relegated” states to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect.” The ruling, he asserted, constitutes “a great step backward in Congress’s design to grant states a significant stake in developing and enforcing national environmental policy.”

Justice Kennedy also directly challenged what he characterized as the majority’s apparent “presumption that state agencies are not to be trusted to do their part.” Enlisting the Court’s recent constitutional federalism rulings promoting state sovereignty, Kennedy cited recent Eleventh Amendment precedent for the proposition that there is an “established presumption that states act in good faith.” He further challenged one of the linchpins of federal environmental law: the notion that a strong and ongoing federal oversight role is needed to guard against a race to the bottom, with states competing to attract industry by offering ever more lax environmental standards. Kennedy contended that EPA, by admitting that it had rarely invoked its supervisory authority, had essentially admitted that “fears about a race to the bottom bear little relation to the real-world experience under the statute.”

Kennedy’s rhetorical stridency in Alaska v. EPA is curious, but also potentially telling. Along the spectrum between large and small federalism issues within federal environmental law, let alone federal-state relations more generally, EPA’s oversight of state BACT determinations borders on the microscopic. Yet, for that same reason, Kennedy’s use of the case to make clear his broader concerns about the need to maintain state autonomy in environmental law leaves little doubt about the depth of his commitment to promoting that end.

What remains less certain is whether Justice O’Connor’s departure in Alaska v. EPA from what otherwise has become known as the “Federalism Five” (Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas) is aberrational or indicative of future trends. We may know soon. The Court heard oral argument in early January in another environmental case, South Florida Water Management District v. Miccosukee Tribe, where petitioner is likewise ringed federalism chords in support of a narrow reading of the Clean Water Act Section 402 permit requirement. (Full disclosure: the author filed an amicus brief on behalf of former EPA officials in this case.) For those in attendance at the argument, it was not Justice Kennedy who seemed to be Justice O’Connor.

While comments made by individual justices at oral argument can be misleading, they are not equally so for all of them. The impression here was that Rehnquist, Scalia, Kennedy, and Thomas favored petitioner’s narrow reading of the Water Act, while Stevens, Souter, Ginsburg, and Breyer favored respondent’s more expansive view. Justice O’Connor was not so easily pegged. She was far more balanced in her questioning, skeptical of what she dubbed petitioner’s more “extreme” theory of limiting the Water Act’s scope, while plainly interested in the potential viability of petitioner’s alternative, more case-specific backup position.

Finally, the least-noted aspect of the Court’s ruling in Alaska v. EPA may in fact prove the most important. The Court endorsed the lower court’s ruling that EPA’s administrative order amounted to “final agency action” subject to judicial review. EPA, which had argued to the contrary in the Ninth Circuit, went out of its way to reverse its position in the Supreme Court.

The significance of the Court’s ruling is that the genesis of EPA’s reversal of position was the Fourth Circuit’s ruling last summer in TVA v. Whitman that EPA’s issuance of a Clean Air Act administrative compliance order to TVA lacked finality. The appellate court reasoned that the order must lack finality and not be subject to judicial review because it would violate due process to impose severe civil and criminal penalties based on noncompliance with such an order. In February, after the Supreme Court in Alaska v. EPA agreed that a Clean Air Act administrative order is final agency action, the Solicitor General filed a petition for cert to review the TVA ruling. Should the Court grant review, its ruling on the due process issue will be potentially momentous because of the large number of potentially implicated federal administrative enforcement programs, including Superfund.

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