THE CONSTITUTIONALITY OF THE CLIMATE STABILIZATION ACT
CAMBRIDGE DRY CLEANING V. UNITED STATES

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Constitutional Law: Structures of Power and Individual Rights
March 10, 2013

A small dry cleaner brings suit against all three parts of the Climate Stabilization Act (CSA) in the present case. Before making a proper judgment on the constitutionality of specific clauses of the CSA, the Court must determine whether the dry cleaner maintains proper standing to sue the United States for each specific clause.

The nature of this case parallels NFIB v. Sebelius in that the Anti-Injunction Act's applicability must be called into question in regard to the standing of the suit. The standing to sue the part of the legislation that conflicts with the Act is the first clause, which establishes a tax on carbon emissions. The Act holds that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The Act was created by Congress to ensure that lawsuits do not interfere with the collection of the federal tax revenue. This case differs from the healthcare case in that Congress termed the individual mandate as a penalty for the purposes of the Anti-Injunction Act's applicability in Sebelius. Here Congress specifically utilized the word tax in the language of the law. The tax has not yet been assessed and therefore the dry cleaner has no standing to sue on these grounds. The Court cannot overturn the will of Congress in this case, despite the questionable nature of the tax apportionment variation on a state level. Another suit must come before this Court under the proper circumstances for a proper judgment on the constitutionality of this clause. (NFIB v. Sebelius, 2012)

The third clause of the CSA does not concretely injure the Cambridge Dry Cleaner because it regards federal spending conditional on state action.

Upon determining that the Cambridge dry cleaner only maintains a standing to challenge the constitutionality of the second clause of the CSA, two constitutional questions arise directly from the clause: The first is whether it is within the constitutional authority of Congress to use

local and state officials to enforce EPA regulation of the dry cleaner in question? The second is whether Congress has the constitutional authority to require commercial establishments to purchase new technology or be reported to the EPA?

Does Congress possess the power to use local and state officials to enforce EPA regulation? The EPA is a federal agency administered by the executive branch. To determine the ability of Congress to impose a regulating duty on non-federal officials, we must examine the enumerated powers derived in the Constitution. None exist that directly indicate how to decipher the answer to this question. The Court has already made a prior decision on this case based primarily upon historical contextual evidence. The federal government has previously argued along a line of reasoning in Printz that because previous statutes exist compelling the actions of some state judiciaries, there is an implied power of Congress to compel the action of a government official at another level of government. "We do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service." These early statutes could easily be based upon a Congressional power to shape and form the judiciary of the nation. The Court's previous arguments also interpret these Congressional actions as recommendations to the legislative branches of the states in question and see these actions as a legal action taken under full respect to the Constitution. (Printz v. United States, 1997)

"It is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." The striking down of the portion of the Brady Act that mandated local law enforcement officials to enforce the regulation of the federal government is interestingly similar in facts to the case at hand. In Printz, the Brady Handgun Violence Prevention Act created an

interim apparatus for regulation by commanding local and state officials not employed by the federal executive to operate directly as an administer of the law. The facts of the Printz case are actually less extreme than the present case not only because the problematic clause of the law was crafted as only temporary, but also because Congress only asked officials in noncompliant states to take on this heavy enforcement burden. (Printz v. United States, 1997)

The present case does differ on one crucial distinction. The wording of the second clause of the CSA maintains only that state and local inspectors are compelled to report in violations of EPA regulations. The government could argue that they are taking on a responsibility of reporting information that they already observe as part of their state or locally delegated duties and there is no additional requirement based in this law than simply submitting a form to the EPA. Do these inspectors already inform federal agencies on compliance issues? The answer here is no. The inspectors operate on the state and local level because building inspection is traditionally a function of the state not enumerated in the Constitution and thus reserved solely to the state. The Federal government certainly does have the ability to regulate and tax emissions under the Commerce Clause and Necessary and Proper Clause authority provided that the regulation is pursued solely under the action of a federal official. The Federal government can regulate individuals and bypass the states, because the Federal government is a formation of the people. (Marbury v. Madison, 1803)

Justice O'Connor clearly states in New York v. United States that no matter how terrible the policy alternative may appear, a "judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse." The gravity of the threat carbon emissions create does not fall upon deaf ears in this court. This clear danger to the collective health of the nation's citizens should be met by legislation, however, fully compliant

to the constitutional authority reserved to Congress. Congress needs to legislate the power to enforce this regulation directly to the EPA, a part of the Federal Executive, through the valid pathways that the Commerce Clause, the Necessary and Proper Clause, Tax and Spending Clause provide together. (New York v. United States, 1992)

The duty state officials maintain would be "the duty owed to the National Government, on the part of all state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law." This in no way reads as a command ability of Congress. Rather, there is a clear anchor of federal supremacy that does not overstep its bounds in protecting state sovereignty. Congress clearly has the right here to regulate under the Commerce Clause. It has established factually that carbon emissions constitute a threat to the public welfare that must be regulated commercially because of its negative interstate commercial effects. Whether or not those effects are the reason for passing the law, the constitutional basis exists and matters not why the Congress took this action. (Printz v. United States, 1997)

Scalia cites the Federalist papers as confirmation to the statement: "The insistence of the framers upon unity in the Federal Executive – to ensure both vigor and accountability – is well known." The Federal Executive's regulatory delegation to the state and local officials in Printz overreached Congressional power in the Constitution and violated the dual-sovereignty of the states. Congress can regulate individuals but not through means by which violate this delicate balance of enumerated powers. (Printz v. United States, 1997)

The government could make the case that the Commerce Clause along with the Necessary and Proper Clause provide a sufficient basis for this overreach. But substantial previous case law explicitly denies the delegation of a federal regulation to the application of the states. Congress must either condition state funding upon meeting a regulatory standard as a

state or regulates the matter itself through federal legislation and the enforcement of the Federal Executive.

The Court overturns the following portion of the law: "town or county building inspectors shall inspect businesses for compliance with this section of the CSA, and report noncomplying businesses to the Environmental Protection Agency." Congress may not command state and local building inspectors to in effect enforce a regulation rooted in the interstate nature of Commerce.

Now we turn to the second portion: Can Congress mandate businesses to comply with the purchase of new technologies that are presumably supposed to reduce emissions as part of the broader intentioned CSA? The only case precedent for an individual mandate in the history is United States is NFIB v. Sebelius. The Court upheld the individual mandate to purchase insurance as part of the Affordable Care Act by holding the mandate amounted to a tax.

The facts of the case here are very different. This law rings of dubious legality because of its vague and open-ended wording. The clause reads that the relevant businesses "shall be required to install advanced technologies to reduce their greenhouse gas emissions." What does the Congress mean in the CSA by advanced technologies? Do businesses, as individuals in the eyes of the law, have the freedom to choose between two products? Do they have the freedom to choose not to purchase an advanced technology? What will the penalty be, if they choose not to purchase an advanced technology to reduce emissions? The individual mandate was upheld in NFIB v. Sebelius because it was written as a tax. The Court found that "the Federal Government does not have the power to order people to buy health insurance." There is no legal difference between the negative externality of not purchasing health insurance and not reducing carbon emissions. In either situation, Congress cannot simply command a purchase based on a

Commerce Clause and Necessary and Proper Clause Power. No tax was written into this clause of the CSA. The CSA mandate cannot be upheld. (NFIB v. Sebelius, 2012)

"The power to regulate commerce presupposes the existence of commercial activity to be regulated." Congress cannot mandate individuals to purchase an item that they were not planning to purchase. Likewise, the Court finds that Congress cannot mandate commercial entities to purchase an item without having the choice not purchase the item. (NFIB v. Sebelius, 2012)

The Court does not reach so far here as to say that inactivity is not taxable. This Court in National Federation of Independent Business v. Sebelius stated, "it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity." This statement needs no revision because of the expansive case law in which capitations were allowed under the Congress's taxing power. Limits do exist to the taxing power, however, and the Court has already determined many of these limits. "Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it." (NFIB v. Sebelius, 2012)

Many implications on a policy level flow from the legal decisions of the case. The first finding, that Congress can't use state and local officials to enforce a federal regulation even if the inspection already is consistent with the job description. Congress could easily take a series of actions designed to curb the decision's effect on policy, which it clearly has the power to do. Congress could pass a law giving the EPA the budgetary funding to hire enough inspectors to enforce the law. This would allow the Commerce Clause Power to be used directly and the spirit of the CSA could be implemented fully. Congress could condition state funding on meeting

regulatory minimums within state regulation as the decision in Dole suggests. The distinction here between not enacting any of the second clause and enacting revised versions of it probably does not mean much for policy. The third clause's requirement for action on the state level conditionally dictated through federal funding for highways is designed to spur state action on the issue. One would be hard-pressed to imagine a situation in which states do not comply. The third clause is far more appropriate in terms of the dual-sovereignty of states that is active in the Constitution than the second clause would have been if upheld. A particularly provocative Congress could re-pass the clause except explicitly state that this clause is necessary for the broader CSA to function on the whole. This outcome might put a new case before the court under different circumstances and the outcome is ambiguous with the lack of foresight as to the particular wording of the new legislation. The policy outcome behind not being able to mandate a business to make a purchase is less ambiguous. Congress can easily amend the remaining portion of the bill with the second clause written in, except explicitly containing a tax on the non-compliant businesses. A somewhat less obvious option available to the Federal Government would be to skirt the decision by providing directly the advanced technologies to the relevant businesses. The Commerce Clause and Necessary and Proper Clause at that point would easily allow the Executive to regulate the use of such technology.

The CSA represents a comprehensive emissions reduction legislation that remains today unprecedented in the United States. Democrats would struggle to pass such a comprehensive plan on an environmental issue because they would face sharp opposition from the current House Republicans. The Court striking down any portion of the CSA would most likely prevent the comprehensive solution that so eludes proponents of this policy.

Bibliography

Marbury v. Madison, 5 US 137 (Supreme Court 1803).
National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (Supreme Court 2012).
New York v. United States, 505 US 144 (Supreme Court 1992).
Printz v. United States, 521 US 898 (Supreme Court 1997).

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Spring 2013