

First Principles and Administrative Agencies

Todd Aagaard

Villanova University Charles Widger School of Law

United States v. Tarkowski

Facts

- John Tarkowski lived on a sixteen-acre parcel of property in Wauconda, Illinois.
- Tarkowski had filled about two acres of his property with tires, scrap metal, car batteries, drums of anti-freeze, refrigerators, lawnmowers, paint cans, and drums labeled to contain pesticides.
- Following complaints from neighbors, EPA requested access to the property to assess for environmental contamination
- Tarkowski refused EPA's request for access.

United States v. Tarkowski

Procedural History

- EPA obtained a warrant for entry and investigation of the property pursuant to CERCLA.
- Subsequent sampling led EPA to conclude that a response action was warranted.
- Tarkowski refused to cooperate.
- EPA sued under CERCLA § 104.
- CERCLA argued that CERCLA § 113(h) precludes courts from stopping EPA to question its choice of response action.

United States v. Tarkowski (7th Cir. 2001)

- “The EPA makes no pretense that the position it advocates serves a public purpose, strikes a reasonable balance between property rights and community rights, rationally advances the agency’s mission, or even comports with the limitations that the Constitution has been interpreted to place on federal regulation of purely local activities, not to mention the limitations that the Fourth Amendment places on searches and seizures.”
- EPA’s position would “nullify judicial control,” “spell[ing] the abolition of the right of judicial review . . . [and] giv[ing] the agency in effect an unlimited power of warrantless search and seizure.”

Lessons from *Tarkowski*

A Tale of Two Perspectives

- EPA had focused on the apparently broad text of CERCLA § 113(h) and EPA's need to address contamination quickly and without interference.
- The Court saw EPA as seeking absolute and unrestrained authority to come onto Tarkowski's property and disrupt his life.

Tension in Administrative Law

- Agencies such as EPA create and implement administrative systems that leverage their experience and expertise to provide consistent and informed decisions that accomplish statutory objectives.
- Specialization and routinization make EPA an effective and knowledgeable expert.
- But specialization and routinization also can lead agencies to miss the application of broader first principles that reflect the core values of our legal system.
- When agencies are perceived as neglecting first principles and core values, they get slammed by courts.

Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (2001)

- Solid Waste Agency sought to locate a solid waste landfill on a 533-acre parcel that included ponds.
- Corps of Engineers Migratory Bird Rule defined “waters of the United States” to include waters used as habitat by migratory birds that cross state lines.
- Supreme Court rejected Rule, holding that intrastate, isolated ponds such as those on the landfill site are not “waters of the United States” subject to Clean Water Act regulation.
- Court relied in part on the concern that the Corps’ interpretation of the Clean Water Act would encroach upon traditional state power.

Rapanos v. United States (2006)

- Real estate developer filled parcels of land that contained wetlands with surface hydrologic connections to nonnavigable tributaries of traditional navigable waters.
- Rapanos argued that the wetlands he filled were not covered by the Clean Water Act.
- Supreme Court plurality held that wetlands are only subject to Clean Water Act regulation if they have a continuous surface connection to a waterbody with a relatively permanent flow.
- Plurality reasoned in part that the Corps' interpretation of the Clean Water Act constituted an "immense expansion of federal regulation of land use."

Sackett v. EPA (2012)

- Sacketts filled residential lot near Priest Lake in Idaho, on which they planned to construct a house.
- EPA argued that its compliance order was not subject to immediate judicial review.
- Supreme Court unanimously held that EPA's compliance order was final agency action subject to judicial review under the Administrative Procedure Act.
- Court cast the agency's position as an attempt "to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review."

Army Corps of Engineers v. Hawkes Co. (2016)

- Three peat mining companies sought to challenge Corps' jurisdictional determination finding that wetlands on their property were “waters of the United States” subject to regulation under the Clean Water Act.
- Corps argued that its jurisdictional determination was not “final agency action” subject to judicial review under the Administrative Procedure Act.
- Supreme Court unanimously held that the jurisdictional determination was final agency action subject to judicial review under the Administrative Procedure Act.
- Court expressed a strong concern for landowners if they were unable to challenge a jurisdictional determination, forcing them to face the risk of criminal or civil penalties or undergo an “arduous, expensive, and long” permitting

Observations on Cases

- EPA and the Corps developed an administrative system that enforced a statute (the Clean Water Act).
- The administrative system effectively accomplished the statutory objectives and led to internally consistent outcomes in which the agencies applied their substantive and procedural standards to adjudicate individual cases.
- On judicial review, the Supreme Court rejected some aspects of the agencies' administrative system based on a perceived inconsistencies with broader first principles.

Broader Observations

- Agency expertise and routinization understandably lead agencies to lose sight of first principles.
- Courts, especially appellate courts, reverse agencies whom courts perceive to have disregarded first principles.
- Courts, as generalists, have a comparative advantage over agencies as to first principles.
- But courts are dangerous, because they lack context.

Options for Agencies

Structures &
Programs

Policy & Enforcement
Discretion

Decision
Documents

Litigation
Briefs

Judicial
Review



- Leave first principles to courts [judicial review]
- Integrate first principles into agency justifications in decision documents and litigation briefs
- Integrate first principles into agency policy and enforcement discretion
- Integrate first principles into agency structures and programs

The Danger of First Principles



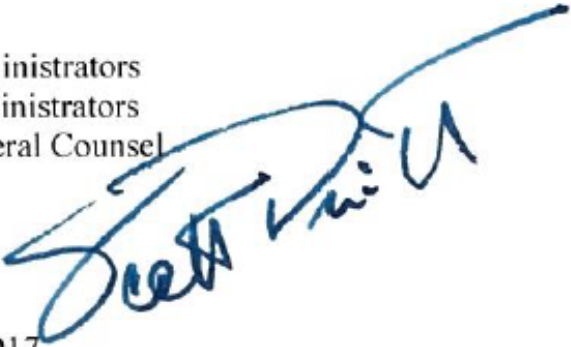
E. SCOTT PRUITT
ADMINISTRATOR

TO: Assistant Administrators
Regional Administrators
Office of General Counsel

FROM: E. Scott Pruitt
Administrator

DATE: October 16, 2017

SUBJECT: Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements

A handwritten signature in blue ink, reading "Scott Pruitt", is written over the "FROM:" field and extends into the "DATE:" field.

In the past, the U.S. Environmental Protection Agency has sought to resolve litigation through consent decrees and settlement agreements that appear to be the result of collusion with outside groups.¹ Behind closed doors, EPA and the outside groups agreed that EPA would take an action with a certain end in mind, relinquishing some of its discretion over the Agency's priorities and duties and handing them over to special interests and the courts.² When negotiating these agreements, EPA excluded intervenors, interested stakeholders, and affected states from those discussions. Some of these agreements even