# The Burger Court Opinion Writing Database

## *Duke Power Co. v. Carolina Environmental Study Group, Inc.*

438 U.S. 59 (1978)

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

June 2, 1978

MEMORANDUM TO THE CONFERENCE:

Re: (77-262 Duke Power Co. v. Carolina Environmental Study Group
(77-375 U.S. Nuclear Reg. Comm. v. Carolina Environmental Study Group

I am enclosing a Wang draft in the above case, which has been completed under some handicaps this week. I anticipate some modification before it is in final format, but nothing that will bear on the essence of the holding.

Regards,

WEB

jc

Draft - 6/2/78

Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Duke Power Co., Nos. 77-262 & 375

From: The Chief Justice

Circulated: JUN 2 1978

Recirculated: _____

These appeals present the question of whether Congress may, consistent with the Constitution, impose a limitation on liability resulting from nuclear accidents occurring in privately operated nuclear power plants licensed by the federal government.

I.

A.

When Congress passed the Atomic Energy Act of 1946, it envisioned that the development of nuclear power would be undertaken by the United States as a government monopoly. See Act of Aug. 1, 1946, ch. 724, 60 Stat. 755. Within a decade, however, Congress concluded that the national interest would be best served if the government encouraged the private sector to become involved in the peaceful development of atomic energy under a program of federal regulation and licensing. See H.R. Rep. No. 2181, 83rd Cong., 2d Sess. 1-11 (1954). The Atomic

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

CHAMBERS OF
THE CHIEF JUSTICE

June 5, 1978

Re: (77-262 Duke Power Co. v. Carolina Environmental
( Study Group
(77-375 U.S. Nuclear Reg. Comm. v. Carolina
( Environmental Study Group

MEMORANDUM TO THE CONFERENCE

I am not sure it is needed but I think I will add the following footnote at the bottom of page 6 in relation to Bill Rehnquist's point about subject matter jurisdiction:

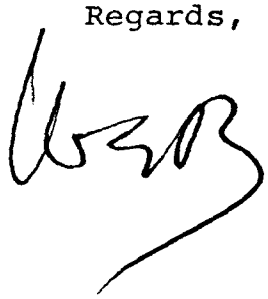
9a/ Appellees' complaint alleges jurisdiction under 28 U.S.C. § 1337, which provides for original jurisdiction in the district courts over "any civil action or proceedings arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Our reading of the pleadings, however, indicates that appellees' claims do not "arise under" the Price-Anderson Act as that language has been interpreted in prior decisions; instead, their right to relief "depends upon the construction or application of the Constitution." Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921). Specifically, they allege that the Price-Anderson Act constitutes arbitrary and irrational government action impinging on property rights and authorizes a taking of their property with no assurance of just compensation. These claims rest on the Fifth Amendment, making 28 U.S.C. § 1331(a), the general federal question statute, the proper jurisdictional base.

Previously § 1331(a) required a minimum amount in controversy in all suits, but the statute was amended in 1976 to eliminate the jurisdictional amount requirement in actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Pub. L. No. 94-574 § 2, 90 Stat. 2721. Thus this action, at least as against the Nuclear Regulatory Commission, would seem clearly permitted by

§ 1331(a) without specification of an amount in controversy. See Andrus v. Charlestone Stone Products Co., Inc., No. 77-380 (May 31, 1978), slip. op, at 3 n. 6. Appellees' failure to assert § 1331(a) as a basis for jurisdiction in their complaint is not fatal since the facts alleged are sufficient to support such jurisdiction. See id.

Since our jurisdiction to hear appellees' constitutional claims is not challenged except by the concurring opinion and in any event is established by § 1331(a), it is unnecessary to resolve the remaining question of whether the District Court was correct in also asserting jurisdiction over appellant Duke Power. Our authority to grant the relief requested does not in any way depend on Duke's status; the constitutional claims raised by appellees against the NRC and Duke are identical.

Regards,



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

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1978

Re: 77-262, 77-375 - Duke Power Co. v. Carolina Environmental Study Group

MEMORANDUM TO THE CONFERENCE

I expect to have some changes, in response to Bill Rehnquist's June 5 memo, around later today.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1978

Re: ( 77-262 - Duke Power Co. v. Carolina Environmental
( Study Group
(77-375 - U.S. Nuclear Reg. Comm. v. Carolina
( Environmental Study Group

MEMORANDUM TO THE CONFERENCE:

None of us thought this was an "easy" case from the outset. As I progressed, the difficulties became more concrete, but I believe the result is sound, even though I readily acknowledge there are valid aspects to Bill Rehnquist's position.

Just how much I am influenced by something akin to the "rule of necessity" I am not sure. Just as such elements enter the scale in equity consideration, as Bill and Lewis so well argued in Conference in Snail Darter, they cannot be totally ignored here once we clear the jurisdictional hurdle.

I contemplate incorporation, in some form in the opinion, of the treatment which follows.

(a) The due process claim: Bill argues that the complaint, albeit in the guise of a request for declaratory relief, states only a claim against Duke Power under North Carolina law. Given this construction of the complaint, the question of the constitutionality of the Price-Anderson Act would emerge only as a defense to appellees' state law claims, and thus, under the "well pleaded complaint" rule, would not support jurisdiction under § 1331(a). See Louisville & Nashville RR v. Mottley, 211 U.S. 149 (1908).

In addition to the essentially state law claim against Duke which Bill identifies, it seems to me that the complaint

can fairly be read as alleging a cause of action directly under the Fifth Amendment against the NRC[1/] That is, as I interpret the complaint, appellees are arguing that the Due Process Clause protects them against arbitrary governmental action impacting on their property rights and that the Price-Anderson Act -- which both creates the underlying injury and limits the recovery therefor -- constitutes such arbitrary action. Their further argument is necessarily that there exists a cause of action directly under the Constitution to vindicate these federal rights through a suit against the NRC, the executive agency charged with enforcement and administration of the allegedly unconstitutional statute.

For purposes of determining whether jurisdiction exists under § 1331(a) to hear appellees' claim, it is not necessary to decide whether appellees' alleged cause of action is one that we will routinely come to recognize; "jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which [appellees] could actually recover." Bell v. Hood, 327 U.S. 678, 682. (Emphasis added). Instead, the test is whether "the cause of action alleged is so patently without merit as to justify . . . the court's dismissal for want of jurisdiction." Hagans v. Lavine, 415 U.S. 528, 542-43. (Emphasis added). See also Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666-67 (1974) (test is whether right claimed is "so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy"). In light of prior decisions, for example, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and Hagans v. Lavine, supra, as well as the general admonition that "where federally protected rights have been invaded, . . . courts will be alert to adjust their remedies so as to grant the necessary relief," Bell v. Hood, supra at 684, I cannot conclude that appellees' alleged cause of action is not sufficient to sustain jurisdiction under § 1331(a) if the other requisites can be satisfied.

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1/ The complaint provides in relevant part:

"19. Since the Price-Anderson Act provides victims of a nuclear disaster no benefit while at the same time limiting their right to recover for their losses to approximately 2 1/2 percent of such losses, the operation of the $500 million limitation would, in the event of a nuclear disaster, deprive the persons injured by such a disaster of property rights without due process of law in violation of the Fifth Amendment to the Constitution of the United States." App., at 32.

Turning to those other requirements, it seems clear that appellees' claim under the Due Process Clause is an essential ingredient of a well-pleaded complaint asserting a right under the Constitution and is not simply a claim made in anticipation of a defense to be raised in a state law action -- an action to which the NRC could not, in Bill's view, even be a proper party. Thus, the Mottley rule is no bar to our jurisdiction. Moreover, appellees' claim clearly "arises under" the Constitution since its resolution "depends upon the construction or application of the Constitution." Smith v. Kansas City Title & Trust, 255 U.S. 180, 199-200. See also Gully v. First National Bank, 299 U.S. 109, 112-13; Bell v. Hood, supra, 327 U.S., at 685. The conclusion that we have jurisdiction over appellees' due process claim against the NRC would seem reasonably to follow.

The further question of whether appellees' cause of action under the Constitution is one to be generally and routinely recognized need not and should not be decided here. (I have no affinity for opening Pandorian boxes.) The question does not directly implicate our jurisdiction, was not raised in the court below, was not briefed and was not addressed during oral argument. As Bill noted last term in a similar context, questions of this sort should not be decided on such an inadequate record and leaving them unresolved is no bar to full consideration of the merits. See Mount Healthy v. Doyle, 429 U.S. 274, 278-79. It is enough that the claimed cause of action is sufficiently substantial and colorable to sustain our jurisdiction. Nor do we need to resolve the question of whether Duke is a proper party since our jurisdiction over appellees' claim against the NRC is established, and Duke's presence or absence makes no material difference to either our consideration of the merits of the controversy or to our authority to award the requested relief.

(b) the taking claim. Bill also argues that appellees' taking claim will not support jurisdiction under § 1331(a), but instead that such claims can only be adjudicated in the Court of Claims under the Tucker Act. Again, I must disagree. As I understand appellees' claim under the Just Compensation Clause they are arguing that in the event of a nuclear accident, thei property would be "taken" without any assurance of just compensation. The Price-Anderson Act is the instrument of the taking since without it, on this record, there would be no power plants and hence no possibility of an accident. Thus appellees are seeking not compensation for a taking, but instead a declaratory judgment that since the Act does not provide advance assurance of adequate compensation in the even

of a taking, it is unconstitutional. It seems reasonably clear to me that appellees' claim tracks quite closely that of the plaintiffs in the Rail Reorganization Act Cases, 419 U.S. 102, which were brought under § 1331 as well as the Declaratory Judgment Act. See Joint App. in Regional Rail Reorganization Act Cases, O.T. 1974, Nos. 74-165, 166, 167, 168, at page 161.

While the Declaratory Judgment Act does not expand the jurisdiction of this Court, it does expand our arsenal of remedies. In the instant situation, it allows a party allegedly threatened with a taking to seek a declaration of the constitutionality of the threatened governmental action before potentially uncompensable damages are sustained. Viewed from this perspective, I do not agree that asserting jurisdiction over appellees' taking claim under § 1331(a) would affect a significant or impermisable expansion of District Court jurisdiction, or would in any way trench on the Tucker Act jurisdiction of the Court of Claims.

Regards,

WJB

CHANGES AS MAR

See pp 7-10
l n 26

To: Mr. [illegible]
Mr. [illegible]
Mr. Justice [illegible]
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 19 '78

Recirculated: _____

1st PRINTED DRAFT

# SUPREME COURT OF THE UNITED STATES

Nos. 77–262 AND 77–375

Duke Power Company, Appellant,
77–262 *v.*
Carolina Environmental Study Group, Inc., et al.

United States Nuclear Regulatory Commission et al., Appellants,
77–375 *v.*
Carolina Environmental Study Group, Inc., et al.

On Appeals from the United States District Court for the Western District of North Carolina.

[June —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These appeals present the question of whether Congress may, consistent with the Constitution, impose a limitation on liability for nuclear accidents resulting from the operations of private nuclear power plants licensed by the Federal Government.

## I

### A

When Congress passed the Atomic Energy Act of 1946, it contemplated that the development of nuclear power would be a government monopoly. See Act of Aug. 1, 1946, ch. 724, 60 Stat. 755. Within a decade, however, Congress concluded that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. See H. R. Rep.

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

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1978

Re: (77-262 Duke Power Co. v. Carolina Environmental
( Study Group, Inc., et al.
(77-375 United States Nuclear Regulatory Comm.
( et al. v. Carolina Environmental Study
( Group, Inc., et al.

Dear Harry:

I have made a final review of the opinion and especially your thought and Potter's that the penultimate paragraph be in a footnote.

However, the Government argued this point and the treatment is quite brief and stylistically I think it belongs in the text and prefer to leave it that way.

Potter, of course, is not joining the opinion.

Regards,

WEB

Mr. Justice Blackmun

If you feel profoundly about this I'll re-examine. There is a way to move the point up to page 21 but that involves 2-3 other changes. No.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 5, 1978

RE: Nos. 77-262 & 375 Duke Power, et al. v. Carolina Environmental Study Group

Dear Chief:

I am happy that I can agree with your duscussion of standing and join this fine opinion.

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 5, 1978

Re: Nos. 77-262 and 77-365 - Duke Power Co. v. Carolina Environmental Study Group

Dear Chief,

It seems to me that Bill Rehnquist's conclusion that the district court was without jurisdiction in this case is quite persuasive. In light of the doctrine of Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, reaffirmed as recently as Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, it seems to me insufficient simply to assert that "28 U.S.C. §1331(a), the general federal question statute, is the proper jurisdictional base."

On the merits, I fully agree with your conclusions. It seems to me that what makes this case difficult to deal with is that the appellees' claims are essentially frivolous, but that they were accepted by the district court. Wholly frivolous arguments are sometimes harder to counter than are substantial ones. In any event, I think the arguments that the appellees now make are accurately summarized on page 2 of Bill's opinion, and I would therefore not even mention the Equal Protection argument, except to note, as Bill does in his footnote 1, that the appellees have abandoned it.

My primary difficulty with your opinion as now drafted is with the "appropriate standard of review" discussion beginning with III-A on page 23. As you know, I cannot

really accept the proposition that there is a differing "standard of review" even in an Equal Protection case, and could not accept such an implication in a Due Process setting.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

77-262; 77-375, Duke Power Co. v. Carolina Environmental Study Group, et al.

From: Mr. Justice Stewart

Circulated: 19 JUN 1978

Recirculated: _____

Mr. Justice Stewart, concurring in the result.

With some difficulty I can accept the proposition that federal subject matter jurisdiction under 28 U.S.C. § 1331 exists here, at least with respect to the suit against the Nuclear Regulatory Commission, the agency responsible for the administration of the Price-Anderson Act. The claim under federal law is to be found in the allegation that the Act, if enforced, will deprive the appellees of certain property rights, in violation of the Due Process Clause of the Fifth Amendment. One of those property rights, and perhaps the sole cognizable one, is a state-created right to recover full compensation for tort injuries. The Act impinges on that right by limiting recovery in major accidents.

1st PRINTED DRAFT

# SUPREME COURT OF THE UNITED STATES

Nos. 77-262 AND 77-375

Duke Power Company, Appellant,
77-262 *v.*
Carolina Environmental Study Group, Inc., et al.

United States Nuclear Regulatory Commission et al., Appellants,
77-375 *v.*
Carolina Environmental Study Group, Inc., et al.

On Appeals from the United States District Court for the Western District of North Carolina.

[June —, 1978]

MR. JUSTICE STEWART, concurring in the result.

With some difficulty I can accept the proposition that federal subject matter jurisdiction under 28 U. S. C. § 1331 exists here, at least with respect to the suit against the Nuclear Regulatory Commission, the agency responsible for the administration of the Price-Anderson Act. The claim under federal law is to be found in the allegation that the Act, if enforced, will deprive the appellees of certain property rights, in violation of the Due Process Clause of the Fifth Amendment. One of those property rights, and perhaps the sole cognizable one, is a state-created right to recover full compensation for tort injuries. The Act impinges on that right by limiting recovery in major accidents.

But there never has been such an accident, and it is sheer speculation that one will ever occur. For this reason I think there is no present justiciable controversy, and that the appellees were without standing to initiate this litigation.

On the issue of standing, the Court relies on the "present" injuries of increased water temperatures and low-level radia-

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 7, 1978

Re: 77-262, 77-375 - Duke Power Co. v. Carolina Environmental Study Group

Dear Chief,

I agree with you that there is § 1331 jurisdiction in this case. All elements of standing are satisfied, it seems to me, although the ice does get pretty thin. Also, as indicated below, I agree with you that the well-pleaded complaint rule is not breached in this case.

Plaintiff's alleged injury flows from the existence of the nuclear plant; and it is established (as it must be if there is standing to attack the statute) that without the limitation of liability, there would be no plant. Hence, rather than seeking an injunction against Duke to halt the operation of the installation, plaintiff seeks to challenge the limitation of liability statute on federal constitutional grounds. He does not seek to declare the plant a nuisance or to have the operator enjoined on any other state-law ground. What he asks is a declaratory judgment against those administering the statute that limiting liability violates the Due Process Clause. If he wins, economics will take care of the plant.

This case is thus not like the classic well-pleaded complaint cases on which Bill Rehnquist relies. It is as though a federal statute required that all licensed nuclear plants have certain safety devices and a neighboring property owner sues to have the plant enjoined because it fails to comply with the law. His claimed injury in fact has nothing to do with the absence of safety features, but as here, flows from the existence of the plant itself. Plaintiff in such a case may have tough standing problems, but I doubt that his complaint would be subject to dismissal under the well-pleaded complaint rule.

Very truly yours,

Byron

The Chief Justice
Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 8, 1978

Re: 77-262,
77-375 - Duke Power Co. v. Carolina Environmental Study Group

Dear Chief,

P. S.: I join your opinion.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 7, 1978

Re: Nos. 77-262 and 77-365 - Duke Power Co. v. Carolina Environmental Study Group

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1978

Re: No. 77-262 - Duke Power Co. v. Carolina Environmental Study Group
No. 77-365 - NRC v. Carolina Environmental Study Group

Dear Chief:

Please join me.

I, too, would prefer to have the reference to the equal protection argument (now on page 37 of your typed draft) relegated to a footnote. This is because of its abandonment here.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 12, 1978

No. 77-262 Duke Power Co. v. Carolina

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: JUN 2 1978

Nos. 77-262, 77-375 - Duke Power Co. v. Carolina Environmental Study Group

Recirculated: _____

MR. JUSTICE REHNQUIST, concurring in the result.

I can understand the Court's willingness to reach the merits of this case and thereby remove the doubt which has been cast over this important federal statute. In so doing, however, it ignores established limitations on District Court jurisdiction as carefully defined in our statutes and cases. Because I believe the preservation of these limitations are in the long run more important to this Court's jurisprudence than the resolution of any particular case or controversy, however important, I too would reverse the judgment of the District Court, but would do so with instructions to dismiss the complaint for want of jurisdiction. Cf., Montana-Dakota v. Public Service Co., 341 U.S. 246, 249-50.

Giving the conclusory allegations of appellees' complaint the most liberal possible reading, they purport to establish

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 5, 1978

Re: Nos. 77-262, 77-375 - Duke Power Co. v. Carolina Environmental Study Group

Dear Chief:

I plan to add two footnotes to my Xerox circulation in this case which went around on June 2nd. Footnote 1a will go at the end of the first sentence of text on page 4 of that circulation, and new footnote 2 will replace the present footnote 2 at the bottom of page 6 of that circulation. The texts of the two footnotes are as follows:

1a/ The Court's suggestion in footnote 9a that it is sufficient for appellees to allege "arbitrary and irrational government action impinging on property rights" would, if followed, overrule without benefit of argument and briefs the entire well-pleaded complaint rule which had its genesis in Mottley and has been restated by the Court as recently as four Terms ago in such cases as Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 675-678, and Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974). It is not sufficient under these cases that a plaintiff allege "arbitrary and irrational government action impinging on property rights"; the plaintiff, in order to sustain a claim of federal question jurisdiction under 28 U.S.C. § 1331 must show that federal statutory or constitutional law is the source of these rights.

Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921), does not make clear whether the Court thought that the plaintiff's rights in that case arose out of federal law as an initial matter, as the quotation in the Court's opinion in footnote 9a indicates. But since in Smith the Court electe to treat the jurisdictional question on its own motion, withou benefit of adversary contentions or briefs by the parties (as it was undoubtedly obliged to do), it cannot have been the intent of the Court in that case to overrule or disregard Louisville and Nashville Railroad Co. v. Mottley, 211 U.S. 149 (1908), decided thirteen years earlier. Particularly since Mottley has been so recently reaffirmed by this Court, its holding may not be avoided by a casual reference to a case such as Smith v. Kansas City Title & Trust Co., supra.

Quite apart from the well-pleaded complaint doctrine, the Court's opinion offers no hypothesis as to how jurisdiction exists with respect to Duke Power Co. The Complaint does not allege and the District Court did not find that North Carolina law would provide any remedy against the Nuclear Regulatory Commission as a joint tortfeasor. Absent such liability, the constitutionality of the defense provided by the Price-Anderson Act is simply irrelevant. To bootstrap Duke into this aspect of the case where no claim has been stated against the Nuclear Regulatory Commission and where the jurisdictional amount neces to establish independent jurisdiction over Duke has neither bee alleged nor proved, see Zahn v. International Paper Co., 414 U. 291 (1975), would broaden the concept of pendent party jurisdic tion far beyond that recognized in any of our previous cases.

2/ The Court apparently concludes in footnote 9a, although appellees do not so contend, that their taking claim is cognizable under 28 § 1331(a) which grants jurisdiction to t District Courts where the suit "arises under the Constitution."

The Court cites not a single case in which a claim of taking has been adjudicated under § 1331, although that jurisdictional statute has been on the books for over a century. To conclude that it embraces a "taking" claim makes the Tucker Act largely superfluous, cf., United States v. Testan, 424 U.S. 392, 404, and will permit the District Courts to consider claims of over $10,000 which previously could only be litigated in the Court of Claims. Richardson v. Morris, 409 U.S. 464 (1973). Such a significant expansion of the jurisdiction of the District Courts should not be accomplished without the benefit of arguments and briefing.

Sincerely,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1978

Re: Nos. 77-262 and 77-375 - Duke Power Co., et al.

Dear Chief:

I have read your memorandum to the Conference of June 6th with respect to this case, and think that it may fairly be said that "issue is joined" as between us on the jurisdictional points.

It seems to me that your memorandum would read out of existence the "well pleaded complaint" rule which we have so repeatedly upheld by substituting for it the test laid down in the quite different context of Bell v. Hood, 327 U.S. 678, to avoid dismissal for frivolousness. Up to now, so far as I know, Bell and Mottley have represented two separate doctrines, and the fact that a complaint might survive the Bell test did not mean that it was not also subject to the "well pleaded complaint" rule.

My principal additional difficulty with your circulation of June 6th is that it suggests that there is a cause of action "directly under the Fifth Amendment" (page 2) on behalf of the plaintiffs against the NRC for "arbitrary governmental action impacting on their property rights." You state that this is "an addition to the essentially state law claim against Duke" (page 1). I thought that our cases such as Perry v. Sindermann, 408 U.S. 593, and Board of Regents v. Roth, 408 U.S. 564,

established that any claim of deprivation of property rights without due process of law must have, as its necessary predicat a property right originating in state law. We said in Roth, supra:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ."

I do not see how the merits of this case can be decided in accordance with your presently circulating draft without significantly expanding the previously understood bounds of federal jurisdiction.

Sincerely,

The Chief Justice

Copies to the Conference

pp. 3-7

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

1st PRINTED DRAFT

Recirculated: JUN 1 2 1978

# SUPREME COURT OF THE UNITED STATES

Nos. 77–262 AND 77–375

Duke Power Company, Appellant,
77–262 *v.*
Carolina Environmental Study Group, Inc., et al.

United States Nuclear Regulatory Commission et al., Appellants,
77–375 *v.*
Carolina Environmental Study Group, Inc., et al.

On Appeals from the United States District Court for the Western District of North Carolina.

[June —, 1978]

MR. JUSTICE REHNQUIST, concurring in the result.

I can understand the Court's willingness to reach the merits of this case and thereby remove the doubt which has been cast over this important federal statute. In so doing, however, it ignores established limitations on District Court jurisdiction as carefully defined in our statutes and cases. Because I believe the preservation of these limitations are in the long run more important to this Court's jurisprudence than the resolution of any particular case or controversy, however important, I too would reverse the judgment of the District Court, but would do so with instructions to dismiss the complaint for want of jurisdiction. Cf. *Montana-Dakota* v. *Public Service Co.*, 341 U. S. 246, 249–250.

Giving the conclusory allegations of appellees' complaint the most liberal possible reading, they purport to establish only two grounds for the declaratory relief requested. First, they contend that the Price-Anderson Act deprives them of their property without due process of law in that it irrationally limits the tort recovery otherwise available in the North

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1978

Re: Nos. 77-262 and 77-375 - Duke Power Co., et al. v. Carolina Environmental Study Group

Dear Chief:

I propose to substitute in my presently circulating first printed draft of the dissent in this case for the language at the bottom of page 5 and at the top of page 6 beginning "The gist . . ." and embracing the remainder of that paragraph the following:

> "The gist of the complaint is the asserted unconstitutionality of 42 U.S.C. § 2210(e) which limits Duke's liability. But this limitation of liability is separate and apart from the 'indemnity agreement' which the Commission is authorized to execute under 42 U.S.C. § 2210(d). The Commission has nothing whatever to do with the administration of the limitation of liability; whatever administration of that statute there is to be is left in the hands of the District Court, 42 U.S.C. § 2210(o). The District Court, of course, is not a party to this suit."

Sincerely,

The Chief Justice
Copies to the Conference

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

Nos. 77–262 AND 77–375

Duke Power Company, Appellant,
77–262 *v.*
Carolina Environmental Study Group, Inc., et al.

United States Nuclear Regulatory Commission et al., Appellants,
77–375 *v.*
Carolina Environmental Study Group, Inc., et al.

On Appeals from the United States District Court for the Western District of North Carolina.

[June —, 1978]

MR. JUSTICE REHNQUIST, concurring in the judgment.

I can understand the Court's willingness to reach the merits of this case and thereby remove the doubt which has been cast over this important federal statute. In so doing, however, it ignores established limitations on District Court jurisdiction as carefully defined in our statutes and cases. Because I believe the preservation of these limitations are in the long run more important to this Court's jurisprudence than the resolution of any particular case or controversy, however important, I too would reverse the judgment of the District Court, but would do so with instructions to dismiss the complaint for want of jurisdiction. Cf. *Montana-Dakota* v. *Public Service Co.*, 341 U. S. 246, 249–250.

Giving the conclusory allegations of appellees' complaint the most liberal possible reading, they purport to establish only two grounds for the declaratory relief requested. First, they contend that the Price-Anderson Act deprives them of their property without due process of law in that it irrationally limits the tort recovery otherwise available in the North

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JUN 16 '78

Recirculated: _____

77-262; 77-375 - Duke Power Co. v. Carolina Environmental Study Group

MR. JUSTICE STEVENS, concurring in the judgment.

The string of contingencies that supposedly holds this case together is too flimsy for me. We are told that but for the Price-Anderson Act there would be no financing of nuclear power plants, no development of those plants by private parties, and hence no present injury to persons such as appellees; we are then asked to remedy an alleged due process violation that may possibly occur at some uncertain time in the future, and may possibly injure the appellees in a way that has no significant connection with any present injury. It is remarkable that such a series of speculations is considered sufficient either to make this case ripe for decision or to establish appellees' standing;*/ it is even more remarkable that this occurs in a

*/ With respect to whether appellees' claim of present injury is sufficient to establish standing, it should be noted that some sort of financing is essential to almost all projects, public or private. Statutes that facilitate and may be essential to the financing abound--from tax statutes to statutes prohibiting fraudulent securities transactions. One would not assume, however, that mere neighbors have standing to litigate the legality of a utility's financing. Cf., Blue Chip Stamp Co. v. Manor Drug Stores, 421 U.S. 723.

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: 6/19/78

Printed

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

Nos. 77-262 AND 77-375

Duke Power Company, Appellant,
77-262 *v.*
Carolina Environmental Study Group, Inc., et al.

United States Nuclear Regulatory Commission et al., Appellants,
77-375 *v.*
Carolina Environmental Study Group, Inc., et al.

On Appeals from the United States District Court for the Western District of North Carolina.

[June —, 1978]

MR. JUSTICE STEVENS, concurring in the judgment.

The string of contingencies that supposedly holds this case together is too flimsy for me. We are told that but for the Price-Anderson Act there would be no financing of nuclear power plants, no development of those plants by private parties, and hence no present injury to persons such as appellees; we are then asked to remedy an alleged due process violation that may possibly occur at some uncertain time in the future, and may possibly injure the appellees in a way that has no significant connection with any present injury. It is remarkable that such a series of speculations is considered sufficient either to make this case ripe for decision or to establish appellees' standing;* it is even more remarkable that this

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