The Burger Court Opinion Writing Database

Union Electric Co. v. EPA

427 U.S. 246 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 24, 1976

Re: No. 74-1542 - Union Electric Co. v. Environmental Protection Agency

Dear Thurgood:

I fear the problems in this case are a consequence of letting a lot of little boys on Congressional staffs write legislation in noble prose that often takes little account of realities. I will wait to see what Lewis turns up.

Regards,

WEB

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 22, 1976

Re: 74-1542 - Union Electric Co. v. EPA

Dear Lewis:

Please show me joining your concurring opinion of June 21.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 12, 1976

RE: No. 74-1542 Union Electric Co. v. Environmental Protection Agency, et al.

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 12, 1976

74-1542 - Union Electric Co. v. EPA

Dear Thurgood,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Marshall

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 17, 1976

Re: No. 74-1542 - Union Electric Co. v. Environmental Protection Agency

Dear Thurgood:

Please join me.

Sincerely,

Mr. Justice Marshall

Copies to Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1542

Union Electric Company, Petitioner, *v.* Environmental Protection Agency et al.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[May —, 1976]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

After the Administrator of the Environmental Protection Agency (EPA) approves a state implementation plan under the Clean Air Act, the plan may be challenged in a court of appeals within 30 days, or after 30 days have run if newly discovered or available information justifies subsequent review. We must decide whether the operator of a regulated emission source, in a petition for review of an EPA-approved state plan filed after the original 30-day appeal period, can raise the claim that it is economically or technologically infeasible to comply with the plan.

I

We have addressed the history and provisions of the Clean Air Act Amendments of 1970, Pub. L. 91–604, 84 Stat. 1676, in detail in *Train* v. *Natural Resources Defense Council* (*NRDC*), 421 U. S. 60 (1975), and will not repeat that discussion here. Suffice it to say that the Amendments reflect congressional dissatisfaction with the progress of existing air pollution programs and

PP 7, 14

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: MAY 19 1976

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1542

Union Electric Company, Petitioner, *v.* Environmental Protection Agency et al. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[May —, 1976]

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HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 23, 1976

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 74-1542, Union Electric Co. v. EPA

No. 75-324, Exxon Corp. v. EPA
No. 75-325, Texas Chemical Council v. EPA
No. 75-326, Harris County, Texas v. EPA

In these cases petitioners raise two claims, neither of which is decided by Union Electric. The first question is whether, when the Administrator of EPA promulgates his own implementation plan for a State upon the State's failure to submit a satisfactory plan, the Administrator must consider economic and technological factors. This question is reserved in Union Electric, slip op. at 13 n. 7. Despite petitioners' contentions, however, the question is not presented in this case. The Administrator agrees with petitioners that, in these circumstances, he must consider such factors, and argues that he has done so here. The Court of Appeals did not deal with the question directly, but held that the fact that it was technologically impossible for petitioners to comply with certain ship and barge emission regulations did not render the regulations void. While petitioners argue that these regulations were issued because the Administrator refused to consider economic and technological factors, the Administrator points to record evidence showing that he considered such claims and rejected them because technology forcing was necessary to meet the national standards. This conclusion is permissible in order to meet the primary standards within three years. Thus, there is no disagreement on the basic question petitioners' present. And, to the extent petitioners' claim is that the Administrator's rejection of economic and technological factors in this case was arbitrary and capricious, it is fact-specific.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

(3)

May 12, 1976

Re: No. 74-1542 - Union Electric Co. v. EPA

Dear Thurgood:

Please join me.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 12, 1976

No. 74-1542 Union Electric v. EPA

Dear Thurgood:

Although I voted at the Conference to affirm, I was then under the impression that some other remedy - other than contesting a criminal case - is available to an electric utility that can prove technological infeasibility. A reading of your well-written opinion leaves me in doubt as to whether there is such a remedy.

At our Conference, Bill Rehnquist commented that this is a "harsh and draconic statute". It is indeed, if it must be read as compelling the closing of a necessary public service because standards cannot be met for technological reasons.

Although I intend to examine the statute and the circuit court decisions more carefully, I write now merely to say that I am not yet quite willing to construe the Act in a way that could - on the face of it - result in great injury to an entire community.

It may be that I will feel compelled to agree with the conclusion you reached, but I believe at least one or two circuit courts have read the statute differently and this gives me some encouragement to seek a result more compatible with rational legislation.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

LFP/gg 6-21-76

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JUN 21 1976

Recirculated: _____

No. 74-1542 UNION ELECTRIC CO. v. EPA

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court because the statutory scheme and the legislative history, thoroughly described in the Court's opinion, demonstrate irrefutably that Congress did not intend to permit the Administrator of the Environmental Protection Agency to reject a proposed state implementation plan on the grounds of economic or technological infeasibility. Congress adopted this position despite its apparent awareness that in some cases existing sources that cannot meet the standard of the law must be closed down. [1]

The desire to impose strong incentives on industry to encourage the rapid development and adoption of pollution control devices is understandable. But it is difficult to believe that Congress would adhere to its absolute position if faced with the potentially devastating consequences to the

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

1st Printed DRAFT

SUPREME COURT OF THE UNITED STATES

From: Mr. Justice Powell

No. 74-1542

Circulated:

Recirculated: JUN 23 1976

Union Electric Company, Petitioner, *v.* Environmental Protection Agency et al.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1976]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring.

I join the opinion of the Court because the statutory scheme and the legislative history, thoroughly described in the Court's opinion, demonstrate irrefutably that Congress did not intend to permit the Administrator of the Environmental Protection Agency to reject a proposed state implementation plan on the grounds of economic or technological infeasibility. Congress adopted this position despite its apparent awareness that in some cases existing sources that cannot meet the standard of the law must be closed down.[1]

[1] The record is clear beyond question that at least the sponsors and floor leaders of the Clean Air Act intended that industries unable to comply with approved state implementation plans, whether because of economic or technological infeasibility, would be "closed down." This is explicit in the Senate Report. S. Rep. No. 1196, 91st Cong., 2d Sess., 2–3. It is repeated quite candidly in the statements of various members of the Senate and is described in detail in the Government's brief in this case. Solicitor General's Brief, at 20–32. Indeed, remarkable as it may seem, it is clear from the legislative history that even total technological infeasibility is "irrelevant." See Solicitor General't Brief, at 16, 18–23.

What this means in this case, if the allegations of Union Electric Company prove to be correct, is that—in the interest of public health—the utility will be ordered to discontinue electric service to

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

6

May 18, 1976

Re: No. 74-1542 - Union Electric Co. v. EPA

Dear Thurgood:

Please join me.

Sincerely,

WHR

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 17, 1976

Re: 74-1542 - Union Electric Co. v. Environmental Protection Agency, et al.

Dear Thurgood:

Please join me.

Sincerely,

John

Mr. Justice Marshall

Copies to the Conference