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Assessing Atomic Energy Act's Reach At High Court

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(November 14, 2018, 3:05 PM EST)


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On Nov. 5, the U.S. Supreme Court held oral arguments in Virginia Uranium Inc. v. Warren,[1] which will further define the reach of the Atomic Energy Act, or AEA, to preempt state legislation encroaching on radiological safety. In this case, Virginia passed a moratorium on conventional uranium mining, which is not covered by the AEA. Virginia Uranium challenged this law as preempted, alleging that the purpose behind the statute was to regulate downstream milling and uranium tailings, activities that are regulated by the AEA. The Fourth Circuit upheld the district court's dismissal of Virginia Uranium's complaint because it found the intent of the state irrelevant — the fact that the AEA did not regulate mining was determinative. Based on the court's argument, however, it looks as if the court may overturn the court of appeals decision and require Virginia to provide some plausible nonradiological safety rationale for the legislation that does not intrude on the AEA.

Preemption and the AEA

The Atomic Energy Act regulates nearly every aspect of the uranium fuel cycle. It does not, however, regulate the conventional mining of uranium on private land. Although mining itself is not regulated, the AEA governs the handling and licensing of byproduct material after it leaves the ground, which includes the milling process that typically accompanies mining and "the tailings or wastes produced by the extraction [i.e., mining] or concentration of uranium."[2]

Amendments to the AEA in 1959 increased the regulatory role of states over nuclear production. Although these amendments confirmed that the federal government occupied the field of radioactive safety regulation, they also provided in § 2021(k) of the AEA that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."[3] Therefore, states can regulate nuclear activity as long as they do not encroach on the field of nuclear safety, which remains exclusively governed by the AEA.

The Supreme Court applied this dichotomy between state and federal regulation first in Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission.[4] In PG&E, California imposed a moratorium on the construction of nuclear power plants — an activity that is directly

regulated by the AEA. California could only regulate the licensing and construction of nuclear plants if its "purpose" was to regulate something other than radiation safety. Because California had other economic development concerns that were not related to safety, the Supreme Court upheld the California law.

Virginia Bans Uranium Mining

Since 1983, Virginia has prohibited uranium mining in the commonwealth. After the price of uranium increased in the 2000s, the owners of land with proven uranium reservoirs in Virginia began to lobby to have the moratorium overturned. In 2015, Virginia Uranium filed suit in federal court against the state, claiming that the moratorium was preempted by the AEA.

The district court granted the defendants' 12(b)(6) motion to dismiss, and the Fourth Circuit affirmed.[5] The court of appeals found no preemption because the AEA does not address traditional mining on nonfederal lands. The AEA expressly covers in-situ mining and mining on federal lands, but it is silent on traditional mining on private lands (save for the regulation of mining waste). Thus, Virginia's ban on such activity, even though the commonwealth conceded for the purposes of its motion that it was concerned only with the radiological safety of the mining activity, survived the preemption analysis. The court also found that the ban on mining did not conflict with the AEA's express purpose of encouraging national uranium development, citing the fact that 90 percent of enrichment activities in the United States consisted of recycled and foreign obtained uranium.

Supreme Court Briefing

The petition for writ of certiorari was filed by the uranium property owners on April 21, 2017. At the invitation of the court, the United States recommended that the court hear the matter as an important question of federal jurisdiction. The court agreed to hear the case, and oral argument was held last week, on Nov. 5, 2018.

In its brief, the petitioner argues that whether or not the AEA governs conventional mining is unimportant to the analysis. Rather, because Virginia conceded for the purposes of its motion to dismiss that its "purpose" was to regulate radiation safety issues (including the radiation impacts of tailings) through the ban on mining, the statute ran afoul of § 2021(k)'s preemptive effect. The petitioner relies primarily on two circuit cases for support, Skull Valley from the Tenth Circuit and Entergy Nuclear from the Second Circuit.[6] Those cases found that the AEA deploys a purpose-based preemption test to strike down state and local attempts to openly or surreptitiously regulate radiological safety based on local concerns, not national interests. In Entergy Nuclear, the Second Circuit overturned a Vermont statute that required General Assembly approval based upon statements of lawmakers that revealed the true purposes behind the statute was nuclear safety, despite language in the statute itself that claimed environmental and economic factors motivated the law. Similarly, in Skull Valley, the Tenth Circuit overturned local ordinances that denied the use of local roads to a company which was storing special nuclear fuel governed by the AEA. Because the road use ordinances were aimed at regulating radiation safety, the fact that they did not directly regulate the storage facility was unimportant. Thus, the petitioners assert that if the Virginia law's purpose was to impact radiological safety, it is preempted.

The United States supports reversing the Fourth Circuit. Since Virginia conceded for the purposes of its motion that it intended to regulated radiation safety, the court of appeals improperly applied the court's decision in PG&E. Finally, in response, Virginia supports the rationale laid out by the Fourth Circuit,

disputing that field preemption applied because the AEA does not regulate conventional mining. Therefore, the purpose test found in § 2120(k) does not apply to Virginia's moratorium, especially since its purpose was to increase state participation in the nuclear field and conventional mining has always been reserved to states. Rather, Virginia argues that this case is more akin to an obstacle preemption case, which is easily resolved in its favor because the federal government has declined to regulate conventional uranium mining.

Supreme Court Oral Arguments

The court quickly questioned the petitioner on its position that the statute's purpose is a fact question. Justices Ruth Bader Ginsburg, Neil Gorsuch, Elena Kagan, Brett Kavanaugh, John Roberts and Sonia Sotomayor all expressed some disquiet at the process for determining what a state legislature was thinking when it passed a law. The court questioned whether determining the purpose required depositions of legislator, and how to handle statutes with dual purposes. Several justices also worried about whether the "purpose" test could lead to a statute in one state being permitted to stand, while requiring the preemption of the exact same statute in another — an odd result in defining the scope of federal preemption.

The petitioner answered these questions by referring back to § 2120(k), which requires an evaluation of the law's intent, allowing state regulation only "for purposes other than protection against radiation hazards." The petitioner also pointed the court to its Arlington Heights decision, wherein the court applied a discriminatory intent test to determine whether the ordinance in question was unconstitutional. The petitioner proposed this test: "the person, the plaintiff challenging the preemption of the statute can demonstrate that the prohibited purpose was a motivating factor, then the state has to come in and show that it would have been enacted even in the absence of the motivating factor."[7]

Justice Gorsuch also pushed the petitioner on whether PG&E, Skull Valley or Entergy Nuclear applied here, because each of those cases dealt with the regulation of an activity that was covered by the AEA — construction of power plants or the storage of nuclear byproduct material. In this matter, the AEA does not regulate mining at all. Accordingly, he questioned how there could be preemption if the federal government has not gotten "into that game at all."[8] Under that view, if the federal government has not regulated conventional mining (which it has not), the "purpose" preemption test found in § 2120(k) does not apply.

The petitioner answered this question by referring back to the PG&E case, which allowed regulation only after determining California's intent. "But what it couldn't do was use that de jure authority over whether to effectively and indirectly regulate the nuclear safety of the operation of the plant."[9] Here, the petitioner argued, Virginia's conceded intent to regulate radiological safety of tailings (which is regulated by the AEA) by prohibiting the mining itself means that the statute is preempted.

The solicitor general agreed with the petitioner that even if the United States cannot directly regulate conventional uranium mining, Virginia's ban of that activity is preempted because it "can't use its authority to reach into and indirectly regulate something reserved exclusive to the federal government," i.e., radiological safety issues related to mining tailings.[10]

In response to a question from Justice Samuel Alito regarding the proper inquiry into legislative inquiry, the solicitor general broke with the petitioner, and offered instead a simple plausibility review to determine if the state legislature intended to regulate a radiological safety in an AEA covered activity: "If the state puts forward a plausible nonsafety rationale and that rationale is not otherwise foreclosed by

the test, legislative history, and historical context, then I think the state wins."[11] He also confirmed that any plausible rationale should be sufficient, so even if a statute had a dual purpose, then it should survive a preemption challenge. Here, because Virginia conceded that the statute's purpose was to address radiological safety issues, the decision must be overturned.

Virginia focused its argument on the limited scope of the AEA. Because it does not regulate conventional uranium mining, then Virginia has absolute authority to ban it for any reason, even if it intended to regulate an AEA-covered area. Several justices appeared troubled by this assertion. Justice Kavanaugh pointed out that mining and milling, which is covered by the AEA, often go hand in hand; therefore, regulation of mining is essentially regulation of AEA activity in the real world. Justice Stephen Breyer questioned whether it made sense to allow a state to regulate in one area for the express purpose of regulating in an area reserved for federal regulation — which would drive a huge hole through the preemption analysis.[12] He also pushed back on whether it would be problematic to look at statute's purpose "because I think that's our job as a court in — in a relevant case to determine what the purpose of the statute is. Sometimes it's easy. Sometimes it's hard."[13]

In response, Virginia stepped back from its original position that the statute's purpose does not matter a bit, arguing instead that it should be a facial review of the statute's language. Here, because the "face of the statute cites environmental and natural resource consequences that flow from mining," Virginia's moratorium survives.[14] This brought questions from several justices who wanted Virginia to explain its nonradiation safety rationale in more detail. Justice Alito expressed some skepticism of the threats to agriculture and tourism in Virginia posed by uranium mining in a state with active coal mines.

In further questioning of Virginia, both Justices Sotomayor and Alito both expressed what seems to be the court's current approach. Justice Sotomayor asked: "one could say here, if you prohibit mining, you're affecting milling or disposal. So how — where and how do we draw the line between that regulation that we're permitted to look to purpose for and that which we're not."[15] And Justice Alito stated that: "yeah, but if the — if a state indirectly, surreptitiously regulates the same thing, it would fall within the prohibited field."[16]

Conclusion

The court's questions and comments during argument sheds some light on its approach to this issue. First, it appears that it will reject the Fourth Circuit's reasoning that Virginia's purpose is irrelevant to the question of whether its ban on mining is preempted. If the purpose was to "surreptitiously regulate" the preempted field of radiological safety, enough justices expressed some discomfort with allowing that statute to stand in light of the AEA. The court, however, appears to be wrestling with the question of how to determine if a statute crosses that line. Should it apply § 2120(k)'s purpose test as the source of the preemption, or is that provision inapplicable because the activity being regulated, conventional mining, is not covered by the AEA? If it finds § 2120(k) inapplicable, it could provide the court with a way to distinguish PG&E, Skull Valley and Entergy, and to create a new review test to determine whether a state's regulation of a non-AEA covered activity is improperly intended to impact a preempted AEA activity. If this is the route the court takes, it may adopt the test offered by the solicitor general, the plausible rationale test. During Virginia's argument, Justice Kavanaugh came back to this test twice to clarify that any statute with a "plausible nonradiological safety rationale" would not be preempted.[17]

Finally, if the court does take this route and overturns the Fourth Circuit opinion, it could remand the case back to the district court for further proceedings. Given the procedural posture of an appeal from a motion to dismiss, in which Virginia accepted all of the petitioner's allegations as true and "conceded

them," the record may not provide the court with a clear basis to make a final determination on whether the statute here presents a plausible non-safety rationale. Indeed, several justices questioned the rationale provided by Virginia in its briefs and at argument, and no clear consensus was apparent.

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[1] Supreme Court Docket No. 16-1275.

[2] Byproduct definition

[3] 42 U.S.C. § 2021(k).

[4] Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n., 461 U.S. 190, 203–04 (1983) (finding that state laws were preempted even in the absences of a conflict because "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states.")

[5] https://www.law360.com/articles/893755/virginia-s-uranium-mining-ban-upheld-by-fourth-circuit. The uranium deposit in Virginia is one of the nation's largest.

[6] Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1247–48 (10th Cir. 2004); accord, e.g., Entergy Nuclear Vermont Yankee, LLC v. Shumlin, 733 F.3d 393, 416 (2d Cir. 2013).

[7] Tr. 16:3-8.

[8] Tr. 8:20.

[9] Tr. 9:9-14.

[10] Tr. 19:6-13.

[11] Tr. 24:16-20.

[12] See Tr. at 34-36.

[13] Tr. 41:12-15.

[14] Tr. 42:18-21.

[15] Tr. 52:7-10.

[16] Tr. 58:22-25.

[17] Tr. 60:11-12.