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Gray B. Taylor

A REVIEW OF THE CONSTITUTIONALITY OF CERCLA IN THE WAKE OF *UNITED STATES V. OLIN CORP.*

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"CERCLA liability has been described as 'a black hole that indiscriminately devours all who come near it.'" One factor contributing to CERCLA's reputation as a virtual leviathan is the seemingly boundless retroactive effect that the statute presents to a party. Although the retroactive effect of CERCLA has been upheld by the vast majority of Courts that have addressed the issue, one recent decision has created a bevy of motion practice throughout the nation.[1]

I. Introduction

Courts have long held that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) applies retroactively to conduct that occurred prior to the Act's 1980 effective date.[2]

Although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have retroactive effect. The language used in the key liability provision[3] refers to actions and conditions in the past tense.[4]

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* U.S.C. School of Law, Candidate for J.D. (1998); Clemson University, M.S. in Forest Resources; University of the South, B.S. in Natural Resources. The author would like to thank Professors Stephen Spitz and Charles Randall for their assistance with this paper. In addition, the author would like to thank his wife, Margaret, for her support through all of his endeavors.

[1] *United States v. Alcan Aluminum Corp.*, Nos. 87-CV-920, 91-CV-1132, 1996 WL 637559, at *2 (N.D.N.Y. Oct. 28, 1996) (citing *Long Beach Unified School Dist. v. Dorothy B. Godwin Cal. Living Trust*, 32 F.3d 1364, 1366 (9th Cir. 1994) (quoting Jerry L. Anderson, *The Hazardous Waste Land*, VA. ENVTL. L.J. 1, 6-7 (1993))).

[2] *See, e.g., United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986) (NEPACCO); *United States v. Shell Oil Co.*, 605 F. Supp. 1064 (D. Colo. 1985); *State ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio 1983).

[3] Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) § 107, 42 U.S.C.A. § 9607 (1995).

[4] For example, section 107(a)(2) mentions "any person who at the time of disposal of any hazardous substances owned or operated . . . ." CERCLA § 107(a)(2), 42 U.S.C.A. § 9607(a)(2). Subsequent sections cover "any person who . . . arranged with a transporter for a transport for disposal," and "any person who . . . accepted

Most importantly, the statutory scheme itself is overwhelmingly remedial and retroactive. CERCLA authorizes the EPA to force responsible parties to clean up inactive or abandoned hazardous substance sites,[5] and authorizes federal, state and local governments and private parties to clean up such sites and then seek recovery of their response costs from responsible parties.[6] In order to be effective, CERCLA must reach past conduct. CERCLA's legislative history confirms its backward-looking focus.[7] Congress intended for CERCLA "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."[8] However, in many situations—such as the one presented in *Olin I*—courts are asked to apply CERCLA to actions which took place prior to the Act's enactment and were entirely legal at the time.

II. *United States v. Olin I*

In 1984, the United States brought action against chemical manufacturer Olin-Mathieson under CERCLA, seeking to recover cleanup costs for a manufacturing facility in McIntosh, Alabama. On motion to enter consent decree, Senior District Judge William Brevard Hand held that (1) CERCLA liability provisions were not retroactive, and (2) application of CERCLA to the facts of the case exceeded Congress' Commerce Clause authority.[9]

The United States Department of Justice (Justice Department), bringing suit on behalf of the Environmental Protection Agency (EPA), alleged that the Olin plant contained two actionable sites. Site 1, consisting of twenty acres on which an active chemical production facility operated, was the focus of the action. The government alleged that from 1952 to 1974, Olin-Mathieson (predecessor to Olin) operated a mercury-cell chloralkali plant, which generated and released wastewater containing mercury. In 1955, on Site 1, Olin Mathieson built a "crop-protection-chemicals" plant, which discharged wastewater into Site 2. Both operations ceased in 1982. The

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any hazardous substances for transport to . . . sites selected by such person." CERCLA § 107(a)(3), 42 U.S.C.A. § 9607(a)(3); CERCLA § 107(a)(4), 42 U.S.C.A. § 9607(a)(4).

[5] CERCLA § 106, 42 U.S.C.A. § 9606.

[6] CERCLA §§ 104, 107, 42 U.S.C.A. §§ 9604, 9607.

[7] *See generally*, H.R. Rep. No. 1016, *reprinted in* 1980 U.S.C.C.A.N. 6119 (CERCLA House Report).

[8] *Id.* at 22, 1980 U.S.C.C.A.N. at 6125.

[9] 927 F. Supp. 1502 (S.D. Ala. 1996) (hereinafter *Olin I*). The United States Court of Appeals for the Eleventh Circuit has since overturned *Olin I*. *See United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997) (hereinafter *Olin II*).

government alleged that as a result of the operations of these two plants from the early 1950s until the late 1982, Olin released mercury and chloroform, which are categorized as hazardous substances under 42 U.S.C. § 9601(14), into Site 1.[10]

Thus, most of the alleged contamination resulting from the operation of these two plants occurred prior to December 11, 1980, CERCLA's effective date. However, because both of these plants also operated after CERCLA's enactment, and due to the threat of continued releases at Site 1, the government also sought to recover CERCLA cleanup costs from Olin for post-enactment conduct.[11]

Olin Corporation conducted a "remedial investigation" of Site 1, followed by a "feasibility study" of proposed responses to the contamination at Site 1. Based on these studies, in December 1994, the EPA executed its "record of decision" and entered a proposed consent decree.

A. The Proposed Consent Decree and Remedial-Investigation Report

The government's proposed consent decree, which both parties had signed, made the Olin Corporation, its officers, directors, and anyone else associated with Olin, liable for everything even remotely associated with the clean-up of Site 1, including insuring the automobiles the government would use in fulfilling and supervising the consent decree.[12] The EPA estimated the cost of compliance to Olin at $10,339,000, but retained an almost unconstrained right to amend the consent decree. Of course, Olin could appeal, but the appeal would first go to the EPA.[13]

Through its remedial actions and signing of the consent decree, Olin had clearly committed itself to performing the actions required by the consent decree.[14] However, Olin sought to do so under the supervision of the Alabama Department of Environmental Management (ADEM) rather than under the EPA. ADEM requested that

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[10] *Olin I*, 927 F. Supp. at 1504.

[11] *Id.*

[12] *Id.* at 1505.

[13] *Id.* Judge Hand summarized this situation, stating that "[t]he propriety of such procedures is beyond the scope of this inquiry, yet defense counsel has acknowledged that the consent decree gives the EPA *carte blanche* over the company treasury." *Olin I*, 927 F. Supp. at 1505 (emphasis in original).

[14] "This is not an action in which anyone is trying to avoid a responsibility to the environment; Olin has agreed to perform the proposed remedial actions called for in the consent decree. The fact that Olin, despite its reservations about the fairness and even legality of the proposed consent decree, originally went along with the EPA is a vivid testament to the powerlessness felt by this citizen when forced to comply with various directives ordered by our administrative state." *Olin I*, 927 F. Supp. at 1506 n.17.

the EPA allow it to implement the record of decision under the Resource Conservation and Recovery Act,[15] and the Alabama Hazardous Waste Management and Minimization Act,[16] rather than CERCLA. EPA denied this request, and issued the record of decision.[17]

When the court inquired at oral argument why Olin had negotiated a settlement and entered into the consent decree, Olin's counsel responded that it was "a pragmatic business judgement,"[18] and that "the fastest and most expedient way to get the work performed would be to simply go along with what the EPA sought here."[19]

B. Review of the Consent Decree

The *Olin I* court had a duty to review the consent decree not only to determine if its factual and legal determinations were reasonable, but also to ensure that the decree did not violate the Constitution, federal statutes, or controlling jurisprudence. The court made two requests for briefs, the first of which directed the parties to argue whether CERCLA, as applied in the case, was consistent with the Supreme Court's view of the Commerce Clause as recently explained in *United States v. Lopez*.[20] At this point, Olin also raised the issue of CERCLA's retroactivity.[21] Thus, the *Olin I* decision serves as a vehicle to examine the constitutionality of (1) CERCLA's retroactive provisions in light of *Landgraf v. USI Film Products*[22], and (2) CERCLA's Commerce Clause implications in light of *Lopez*.

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[15] 42 U.S.C.A. § 6901.

[16] ALA. CODE §§ 22-30-1 to 22-30-24 (1975).

[17] *Olin I*, 927 F. Supp. at 1505.

[18] *Id.*

[19] *Id.*

[20] 514 U.S. 549 (1995).

[21] Olin cited and summarized an article by George Clemon Freeman, Jr., entitled, *A Public Policy Essay: Superfund Retroactivity Revisited*, 50 A.B.A. BUS. LAW. 663 (1995) (hereinafter Freeman). The author argues that neither the text nor legislative history demonstrate that Congress intended CERCLA to be retroactive, contending that "[i]f the question were before a federal court today in a case of first impression, Superfund's liability provision, section 107(a), could not meet the test of statutory construction set forth in Justice Stevens' majority opinion in *Landgraf*. Neither the text of the statute not its legislative history could sustain retroactive application. Nor could section 107(a) meet the more restrictive test of Justice Scalia's concurrence, which looked only at the text of the statute." Freeman at 664-665 (footnotes omitted).

[22] *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

III. CERCLA and Retroactivity

Although CERCLA's retroactivity had been the subject of holdings in other circuits, the Eleventh Circuit had never squarely addressed the issue. Of the many federal decisions directly addressing the issue of CERCLA's retroactivity,[23] no court had ever declined to apply CERCLA on retroactivity grounds. The *Olin I* court notes though, that "all of those cases were decided before the Supreme Court's decision in *Landgraf v. USI Film Prods.*, on which the defendant rests its argument against retroactivity."[24] The Justice Department responded to the court's stance in an understandably cavalier manner, contending that the issue of CERCLA's retroactivity was "well settled" and unaffected by *Landgraf*:

> Every court to face CERCLA retroactivity challenges has rejected the arguments advanced here. Indeed, courts have uniformly held that (1) Congress clearly and unequivocally intended retroactive application of CERCLA and; (2) such a liability scheme is rationally related to a legitimate governmental interest. The Supreme Court's decision in *Landgraf v. USI Film Prods.*, announces no new constitutional rules, and in no way impacts this case law (citations omitted).[25]

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[23] *See United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986); *HRW Systems v. Washington Gas*, 823 F. Supp. 318 (D. Md. 1993); *City of Philadelphia v. Stepan Chem.*, 748 F. Supp. 283 (E.D. Pa. 1990); *Kelley v. Solvent Co.*, 714 F. Supp. 1439 (W.D. Mich. 1989); *O'Neil v. Picillo*, 682 F. Supp. 706 (D.R.I. 1988); *United States v. Hooker Chems. & Plastics*, 680 F. Supp. 546 (W.D.N.Y. 1988); *United States v. Dickerson*, 640 F. Supp. 448 (D. Md. 1986); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985); *Town of Boonton v. Drew Chem.*, 621 F. Supp. 663 (D.N.J. 1985); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162 (W.D. Mo. 1985); *United States v. Shell Oil*, 605 F. Supp. 1064 (D. Colo. 1985); *Jones v. Inmont*, 584 F. Supp. 1425 (S.D. Ohio 1984); *United States v. South Carolina Recycling Disposal Co.*, 653 F. Supp. 984 (D.S.C. 1984); *United States v. Price*, 577 F. Supp. 1103 (D.N.J. 1983); *Ohio v. Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio. 1983); *United States v. Wade*, 546 F. Supp. 785 (E.D. Pa. 1982); *Cf. Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991); *In the Matter of Penn Central*, 944 F.2d 164 (3rd. Cir. 1991); *O'Neil v. Picillo*, 883 F.2d 176 (1st. Cir. 1989); *United States v. Kramer*, 757 F. Supp. 397 (D.N.J. 1991).

[24] *Olin I*, 927 F. Supp. at 1508.

[25] *Id.*

As briefly mentioned above, much of the controversy surrounding CERCLA's liability scheme centers on the application of its liability provision, section 107(a), to the conduct of "potentially responsible parties" (PRPs) prior to its 1980 effective date. The presumed retroactive effect of the Act stems from several sources.

First, although CERCLA does not explicitly state whether the "costs of removal or remedial action"[26] or for "any other necessary"[27] response costs, are retroactive, it does explicitly provide that liability for natural resources damages[28] is prospective. Because CERCLA affirmatively limits retroactive liability of this particular category of damages, a number of courts have surmised that Congress did not intend to limit the Act's other forms of liability to prospective application.[29]

Second, it has been argued, and some courts have held, that the past tense language of CERCLA's liability provision is consistent with retroactive liability.[30] Section 107 itself refers to "any person who at the time of disposal of any hazardous substance owned or operated" a facility, or "who . . . arranged with a transporter for transport for disposal," or "who accepted any hazardous substances for transport . . . ."[31]

Additionally, many courts have observed that CERCLA seems to have been a response to the perceived deficiencies and inadequacies of then-existing environmental protection statutes.[32] Prior to CERCLA's passage, the Resource Conservation and Recovery Act (RCRA) was thought to be prospective, addressing only future, post-enactment handling of hazardous wastes. Thus, the underlying purpose for CERCLA may have been to fill a regulatory gap that could be addressed only through retroactive liability.[33]

Numerous federal courts developed these arguments and addressed the issue of CERCLA's retroactivity prior to the Supreme Court's decision in *Landgraf*.[34] Those pre-*Landgraf* cases typify the few early decisions that attempted to address specifically the longstanding common law presumption against retroactivity, such as *United States v. Northeastern Pharm. & Chem. Co.* (NEPACCO),[35] *United States v. Shell*

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[26] 42 U.S.C.A. § 9607(a)(4)(A).

[27] *Id.* at § 9607(a)(4)(B).

[28] *Id.* at § 9607(a)(4)(C); 42 U.S.C.A. § 9607(f).

[29] *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1076 at n.2 (D. Colo. 1985).

[30] John R. Jacus and Jan G. Laitos, *May CERCLA Apply Retroactively?*, 25 COLO. LAW. 103 (1996).

[31] 42 U.S.C.A. §§ 9607(a)(2)-(4).

[32] Jacus and Laitos, *supra* note 29, at 104.

[33] *Id.*

[34] *See* cases cited *supra* note 22.

[35] 810 F.2d 726 (8th Cir. 1986).

Oil,[36] and *State ex rel. Brown v. Georgeoff*.[37] In these early instances, because the language of the Act contains no express provision for its retroactive application the courts tended to base their reasoning on CERCLA's general purpose, statutory scheme, and structure.[38]

A. *Landgraf* and the Presumption of Prospectivity

Simply stated, *Landgraf* stands for the proposition that a court will presume prospective application of a statute. A party may rebut such a presumption only when the legislature "makes its intention clear" that a statute operates retroactively.[39] This rule raises the question of when a statute will satisfy a court that the legislature clearly intended to apply a new statute retroactively, especially in the absence of express statutory language. *Landgraf* provides some guidance here, speaking in terms of "strong and imperative language requiring retroactive application."[40] Even so, *Landgraf* ultimately considers certain aspects of the statute's legislative history before the court in that case.[41] Reliance on such evidence is problematic when evaluating CERCLA, since CERCLA's legislative history lacks a conference report or hearing transcript on the final bill and contains statements that might be read as supporting both prospective and retroactive liability.[42]

Landgraf's presumption of prospectivity does not apply where a statute draws on antecedent facts for its operation or upsets expectations based in prior law.[43] Thus, *Landgraf* applies only when a statute has a truly retroactive effect; that is, when it "attaches new consequences to events completed before its enactment,"[44] and "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions . . . already past."[45]

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[36] 605 F. Supp. 1064 (D. Colo. 1985).

[37] 562 F. Supp. 1300 (N.D. Ohio 1983).

[38] Jacus and Laitos, *supra* note 29, at 104.

[39] *Landgraf*, 511 U.S. at 268.

[40] *Id.* at 270.

[41] *Id.* at 285 ("There is reason to believe that the omission of the 1990 version's express retroactivity provision was a factor in passage of the 1991 bill").

[42] *See* Jacus and Laitos, *supra* note 29.

[43] *Landgraf*, 511 U.S. 244, 270; *Lieberman-Sack v. HCHP-NE*, 882 F. Supp. 249, 255 (D.R.I. 1995).

[44] *Landgraf*, 511 U.S. 244, 269.

[45] *Id.*

B. *Landgraf* Applied to CERCLA

Prior to *Olin I*, no federal court had applied *Landgraf* to CERCLA. Ironically, just two days after the court announced *Olin I*, and without knowledge of Judge Hand's lengthy opinion, the United States District Court for the District of Nevada held in *State ex rel. Dept. of Transportation v. United States* (NDOT)[46] that section 107(a) of CERCLA could still be applied retroactively, although on somewhat narrower grounds than articulated in pre-*Landgraf* decisions. *Olin I* holds that (1) all pre-*Landgraf* cases that hold CERCLA to be retroactive are inconsistent with the requirements of *Landgraf* concerning the proper presumption of prospectivity, and (2) independent evaluation of CERCLA's text and legislative history reveals no clear statement of intent to impose retroactive liability. Specifically, *Olin I* rejects *NEPACCO*, *Shell Oil* and *Georgeoff* as having applied the wrong presumption[47] and narrowly interprets what constitutes CERCLA's legislative history.

C. Congressional Intent

Olin I begins its attack on CERCLA's retroactivity by noting that not all the courts that have applied CERCLA to pre-enactment conduct have agreed that it is retroactive,[48] and that those which have actually analyzed the retroactivity issue differed on whether Congress acted "clearly and unequivocally." CERCLA contains no language explicitly stating it is retroactive. *Olin I* notes that, under the language in some Supreme Court opinions, this failure alone would be fatal for retroactivity. However, *Olin I* concedes that while *Landgraf* demonstrates a preference for express language regarding retroactivity, it acknowledges that a court should consider other (i.e., non-express) statutory language and legislative history in determining congressional intent.

In resolving the retroactivity issue, *Landgraf* instructs that the answer may vary among provisions within an act.[49] Thus, *Olin I* focused its review on sections 106(a) [50]and 107(a)[51] of CERCLA.

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[46] 925 F. Supp. 691 (D. Nev. 1996).

[47] *Olin I*, 927 F. Supp. 1502, 1516 at n.4.

[48] *See United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984), *aff'd in part and vac. in part sub nom., United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988). *South Carolina Recycling* concluded that the act was not "retroactive," but applied CERCLA on the theory that the previous disposal continued to cause or threatened to cause releases after the Act's effective date.

[49] 511 U.S. at 259 and 281.

[50] Section 106(a) of CERCLA provides in pertinent part: "In addition to any

In the first claim of the complaint, the EPA seeks injunctive relief under section 106(a). Because this relief would require the Olin Corporation to spend funds related to actions taken prior to CERCLA's enactment, the *Olin I* court deemed such relief retroactive.[52] Thus, to the extent that the government's claims under 106(a) and 107(a) related to actions taken prior to CERCLA's effective date, *Olin I* finds that they involved the issue of retroactivity.

D. Legislative History

CERCLA itself has almost no legislative history:

> Although Congress had worked on "Superfund" cleanup of toxic and hazardous waste bills, and on parallel oil spill bills for over three years, the actual bill which became Public Law No. 96-510 had virtually no legislative history at all, because the bill which became law was hurriedly put together by a bipartisan leadership group of Senators—with some assistance of their House counterparts—introduced and passed by the Senate in lieu of all pending measures on the subject. It was then placed before the House, in the form of a Senate amendment of the earlier House bill. It was considered on December 3, 1980, in the closing days of the lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments. Faced with a compli-

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other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require." CERCLA § 106(a), 42 U.S.C.A. § 9606(a).

[51] Section 107(a) of CERCLA provides, in part:

(1) the owner and operator of a vessel or a facility; [and]

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for (A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan . . . . CERCLA § 107(a), 42 U.S.C.A. § 9607(a).

[52] *Olin I*, 927 F. Supp. at 1516.

> cated bill on a take-it-or-leave-it basis, the House took it, groaning all the way.[53]

This unusual lack of legislative history is attributable to "[t]he delicate nature of the compromise" which led to the Act's passage.[54] Much of what passes for CERCLA's legislative history comes from "bills introduced which contributed to some extent to the final act."[55]

In *Landgraf*, the Supreme Court considered a prior bill in its review of the legislative history, and placed some weight on the fact that a bill vetoed in the previous year had explicitly provided for retroactivity.[56] The fact that the later legislation had no such retroactivity provision prompted the Court to infer that "it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement not to include the kind of explicit retroactivity command found in the 1990 bill."[57]

The most that can be said from the legislative history of CERCLA is that Congress left many questions, including retroactivity, open. The circumstances surrounding CERCLA's passage strongly suggest that the failure to define expressly the reach of the statute was deliberate on Congress' part:

> It would have been a simple matter for Congress to have included a provision within the Act providing that liability would be imposed retroactively. Given the undoubted Congressional awareness of an existing problem, this omission takes on special importance. There can be no question that Congress was aware that the issue of retroactivity could arise. Yet, Congress failed to make this statement.[58]

Accordingly, *Olin I* concludes that:

> [w]hatever the reasons, the legislative history lacks the clear congressional intent to make CERCLA liability retroactive. Given that the language—express or otherwise—and the legislative histo-

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[53] FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.02[2][a], at 4A-51(1994). (footnote omitted).

[54] SENATE COMM. ON ENV'T AND PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND).

[55] GRAD, *supra* note 54, at 4A-51.

[56] *Landgraf*, 511 U.S. at 285.

[57] *Id.* at 261.

[58] *Georgeoff*, 562 F. Supp. at 1309.

> ry—broadly and narrowly understood—fail to demonstrate a clear congressional intent for retroactivity, *Landgraf* requires that the presumption against retroactivity be applied if the statute is one to which that presumption applies.[59]

Landgraf does not simply ask, "Is the statute retroactive?" Framing the question that way, as a number of lower federal courts have, reduces the analysis to a matter of labeling rather than distinguishing between the statute's effect and Congressional intent.[60] Under CERCLA's liability provisions, a "release or threatened release"[61] of hazardous wastes is required to trigger liability. In *Olin I,* the Justice Department argued that there was a continuing release of hazardous waste, triggering liability at any time before the wastes' removal. Imposition of liability, therefore, would not be retroactive because the Justice Department based at least some of the facts giving rise to the liability on events taking place after CERCLA's enactment.

Olin I concludes that, under the *Landgraf* analysis, CERCLA liability certainly has "retroactive effect" because it easily falls within the explanatory language of that term.[62] The EPA's attempt to impose liability under section 107(a) largely on actions occurring prior to the statute's effective date "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[63] Furthermore, the *Olin I* decision applies what *Landgraf* said about compensatory damages to financial liabilities under CERCLA for pre-enactment conduct: "The new damages remedy in § 102, we conclude, is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent."[64]

In the third step of the analysis, *Landgraf* asks "whether, given the absence of guiding instruction from Congress, the [particular section of the act] is the type of provision that should govern cases arising before its enactment."[65] The Court does not ask generally whether the act is retroactive, but focuses on the particular section. The opinion then distinguishes between a procedural provision of that section (right

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[59] *Olin I,* 927 F. Supp. at 1516.

[60] *Landgraf,* 511 U.S. at 269. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

[61] 42 U.S.C.A. § 9607(a).

[62] *Olin I,* 927 F. Supp. at 1516.

[63] *Landgraf,* 511 U.S. at 280.

[64] *Id.* at 282.

[65] *Id.*

to jury trial) which would "presumably apply to cases . . . regardless of when the underlying conduct occurred,"[66] and its punitive and compensatory damages provisions. Recognizing that "[r]etrospective imposition of punitive damages would raise a serious constitutional question,"[67] the Court avoids that constitutional question by interpreting the punitive damages provision as prospective.[68] The provision "authorizing recovery of compensatory damages is not easily classified,"[69] because the conduct itself was already unlawful. Only the remedy was new. Despite these differences, *Landgraf* applies the presumption against retroactivity even to the compensatory damages provision.

Olin I holds that section 107(a) falls somewhere between the punitive damage and the compensatory damage provisions considered in *Landgraf.* In *Olin I,* punitive damages were not sought. Nevertheless, section 106 provided for fines for failure to comply with an executive branch abatement order, and the *Olin I* court concluded that such fines were clearly punitive. Because section 107(c)(3) also authorizes punitive, treble damages, *Olin I* held that CERCLA retroactivity posed very nearly the same "ex post facto" danger referred to in *Landgraf.*[70]

Regardless of the threat of punitive damages, retroactive CERCLA liability is more egregious than the compensatory relief, which the Court refused to apply retroactively in *Landgraf.* In *Olin I* and many other cases, liability under CERCLA requires compensation for actions that violated no federal or state law. At least as to the compensatory damages remedy sought in *Landgraf,* one could say that retroactivity involved no new legal standard.[71] Nevertheless, even on the compensatory damages issue *Landgraf* finds that "it is the kind of provision that does not apply in the absence of clear congressional intent."[72] Certainly, under *Landgraf* principles, CERCLA liability is the kind that does not apply retroactivity without clear congressional intent.

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[66] In *Landgraf,* the right to a jury trial does not apply retroactively, despite the fact that it is a procedural provision, because this right is attached to the punitive and compensatory damages provisions, to which the presumption against retroactivity applies. *See* 511 U.S. at 280.

[67] *Landgraf,* 511 U.S. at 281.

[68] *Id.* "Before we entertained that [constitutional] question, we would have to be confronted with a statute that explicitly authorized punitive damages for pre-enactment conduct. The Civil Rights Act of 1991 contains no such explicit command."

[69] *Id.*

[70] *Id.* According to *Landgraf,* a provision for punitive damages should not be construed as retroactive unless the language forces that conclusion because the court must then confront substantial constitutional questions which follow.

[71] *Id.*

[72] *Id.*

As above, *Olin I* characterizes all pre-*Landgraf* cases addressing CERCLA retroactivity as unreliable. *Landgraf* insists that in no case "in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment."[73] Liability under CERCLA certainly must be in accord with this principle. The fact that "retroactive application of [this] statute would vindicate its purpose more fully,"[74] as in *Landgraf*, "is not sufficient to rebut the presumption against retroactivity."[75]

Without a doubt, under CERCLA, Congress is addressing an existing situation as well as future problems. In this respect, CERCLA certainly has a "backward focus." It does not follow, however, that the liability provision "must be understood to operate retroactively because a contrary reading would render it ineffective."[76] Thus, finding that nothing presented in the Justice Department brief or pre-*Landgraf* cases concerning the statutory language of CERCLA or its legislative history demonstrates that section 107(a) is "the sort of provision that must be understood to operate retroactively because a contrary reading would render it ineffective,"[77] the *Olin I* court held that sections 107(a) and 106(a) were not retroactive.

IV. The Commerce Clause

The court's ruling on retroactivity disposed of most of the Olin Corporation's alleged liability. However, because some of the alleged contamination occurred after December 1980 (CERCLA's effective date), Judge Hand then addressed the constitutional issue of whether the enactment of CERCLA—or, at least, its application to the *Olin I* case—was a proper exercise of congressional power under the Commerce Clause.

Judge Hand embarks on a lengthy discourse on the history of the Commerce Clause, concluding with an analysis of the Supreme Court's 1995 decision in *United States v. Lopez*.[78] In *Lopez*, Chief Justice Rehnquist found that the Gun-Free School Zones Act of 1990, which made knowing possession of a firearm within a school zone a federal criminal offense, "neither regulates a commercial activity nor contains a requirement that the possession [of a firearm in a school zone] be connected in any way to interstate commerce."[79] *Lopez* held that the enactment of the Gun-Free

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[73] *Id.* at 283.
[74] *Id.*
[75] *Id.* at 285.
[76] *Id.*
[77] *Id.* at 285.
[78] 514 U.S. 549 (1995).
[79] *Id.* at 550.

School Zones Act exceeded Congress's authority to regulate commerce among the several states, because the statute has nothing to do with commerce or any sort of economic enterprise and was not a critical part of a larger regulatory framework governing economic activity.[80]

The *Lopez* majority focused on the Constitution's limits on federal power. They emphasized that the Constitution does not grant Congress "a plenary police power that would authorize enactment of every type of legislation."[81] While a few of its cases had "taken long steps" towards granting such "a general police power of the sort retained by the states," the Court declined to follow some of the very broad language which seemed to allow Congress to do virtually anything under the Commerce Clause.[82]

Any application of *Lopez* must begin with its reassertion that the Constitution's enumeration of powers limits federal power, that such enumeration "[does] not presuppose something not enumerated."[83] Accordingly, *Olin I* applied the principle of enumerated powers discussed in *Lopez* to the question of CERCLA's constitutionality. In so doing, *Olin I* held that, when measured against the "ultimate touchstone of constitutionality,"[84] CERCLA's application exceeds the power given Congress under the Commerce Clause.

In *Olin I*, the Justice Department narrowly views *Lopez* as applying only to the facts of the Gun-Free School Zones Act. Only wishful thinking, however, can lead to the conclusion that the holding of *Lopez* is applicable only to schools or guns-in-schools cases. *Lopez* could have chosen a narrower approach, by limiting its holding to federal criminal statutes under the Commerce Clause that involve no "substantial effect" on interstate commerce.

Rather, *Lopez* categorizes the Commerce Clause cases as being divided into three parts:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities . . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relationship to interstate commerce.[85]

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[80] *Id.* at 566.

[81] *Id.*

[82] *Id.* at 567.

[83] *Id.* (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)).

[84] 927 F. Supp. 1502 (citing *Graves v. O'Keefe*, 306 U.S. 466, 491-92 (1939)).

[85] *Lopez*, 514 U.S. at 558-59 (citations omitted).

Like *Lopez*, the facts of the *Olin I* case involve only the third of these categories.

In discussing the third category, *Lopez* refers not simply to regulating activities that have a substantial effect on interstate commerce but to "regulating economic activity" that has a substantial effect on interstate commerce:

> Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.[86]

Thus, *Lopez* requires that the object of the regulation, which "substantially affects" interstate commerce, must itself be "economic activity." *Lopez* requires that there be a genuine causal connection between the regulated activity and interstate commerce. In other words, the assumption that the regulation of any activity which has a substantial effect on interstate commerce is automatically "necessary and proper" is not appropriate under *Lopez*. Thus, the *Lopez* majority criticizes the dissent for their willingness to gloss over the tenuous connection between gun possession at a school and interstate commerce. As Chief Justice Rehnquist notes, "[D]epending on the level of generality, any activity can be looked upon as commercial."[87]

A. Application of *Lopez* to CERCLA

In *Olin I*, Judge Hand follows the two-part test for determining whether a statute is constitutional under the Commerce Clause. First, the statute must regulate economic activity that "substantially affects" interstate commerce. Second, the statute must include a "jurisdictional element which would ensure, through case-by-case inquiry, that the [statute] in question affects interstate commerce."[88] Immediately, Judge Hand finds it doubtful that the object of regulation is "economic activity," as the term is used in *Lopez*. He notes that at one point the defendant operated two plants, which are the focus of this litigation, and that these plants were surely engaged in "economic activity." These two plants, however, were no longer in operation and have not been since 1982, long before the present litigation.

Arguably, *Olin I* might have been a very different case if the government were

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[86] *Lopez*, 514 U.S. at 549.

[87] *Id.* at 565.

[88] 927 F. Supp. at 1532.

attempting to regulate a functioning facility. While environmental degradation generally may have an effect on interstate commerce, *Olin I* failed to conclude that the degradation at issue was "economic activity" or that it had a "substantial effect" on interstate commerce. Given that *Lopez* does not limit its holding to criminal cases, the government must demonstrate that its use of CERCLA is limited to the regulation of economic activity, which "substantially affects" interstate commerce. *Olin I* thus determines that CERCLA generally represents an example of the kind of national police power rejected by *Lopez*. However, Judge Hand finds that he need not "reach such a conclusion, because—at least in this case—the application of CERCLA fails to meet the second criteria of *Lopez*."[89] Accordingly, *Olin I* holds that EPA's attempt to apply CERCLA liability against the defendant would exceed Congressional power.

V. Reaction to *Olin I*

Not surprisingly, *Olin I* quickly became a strong defense for many defendants involved in CERCLA litigation. Less than two months later, in July 1996, several of the defendants in *Gould, Inc. v. A & M Battery & Tire Service*[90] cited *Olin I* for the proposition that courts could not apply CERCLA retroactively to actions prior to its enactment. In one brief sentence, the district court in *Gould* held that the court was "unpersuaded by a single Alabama District Court case which is surrounded by a myriad of opinions that apply CERCLA retroactively, either directly or implicitly."[91]

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[89] *Olin I*, 927 F. Supp. at 1533. "Even if the application of CERCLA to the facts of this case does generally meet the first test of regulating intrastate economic activity which substantially affects interstate commerce, it must also be shown that the statute has a 'jurisdictional element which would ensure, through case-by-case inquiry, that the [statute] in question affects interstate commerce.' Nothing in the statute provides for such a case-by-case inquiry. Nevertheless, assuming it had such a provision, the particular inquiry in this case clearly demonstrates that the activity in question has virtually no effect on interstate commerce. As demonstrated in the remedial investigative report, any contaminants still at Site 1 affect groundwater mostly by migrating through the locally-contained alluvial aquifer. This aquifer lies atop a miocene aquifer. The remedial-investigation report indicates there is little or no migration between the two aquifers, and there is no evidence that contaminants at Site 1 travel across state lines." *Id.*

[90] *Gould, Inc. v. A & M Battery & Tire Serv.*, 933 F. Supp. 431 (M.D. Pa. 1996).

[91] *Id.* at 438.

A. *United States v. NL Industries, Inc.*

The *Olin I* decision was cited and thoroughly analyzed in *United States v. NL Industries, Inc.*[92] Therein, the defendants cited *Olin I* for the proposition that CERCLA is not a proper exercise of Congress' power to regulate activities that substantially affect interstate commerce. The *NL Industries* court gave a thorough analysis of the *Olin I* holding, concluding that "*Olin* misconstrues *Lopez*."[93] Principally, *NL Industries* finds that, contrary to the conclusion reached in *Olin I*, *Lopez* does not require that a statute contain a jurisdictional element ensuring, through case-by-case inquiry, that the statute in question affects interstate commerce. The court here points to the Seventh Circuit as reaching the same conclusion.[94] Furthermore, the court criticizes *Olin*'s reliance on the argument that CERCLA is a usurpation of the states' police power to control real property.[95] Lastly, *NL Industries* takes objection to *Olin I's* conclusion that the regulated activity was not "economic activity" and that the environmental degradation in that case did not have a substantial effect on interstate commerce, describing the court's conclusion as "misplaced."[96]

NL Industries substantive analysis of the effect of environmental degradation on interstate commerce focuses on the *Lopez* decision,[97] and several of the cases cited therein. Specifically, the court points to *Hodel*, which held that regulation of surface coal mining was a permissible exercise of Congress' commerce power. In applying this principle to hazardous waste, *NL Industries* finds that "because of the transitory nature of hazardous waste and the wide-ranging effects of its improper disposal, CERCLA's regulatory scheme would be undercut if intrastate disposal of hazardous waste was not regulated."[98]

However, the court is somewhat honest in noting that unlike the Surface Mining Act at issue in *Hodel*, "CERCLA's legislative history . . . does not contain any specific findings regarding the effect of improper disposal of hazardous waste on interstate commerce."[99] Yet, in a final analysis, which this author feels is the appropriate response to *Lopez*, the *NL Industries* concludes that the comprehensive nature of CERCLA's statutory scheme supports the conclusion that CERCLA was intended to

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[92] *United States v. NL Industries, Inc.*, 936 F. Supp 545 (S.D. Ill. 1996).

[93] *Id.* at 560.

[94] *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995).

[95] 936 F. Supp. at 545.

[96] *Id.* at 561.

[97] *Id.* It should be noted that although *Olin I* also obviously spent a great deal of time analyzing *Lopez*, the specific language quoted in *NL Industries* was not quoted in the *Olin I* decision.

[98] *Id.*

[99] *Id.* (citing H.R. Rep. No. 96-1016(I), *reprinted in* 1980 U.S.C.C.A.N. 6119).

regulate an activity, which taken in the aggregate, clearly affects interstate commerce. The Gun-Free School Zones Act at issue in *Lopez* was "not part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[100] CERCLA, in contrast, established a comprehensive mechanism for responding to releases of hazardous waste and for assessing liability against those responsible for the pollution. The aggregate effects of the improper disposal of hazardous waste are significant and widespread.

A second, and more obvious differentiation of *Lopez* from the field of toxic waste disposal is that *Lopez* was 'a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[101] After noting this, *NL Industries* goes on to state that "CERCLA is a civil statute and, as shown by the Congressional records discussed above, the improper disposal of hazardous waste is economic activity."[102]

> The activities regulated by CERCLA have a much more direct impact on the economy than the somewhat speculative effect of Rosco Filburn's harvest of twelve too many acres of wheat had on the grain markets in *Wickard.* Pollution of surface water and groundwater affects the fishing industry, agriculture, live-stock production, recreation, and domestic and industrial water supplies. . . . In sum, CERCLA regulates economic activities which have a substantial affect on interstate commerce.[103]

The *Olin I* decision was most recently cited in *United States v. Alcan Aluminum Corporation,*[104] wherein defendant Alcan raised *Olin I* in a motion to dismiss the claims because (1) CERCLA could not be retroactively applied, and (2) CERCLA, as applied to the case, exceeded congressional authority under the Commerce Clause.[105] Defendant Alcan argued that the court lacked subject-matter jurisdiction, because the alleged dumping for which the government sought to impose liability occurred prior to CERCLA's enactment in 1980.

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[100] *Id.* (quoting *Lopez,* 514 U.S. at 561).

[101] *Lopez,* 514 U.S. at 561.

[102] *NL Industries,* 936 F. Supp. at 562.

[103] *Id.* at 563.

[104] *United States v. Alcan Aluminum Corp.,* Nos. 87-CV-920, 91-CV-1132, 1996 WL 637559 (N.D.N.Y. Oct. 28, 1996).

[105] *Id.* at *1.

VI. *United States v. Olin II*

After *Olin I*, the government immediately appealed the decision of the district court, which the United States Court of Appeals for the Eleventh Circuit recently overturned on March 25, 1997. Thus, the bevy of motion practice which followed *Olin I* must come to an end. *Olin II* quietly returns the Eleventh Circuit to the status quo.

A. No Commerce Clause Violation

Olin II flatly rejects the district court's conclusion that *Lopez* altered the constitutional standard for federal statutes regulating intrastate activities.[106] *Olin II* concludes that "although Congress did not include in CERCLA either legislative findings or a jurisdictional element, the statute remains valid as applied in this case because it regulates a class of activities that substantially affects interstate commerce."[107] From there, the court goes on to conclude that onsite waste disposal substantially affects interstate commerce.

The first step of *Olin II*'s analysis is to categorize the activity at issue. Although the government argued that the issue was "releases of hazardous substances generally,"[108] the court found this an overly broad categorization, and focused instead on "disposal of hazardous waste at the site of production."[109] To conclude that this type of "on-site" disposal constitutes a substantial affect on interstate commerce, *Olin II* relies on two divergent sources. First, the court cites language from a Senate committee report, which cited improper on-site waste disposal as a significant factor in chemical contamination leading to agriculture losses.[110] Second, the court states broadly, and with reference only to *Lopez*, that "the regulation of intrastate, on-site waste disposal constitutes an appropriate element of Congress's broader scheme to protect interstate commerce and industries thereof from pollution."[111]

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[106] *Olin II*, 107 F.3d 1506 (11th Cir. 1997). As if for justification for returning to the status quo, the court notes that "other courts also have found the district court's interpretation of *Lopez* unpersuasive." *Olin II*, 107 F.3d at 1510 n.5.

[107] *Id.* at 1510.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.* at 1511.

B. A Return to Retroactivity

The second half of the *Olin II* decision overturns *Olin I*'s determination that CERCLA could not be applied retroactively to actions occurring before the Act's effective date. Pursuant to *Landgraf*, *Olin II* makes the same review made in *Olin I*. That is, a review of CERCLA's language, structure, and purpose, as well as legislative history, to determine if Congress made clear its intent to apply CERCLA's remediation liability scheme to conduct pre-dating the statute's enactment. Examining the language of CERCLA, the court concludes that *Olin I* mistakenly found no insight into Congress' intent.[112] Upon review of the legislative history, the Court of Appeals seems to have no trouble determining that the legislative history "confirms that Congress intended to impose retroactive liability for cleanup."[113] Thus, in few short pages, the Eleventh Circuit rendered Judge Hand's landmark decision obsolete.

VII. Legislative Initiatives

Given the role that CERCLA's legislative history (or lack thereof) played in the *Olin* decisions, it seems only proper to discuss briefly some current legislative proposals regarding CERCLA. Of the numerous proposed revisions to CERCLA that have been brought for congressional approval, the principal changes to CERCLA involve its joint and several liability provisions and its retroactivity interpretation. H.R. 2500, introduced in October 18, 1995, embodied a modified repeal of retroactive liability.[114] The bill provided for reimbursing liable parties for up to 50 percent of the cleanup costs they incurred before 1987, and replaced CERCLA's joint and several liability system with a "fair share" system that allocated liability among PRPs at a site in proportion to the contamination they caused.[115]

A second piece of CERCLA legislation, S. 1285, introduced September 29, 1995, provided for a 50 percent tax credit, to be applied to cleanup costs that PRPs incurred before 1981.[116] This bill also set forth a mandatory, nonbinding allocation process for multiparty sites, whereby PRPs would only be assessed for costs associated with their own actions, and it specified that the Superfund trust fund would cover the costs of liable parties that were bankrupt or insolvent.[117]

Both bills met with opposition. Senator Dole opposed S. 1285's tax credit

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[112] *Id.* at 1514.

[113] *Id.*

[114] H.R. 2500, 104th Cong. (1995).

[115] *Id.*

[116] James E. Satterfield, *A Funny Thing Happened On the Way to the Revolution: The Environmental Record of the 104th Congress*, 27 ENVTL. L. REP. 10019 (1997).

[117] S. 1285, 104th Cong. (1995).

scheme, and opposition to H.R. 2500 compelled Representative Oxley to rewrite his bill to replace the 50- percent credit with language eliminating the pre-1987 liability of hazardous-substance generators and transporters.[118]

The 105th Congress has continued the 103d and 104th Congress' unsuccessful attempts at CERCLA reform,[119] with reform cited as a legislative priority by both sides of the aisle.[120] The most recent Republican proposal, S. 8, entitled "The Superfund Cleanup Acceleration Act of 1997," was introduced January 21. It revamps the liability scheme, affords the states a greater role in the remediation process, and reforms the natural resource damage provisions.[121] As of the date of this article, the House of Representatives has yet to offer its own proposal, but has indicated that its version will be very similar to that of the Senate.[122]

Superfund's most controversial feature has always been its retroactive application. While bills from the 103d and 104th Congresses argued for full a repeal of retroactive liability, the present Congress adopted a more pragmatic approach. Although retroactive liability may be unfair and impede business development, it is a necessary evil. Without retroactive liability, the Superfund program would rarely reach enough parties with sufficient assets to clean up contaminated sites. Thus, the sponsors of S. 8 limited their exemption from retroactive liability to parties connected with co-disposal landfills.[123] In many cases, these parties are the "little guys" of Superfund litigation and public sympathy with their plight is widespread. S. 8 would

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[118] L. Carol Ritchie, *Superfund Talks Go on Amid Angry Rhetoric*, CONG. GREEN SHEETS ENV'T & ENERGY WKLY. BULL., Mar. 4, 1996, at B6.

[119] It should be noted that one piece of significant legislation related to CERCLA did emerge from the 104th Congress. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 amends CERCLA § 101(20)'s definition of "owner or operator" to exclude from liability a "lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding" that the lender forecloses on the vessel or facility and takes steps to prepare the vessel or facility for sale. Pub. L. No. 104-208 (to be codified at 42 U.S.C.A. § 9601(20)). The new law defines "participate in management" as "actually participating in the management or operational affairs of a vessel or facility." *Id.* The new law also excludes from the definition of "owner or operator" a lender that "without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the [lender] in the vessel or facility." It also protects lenders from RCRA liability resulting from contamination from underground storage tanks. Pub. L. No. 104-208 (to be codified at 42 U.S.C.A. § 6991b(h)).

[120] *Recent Developments in the Congress*, 27 Envtl. L. Rep. 10128 (Mar. 1997).

[121] *Id.*

[122] *Id.*

[123] *Id.*

exempt from liability all co-disposal landfill generators, arrangers and transporters for activities before January 1, 1997. As for multi-party sites, CERCLA's current joint-and-several liability scheme would be replaced with a mandatory, non-binding allocation system at multi-party sites.[124] Lastly, more flexibility would be given to states wanting to take over all, or portions of, federal cleanup actions.[125]

VIII. Conclusion

Had S. 8 been the law of the land when Judge Hand was asked to review the consent decree entered into by the EPA and Olin Corporation, it is still unlikely that he would have signed the decree. S. 8 would not release the sole polluter from CERCLA's retroactive reach. Yet, although S. 8 does not address the Commerce Clause implications of CERCLA raised in *Olin I*, it does address the issue which may have been the impetus for Judge Hand's decision. Judge Hand obviously felt some sympathy for Olin. The company had committed to clean up the site, regardless of the consent decree. All that the company asked was that they do it under the Alabama Department of Environmental Management rather than the EPA. Given the level of EPA involvement in the matter up to this point, it is not inconceivable that Olin could have been quite frustrated with the federal government. ADEM agreed to take over supervision of the clean up, and had made a formal request to the EPA, which denied this request. From that point in the opinion forward, Judge Hand's attitude towards the federal clean up statute seems to shift dramatically. Regarding EPA's reasons for denial of the ADEM's request, he concludes, "Be that as it may, consistency and decreased potential for conflict are not necessarily synonymous with constitutionality."[126]

There can be no dispute that the *Olin I* decision was not well-received prior to its reversal on appeal. To the contrary, the *NDOT* decision—which also analyzed CERCLA in light of *Lopez*—has been well-received.[127] Yet, given the numerous bills promulgated by recent Congresses, it appears that change is rapidly approaching for CERCLA. Key to these changes are the very provisions and interpretations with which Judge Hand took issue. Perhaps Judge Hand's decision, while rebuked by other courts and ultimately overruled by his brethren on appeal, will find an ally in the 105th Congress.

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[124] *Id.*

[125] *Id.*

[126] 927 F. Supp. 1502, 1505.

[127] NDOT has been favorably cited in *Nova Chemicals, Inc. v. GAF Corp.*, 945 F. Supp. 1098 (E.D. Tenn. 1996) and *Ninth Ave. Remedial Group v. Fiberbond Corp.*, 946 F. Supp. 651 (N.D. Ind. 1996). Both *Nova Chemicals* and *Fiberbond* also rejected the *Olin I* decision.