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Does the Paperwork Reduction Act give OMB the authority to review Labor Department health regulations?

by Gregory L. Ogden

Elizabeth Dole, Secretary of Labor

v.

United Steelworkers of America, et al.

(Docket No. 88-1434)

Argument Date: Nov. 6, 1989

This case provides the Supreme Court with its first opportunity to interpret the provisions of the Paperwork Reduction Act of 1980. It invites the Court to decide whether the Paperwork Reduction Act (PRA) authorized the Office of Management and Budget (OMB) to review and disapprove Department of Labor regulations that set standards for health hazard communications.

The Labor Department regulations disapproved by OMB would have required employers to collect and distribute information about on-the-job chemical health hazards to employees.

ISSUE

The Supreme Court is asked to decide whether the Paperwork Reduction Act applies to regulations requiring the collection of information for disclosure to non-governmental parties, and whether the Act authorizes OMB to review and disapprove substantive regulations adopted by the Labor Department under its implementing statute.

FACTS

The Paperwork Reduction Act was enacted in 1980 to minimize the burdens and maximize the utility of governmental demands for the collection and dissemination of information. The PRA directs the OMB to review federal agencies' information-collection requests to determine their necessity and practical utility. Only collection requests that meet the PRA's standards can be approved, and if an agency's proposal is disapproved it cannot collect the information.

The PRA requires OMB to adopt implementing regulations, and it specifies that the authority of federal agencies to collect information under other laws is subordinate to OMB's authority under the PRA. Finally, however, the

PRA provides that the Act does not give OMB any new authority relating to the substantive policies of other federal agencies.

OMB regulations define "information collection request" to include the collection of information for distribution to persons other than federal agencies, and require it to assess these requests by statutory standards of necessity and practical utility.

To assess whether a request meets PRA standards, OMB determines whether the proposed information collection is 1) the least burdensome necessary; 2) not duplicative; and 3) of practical utility. OMB then determines whether the burden is justified by the practical utility of the information collected. Requests are approved if they meet these specific standards and disapproved if they don't.

The Occupational Safety and Health Act of 1970 (OSHA) requires the Department of Labor to set mandatory occupational safety and health standards. Acting under this authority, Labor has regulated the occupational exposure to various chemical hazards. As part of this substantive mission under OSHA, Labor proposed comprehensive hazard-communication standards that would require employers to evaluate chemical hazards and transmit information about such hazards to its employees and other employers.

Labor published a hazard-communication standard in 1983 that required employers in the manufacturing sector of the economy to inform employees of workplace hazards through training, labeling, and safety data sheets. OMB approved this standard under the PRA.

Labor unions including the United Steelworkers, challenged the standard in the court of appeals, however, and the court directed the Secretary of Labor to reconsider whether the standard should apply to the non-manufacturing sector as well. The court ordered the secretary to apply the standard across the board unless the secretary could identify specific reasons why it would not be feasible to do so.

The Department of Labor reopened the rulemaking record, gathered new evidence as to the feasibility of applying the hazard-communication standard to the non-manufacturing sector, and initiated a new rulemaking proceeding on the issue. The United Steelworkers of America objected to the new rulemaking and asked the court of appeals to hold the assistant secretary of labor in contempt for failing to revise the hazard-communication standard based on the existing administrative record.

The court of appeals then ordered the Labor Department, under threat of contempt sanctions, to promulgate

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a hazard-communication standard based on the existing administrative record within 60 days, or else include a statement explaining why such a standard would not be feasible.

The Labor Department complied with the court order and issued a final revised hazard-communication standard that covered both the manufacturing and the non-manufacturing sectors of the economy. After reviewing this standard under the PRA, OMB approved all of the regulations—except for the three under review in this case.

The three disapproved standards provide for: 1) the application of Material Safety Data Sheets (MSDS) requirements to multi-employer work sites; 2) the exemption of paperwork requirements for consumer products excluded from the definition of hazardous chemicals under the Superfund Amendments and Reauthorization Act of 1986; and 3) the exemption of paperwork requirements for drugs regulated by the FDA in the non-manufacturing sector.

OMB rejected the first standard because the paperwork burden exceeded the practical utility of the information, and because there were less burdensome means of making the same information available. It rejected the second standard because it would still result in the duplication of disclosures required by the Consumer Product Safety Commission, and because it was inconsistent with Environmental Protection Agency requirements. It rejected the third standard because it would result in the duplication of existing Food and Drug Administration disclosure requirements. In the OMB's view, in other words, the exemptions do not go far enough.

The United Steelworkers, arguing that the Labor Department violated the previous court order when it submitted the standards to OMB for review under the PRA, asked the court of appeals to hold the Secretary of Labor and the Director of OMB in contempt. The union also argued that OMB did not have authority under the PRA to invalidate the Labor Department's hazard-communication standards.

The court of appeals denied the contempt motion, but held on the merits that OMB lacked authority under the PRA to review and disapprove the Labor Department standards. The court thus set aside OMB's disapproval, which made the Labor standard valid and enforceable.

The court reasoned that the consumer product and drug exemption standards are not information-collection requests within the meaning of the PRA, and that the Material Safety Data Sheets standard is not subject to the PRA because it requires the transmittal of information to third parties, not the collection of information by a government agency.

The court also reasoned that the PRA's substantive limitations supported its conclusion that OMB has no authority to set aside Labor standards that are mandated by OSHA.

BACKGROUND AND SIGNIFICANCE

To enforce regulatory legislation and monitor industries'

compliance with those statutes, administrative agencies rely on regulated industries to collect information, keep records, and make reports. Typically, the information the industry must collect must also be disclosed to the regulatory agency.

The PRA was enacted to rationalize federal information-collection policy, to centralize policy making in the Office of Management and Budget, and to regulate agency information-collection requirements so that the burden on industry to comply with those requirements does not exceed the practical utility of the information collected.

In theory, then, OMB would develop expertise as the enforcing agency and, as the central agency deciding information policy, be able to make better judgments than could individual agencies as to whether a particular information-collection requirement passed muster under the PRA's standards. OMB was thus given authority to disapprove requests as unnecessary or unduly burdensome. The PRA did not give it the authority, however, to directly impact the substantive mission of any federal agency.

The Court is presented with two distinct questions. First, it must determine whether the PRA applies to the type of information-collection requirements the OMB reviewed in this case—requirements that exempt some types of information from disclosure and require the disclosure of other information to non-governmental parties.

Second, the Court is asked to decide whether the review authority the PRA delegates to the OMB conflicts with the Act's substantive limitations on the agency's authority. To answer either question, the Court will have to examine the language of the statute, its legislative history, and OMB's interpretation of it.

As to the first issue, the parties disagree as to whether the PRA applies only to requests that information be supplied to a federal agency, or whether it also applies to requests that information be supplied to non-governmental parties such as the employees of OSHA-regulated employers in this case.

While it is true that agencies' information-collection requests traditionally seek information for government use, neither the language nor the legislative history of the PRA conclusively establish that OMB authority is limited to those types of requests.

On the other hand, because administrative agencies are creatures of statute, OMB only has whatever authority has been delegated to it by Congress under the statute. Thus, if the Court interprets the PRA narrowly to exclude "exemption" standards and "disclosure to third party" standards, then OMB would not have any authority to set aside the Labor standards.

If the Court resolves this initial question against OMB, it might not have to decide the second question—whether OMB faces a conflict in the PRA's limitations and grants of authority.

If the Court determines that the PRA's language and legislative history are clear, it will interpret the statute—and de-

cide this case—so as to give effect to the clearly expressed congressional intent. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If, however, the congressional intent is ambiguous, then the Court may defer to the reasonable interpretation of the enforcing agency. *Chevron*, 467 U.S. 837 (1984).

Thus, the Court first must decide whether the statutory language and legislative history clearly resolve the question of the scope of OMB authority. If they do not, the Court may defer to OMB's interpretation of the statute in its implementing regulations, and allow OMB to review the Labor Department's information-collection standards under the PRA. The OMB regulations clearly include Labor's standards within the scope of the PRA.

If the Court interprets the statute narrowly, it may be undercutting OMB's role as the centralized information policy agency. If it interprets the statute broadly, it may be undercutting Labor's efforts to carry out its statutory mandate under OSHA.

The second issue—whether the information-collection authority the PRA grants OMB conflicts with the Act's substantive limitations on OMB's authority—is much more difficult than the first issue. As already noted, the Court may resolve the case on the first issue, and not reach this question. That solution is most likely if the Court holds that OMB does not have authority to disapprove the Labor standards.

If it holds that OMB does have such authority, however, it will have to resolve this question. There are two views. The Department of Labor takes the position that Congress intended OMB's regulation of information-collection requirements to have a substantive impact on information-collection requests and agency information policy, but not on any other agency policies.

The USWA takes the position that, because the Labor Department's information disclosure standards are mandated by OSHA as a matter of substantive policy, the PRA's substantive limitations preclude OMB from disapproving those standards. In other words, OSHA requires the disclosure of chemical hazards to employees to protect their health and safety, and the PRA limitations prohibit OMB from using the PRA review process to override that policy.

The Court has frequently had to reconcile apparent or real conflicts between two statutes, and this case is probably no more difficult than many others on this issue. Since it is unlikely that Congress thought about this conflict when it enacted either OSHA or the PRA, the Court probably will have to decide which approach is most consistent with the overall policies and purposes of both statutes.

ARGUMENTS

For Elizabeth Dole, Secretary of Labor (*Counsel of Record, Lawrence G. Wallace, Acting Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 633-2217*):

1. The Paperwork Reduction Act directs the OMB to review the disapproved provisions of the Secretary of Labor's hazard-communication standard.
2. The Paperwork Reduction Act and OMB's implementing regulations establish that the relevant provisions of the hazard-communication standard are information-collection requests subject to OMB review and approval.
3. OMB's review does not impermissibly increase OMB's authority with respect to the substantive policies and programs of the Department of Labor.
4. The Paperwork Reduction Act's legislative history indicates that Congress intended to require OMB review in these circumstances.

For Associated Builders and Contractors Inc., et al., in Support of the Secretary of Labor (*Counsel of Record, Maurice Baskin, 1301 Pennsylvania Avenue, N.W., Suite 1200, Washington, D.C. 20004; telephone (202) 662-4300*):

1. OMB, which has been given broad paperwork reduction authority by Congress, acted properly in disapproving portions of OSHA's revised regulations.
2. The court of appeals lacked authority to review OMB's order in the context of the USWA's motion for further relief.
3. The disapproved provisions of the revised regulations clearly constitute "collection of information" and "information collection" requirements within the meaning of the PRA, and are therefore subject to OMB review.
4. The court of appeals erroneously held that OMB's disapproval of the revised regulations constituted unlawful interference with OSHA's "substantive rulemaking authority."

For United Steelworkers of America, et al., (*Counsel of Record, Laurence Gold, 815 16th Street, N.W., Washington, DC 20006; telephone (202) 637-5390*):

1. The review provisions of the PRA apply only to information collections required for the government's own use.
2. Even if the provisions at issue were subject to review under the PRA, OMB exceeded the limitations in that Act which require OMB to adhere to "applicable law" and which deny OMB authority over "substantive policies and programs" entrusted to other agencies.