Decriminalizing Corporate Environmental Violations: Post-
Southern Union Company v. United States

INTRODUCTION

On June 21, 2012, the Supreme Court in Southern Union Co. v. United States held that any fact, other than a prior conviction, that increases a defendant's maximum criminal fine must first be submitted to the jury and proven beyond a reasonable doubt. While this change may not seem monumental at first glance, the decision has potentially widespread effects on enforcing environmental regulations. With this new rule, the Court has severely limited the government's capacity to fine corporations that pollute and violate environmental regulations for extended periods of time. Decriminalizing corporate violations, however, would still preserve enforcement via the civil and administrative court system and permit adequate flexibility in award amounts.

I. BACKGROUND

In 2007, Southern Union Company, a Texas-based natural gas distributor, was indicted on two counts of violating the Resource Conservation and Recovery Act (RCRA) and the Emergency Planning and Community Right to Know Act (EPCRA). RCRA is designed to allow the U.S. Environmental Protection Agency (EPA) to control the transportation, treatment, storage, and disposal of hazardous waste. Under the act, any person who "knowingly treats, stores, or disposes of any hazardous waste . . . without a permit . . . shall, upon conviction, be subject to a [criminal] fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years."

Between September 19, 2002 and October 19, 2004, Southern Union knowingly stored liquid mercury and mercury regulators without a permit in a...
vacant building at its Pawtucket, Rhode Island Tidewater facility.\textsuperscript{5} Southern Union's Tidewater facility was once a gas manufacturing plant but as of 2000 was mostly unused and had fallen into disrepair.\textsuperscript{6} In June 2001, Southern Union began to replace their customers' outdated mercury regulators and replace them with updated regulators.\textsuperscript{7} When Southern Union was replacing the regulators, it shipped the old regulators to an environmental firm that would remove the mercury safely from the regulators.\textsuperscript{8} After Southern Union's contract with the environmental firm ended, Southern Union still continued to remove old regulators and stored them in the Tidewater facility in plastic bags where they were placed in plastic kiddie pools.\textsuperscript{9} Southern Union also encouraged employees to bring loose mercury that they may have found to the same Tidewater facility building where they were stored in a "milk jug, a paint can, glass jars, and plastic containers."\textsuperscript{10}

During the time the mercury was stored at the Tidewater facility, the storage building was in a deteriorated condition with broken windows, graffiti, no security cameras or security guards, and homeless people staying on the property.\textsuperscript{11} On three occasions Southern Union's environmental coordinator drafted bids for the removal of the mercury from the building. The bids, however, were never sent out to contractors.\textsuperscript{12} Recent break-ins and the poor condition of the Tidewater facility prompted one Southern Union employee to raise safety concerns about the mercury storage at three separate safety committee meetings.\textsuperscript{13} Each time, the company failed to adequately address the employee's concerns about the mercury. The mercury remained in the vacant building without the requisite permit and without any posted warnings.\textsuperscript{14} By July 2004, a Southern Union employee documented that there was more than 140 pounds of loose mercury stored at the building at the Tidewater facility.\textsuperscript{15}

In September 2004, three youth broke into the Tidewater facility building that housed the mercury. These youth then spilled liquid mercury both at the Tidewater facility and at a nearby apartment complex.\textsuperscript{16} It took Southern Union three weeks to realize the mercury spill and eventually take steps to remove the mercury from the facility.\textsuperscript{17} At no point did Southern Union warn or inform the proper authorities, such as the Pawtucket Fire Department or the Rhode Island
State Fire Marshal, of either mercury spill. In 2007, The U.S. Department of Justice, along with the EPA, indicted Southern Union for its improper storage of mercury.

The trial court convicted the defendant on the first count for storing liquid mercury without a permit. The trial court then determined a maximum fine of $38.1 million based on 762 days of violation multiplied by the $50,000 per day of violation maximum set by RCRA. The court eventually sentenced Southern Union to pay a $6 million fine with a community service obligation of $12 million. This holding was affirmed by the appellate court. The Supreme Court, however, reversed and remanded the appellate court's sentencing.

The Court decided that the rule in Apprendi v. New Jersey should be expanded to include criminal fines. The Apprendi rule states that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In Apprendi, the defendant was convicted of unlawful possession of a firearm and sentenced to an enhanced sentence of twelve years. The Supreme Court overturned the sentence as unconstitutional. Applying the Apprendi rule in Southern Union, the Court found that "the only violation the jury necessarily found was for one day," which would make the maximum fine charged on the defendant only $50,000, the maximum penalty for one day of violation under RCRA. Thus the $6 million fine and $12 million community service obligation clearly violate the Apprendi rule.

Although the government argued that applying Apprendi to criminal fines will prevent the federal government from attempting to standardize fines for statutory violations, the majority opinion argued that "legislatures are free to

18. Id.
21. Id.
22. The $12 million "community service obligation" imposed on Southern Union Company by the trial court was designated to specific entities. United States v. S. Union Co., 630 F.3d at 37. $200,000 was to be given each to the Rhode Island Chapter of the American Red Cross, the Rhode Island Environmental Response Fund, the Hasbro Children’s Hospital in Providence, the state Distressed Communities Recreation and Acquisition Fund, and the Pawtucket Fire Department. Id. The remaining $11 million was to be used to create a fund managed by the Rhode Island Foundation that would provide grants for "environmental education, remediation, conservation, and children’s health issues related to toxic waste." Id.
24. Id. at 2357.
25. Id. at 2349.
27. Id. at 469.
28. Id. at 497.
enact statutes that constrain judges' discretion in sentencing" as long as they conform to the Sixth Amendment.\textsuperscript{30}

II. ANALYSIS

The enforcement of environmental regulations presents an ongoing challenge for governmental organizations. To protect the environment and the public from harm, the government conducts compliance monitoring to ensure that people and corporations do not violate the rules imposed upon them. When an investigation uncovers a violation, the government can then formally charge the polluter under the civil or criminal system depending on the severity of the offense.\textsuperscript{31} There are three main differences between civil and criminal enforcement: legal standard, burden of proof, and results.\textsuperscript{32}

\textbf{A. Legal Standard}

In terms of RCRA enforcement, the only distinction of whether a case is tried as a criminal action versus a civil or administrative action is intent. In order to charge a corporation or individual with a criminal penalty, there has to be a \textit{mens rea} of "knowingly" storing the hazardous substance without a permit.\textsuperscript{33} In contrast, if a violation resulted from an accident or otherwise lacked the specific intent required, the case would be tried in civil court. Other than this heightened requirement of intent for criminal cases, all other elements of RCRA violation remain the same whether a defendant is tried under a civil, administrative, or criminal action. Administrative courts adjudicate violations of laws created by government agencies such as the EPA. In administrative proceedings, an administrative law judge will make all the findings of fact and law and make a decision without the use of a jury.\textsuperscript{34}

\textbf{B. Burden of Proof}

In order to be found guilty of a crime under the criminal justice system, a defendant must be found guilty "beyond a reasonable doubt" by a jury.\textsuperscript{35} This is a very high standard, which requires the jury to have almost complete confidence in the defendant's guilt, with some courts requiring a degree of

\begin{itemize}
\item \textsuperscript{30} \textit{Id.} at 2456.
\item \textsuperscript{32} \textit{Basic Information About the 2011 Enforcement Results}, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/compliance/resources/reports/endofyear/eoy2011/basic.html (last updated Dec. 8, 2011).
\item \textsuperscript{33} 42 U.S.C § 6928(d) (2006).
\item \textsuperscript{34} 2 AM. JUR. 2d ADMINISTRATIVE LAW § 269 (1994).
\item \textsuperscript{35} \textit{See In re Winship}, 397 U.S. 358, 364 (1970).
\end{itemize}
certainty as high as ninety-five percent. This high burden is generally supported by the higher penalties of a criminal trial, as demonstrated by the increased fines and potential imprisonment for individuals in criminal RCRA violations, which usually results in social stigma. In contrast, in a civil and administrative trial, the burden of proof is based on a “preponderance of the evidence” or the “greater weight of the evidence” standard. This language means, roughly, that it is more likely than not that the defendant did violate the environmental regulation or that there is slightly stronger evidence in favor of the plaintiff than in favor of the defendant. The burden of proof is lower in civil trials because the harshest punishments are economic and injunctive in nature instead of imprisonment.

C. Results

Finally, the results of criminal and civil trials are different in that each carries a different penalty. If charged criminally with violating an environmental regulation, an individual can be sentenced to a term in prison and made to pay a criminal fine or restitution. Penalties for civil cases usually consist of either a fine or an order for injunctive relief but never a term of imprisonment.

D. A Different Approach

According to the law, individuals and corporations who knowingly disregard environmental laws face higher penalty maximums. The new rule established by Southern Union may mean a change in strategy for environmental enforcers. This includes the EPA, which is charged with upholding environmental statutes, often through litigation. But when violators of environmental regulations are companies and corporations instead of individuals, the question of imprisonment does not come into play. That leaves only the question of a criminal fine as a penalty. If the ultimate objective is to have convicted defendant corporations remediate their damages by paying fines for violating environmental regulations, then a civil trial would likewise

37. See 42 U.S.C § 6928(d)(7)(B), (g).
40. 2 AM. JUR. 2d ADMINISTRATIVE LAW § 357 (2008).
41. Ramadan, supra note 36, at 1.
42. See 42 U.S.C. § 6928(g).
43. Id. § 6928(d)(7)(B).
44. Id. § 6928(a)(1), (g).
45. Id. § 6928(d)(7).
achieve that same goal. EPA should thus consider decriminalizing environmental regulation violations in order to more effectively levy predictable fines that would be exempt from the ruling in Southern Union. For example, an initial lawsuit against Southern Union under the civil justice system for a maximum $38.1 million would then be able to be adjusted by both judge and jury.

When the government finds a corporation liable of a criminal offense, the only “punishment” that is applied is a higher sentence ($50,000 a day rather than $25,000 a day for non-criminal violations). Corporations cannot be put in jail and any remedial measures the court orders, such as community service, are ultimately just another requirement to pay a fine. The social stigma of a criminal conviction also may not have the same deterrent effect as it might have on an individual. Corporations rely on their customers or business partners in order to generate revenue, and a criminal conviction might generate negative publicity and might even cause a corporation to lose customers and, therefore, profit. But in order to be affected by the social stigma attached to a criminal conviction, the corporation must have a somewhat positive reputation to begin with and the customers must care about where they are putting their money. For corporations such as Southern Union, a natural gas provider, customers are unlikely to have a choice as to where their natural gas comes from and they are even less likely to be informed about such a criminal conviction. Unlike popular manufacturers of everyday goods such as Nike and Unilever, Southern Union’s conviction is unlikely to generate the same type of attention that a more familiar corporation would gain from the conviction. The deterrent value of a social stigma, therefore, becomes very uncertain.

Currently EPA litigates more civil and administrative cases than criminal cases in order to enforce environmental regulations. According to EPA’s assessment figures from fiscal year 2012, it concluded 3,012 civil and administrative cases but only charged 231 defendants with criminal offenses for their violation of an environmental statute. The total amount of fines awarded through civil and administrative trials was also higher ($208 million compared to $44 million for criminal fines). Moving more cases from

47. 42 U.S.C § 6928(a)(3), (d)(7)(B).
52. Id. at 6.
Criminal litigation to civil and administrative litigation will allow the EPA to more effectively utilize their resources for more certain results. It is also important to note that decriminalizing environmental regulation violations for corporations will have a small footprint in terms of the volume of cases that the EPA prosecutes. Of the 231 convicted criminal defendants last year, 70 percent of them were individual defendants while the remaining 30 percent were corporations that were convicted. Changing tactics by prosecuting corporate violations of environmental statutes through civil or administrative trials would have affected only the 30 percent—or about seventy cases—in which the EPA convicted defendant corporations as opposed to individual defendants. Charging corporations civilly will, therefore, not be a dramatic change from the status quo but will allow for the delivery of more accurate fines for statutory violations. This is especially true since corporate defendants tend to have higher potential fines maximums available than individual defendants violating an environmental statute because they have the capability to conduct graver violations in a shorter amount of time.

**CONCLUSION**

Civil and administrative courts are great assets already in use by the EPA to a large extent. By changing the way that the EPA treats corporate violators, *Southern Union*’s ruling will be circumvented completely, allowing the court to avoid the difficulties of determining sentencing with the increased burdens.

Decriminalizing violators of environmental regulations is likely to raise concern and protest from environmentalists. In light of the ruling in *Southern Union*, however, this approach may be the most likely to produce increased sentencing maximums on fines, and therefore, increased sentences. By utilizing civil and administrative courts, adjudicators will be able to circumvent the need for juries to find “beyond a reasonable doubt” every factor that the judge will use to increase sentencing maximums. In this way, the amount in controversy will be apparent from the start of trial and the jury will be free to decide an appropriate amount under consultation, subject to the normal checks on juries in civil trials.

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