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Upping the Ante: Fines for Ignoring EPA Information Requests Unlikely to Be "Excessive" in Sixth Circuit. United States v. Gurley

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UPPING THE ANTE: FINES FOR IGNORING EPA INFORMATION REQUESTS UNLIKELY TO BE "EXCESSIVE" IN SIXTH CIRCUIT

United States v. Gurley[1]

I. INTRODUCTION

Failing to comply with an official request from a governmental agency has always been a risky bet to make. Through the use of fines, the Environmental Protection Agency ("EPA") has frequently striven to make such a bet even more precarious. In *United States v. Gurley*, William Gurley attempted to call the EPA's bluff and chose to ignore a statutorily authorized information request, risking fines of up to $25,000 per day for noncompliance.[2]

Faced with almost two million dollars worth of fines, Gurley claimed the amount was a violation of the Eighth Amendment's Excessive Fines Clause.[3] The Sixth Circuit, however, responded by upping the ante: the court held that as long as the fine was within the amount deemed reasonable by the legislature, it was highly unlikely that it would violate the Excessive Fines Clause.[4] As a result, betting against the EPA just became even more risky than before. For individuals on the receiving end of an information request, hedging your bets and complying with information requests might be the safest way to play the odds.

II. FACTS AND HOLDING

The Environmental Protection Agency began investigating a former landfill near South Eighth Street in West Memphis, Arkansas as early as 1982.[5] As a result of the investigation and the detection of "various hazardous chemicals" at the site, the landfill was placed on the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") National Priorities list on October 14, 1992.[6] One of the contributors to the landfill was Gurley Refining Company ("GRC"), an oil refinery that used the landfill to dump an "oily waste" created as a by-product of the refining process.[7]

Accompanied by a general notice letter, the EPA issued an information request[8] to William Gurley ("Gurley") on February 6, 1992, since he was the president and majority stockholder of GRC.[9] Among other things, the "information request sought Gurley's individual knowledge of . . . Gurley's assets, generators of material that [was] disposed of at the site, site operations, and the structure of GRC."[10] For some time, Gurley refused to fulfill the information request and failed to answer six additional questions posed by the EPA.[11] The

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[1] 384 F.3d 316 (6th Cir. 2004).
[2] *Id.* at 319.
[3] *Id.* at 325.
[4] *Id.*
[5] *Id.* at 319.
[6] *Id.*
[7] *Id.*
[8] CERCLA grants the EPA authority to issue information requests at 42 U.S.C. § 9604(e)(2), which states as follows:

> Any officer, employee, or representative described in paragraph (1) may require any person who has or may have information relevant to any of the following to furnish, upon reasonable notice, information or documents relating to such matter: (A) The identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of at a vessel or facility or transported to a vessel or facility. (B) The nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a vessel or facility. (C) Information relating to the ability of a person to pay for or to perform a cleanup.

42 U.S.C. § 9604(e)(2) (2000).
[9] *Gurley*, 384 F.3d at 319. The EPA failed in several attempts to deliver the information request to Gurley. The United States Marshals Services eventually served it on his wife. *Id.*
[10] *Id.*
[11] *Id.* at 319-20.

United States responded by filing suit against Gurley on August 8, 1993, alleging that he "had failed to adequately respond to the agency's request."[12] At this point, Gurley submitted answers to the initial information request but failed to provide answers pertaining to his individual financial condition or to the six additional questions added to the initial request.[13]

In its suit against Gurley, the EPA relied on its authority granted under CERCLA to issue information requests.[14] The EPA moved for and received a grant of summary judgment on December 30, 1998.[15] Liability for failing to comply with EPA information requests is determined by the court and can take the form of civil penalties up to $25,000 a day for each day of noncompliance.[16] The court granted the EPA's motion to impose civil penalties on Gurley on November 26, 2002.[17] Based on the court's determination of the "varying levels of egregiousness Gurley demonstrated in failing to comply fully with the EPA's information requests," the court imposed three different levels of penalties.[18] Gurley was fined $2,000 a day from February 28, 1992 through September 15, 1992; $1,000 a day from September 16, 1992 though July 29, 1994; and $500 a day from July 30, 1994 through February 2, 1999.[19] In total, Gurley's fines reached $1,908,000.[20]

Following the imposition of civil penalties, Gurley appealed the grant of summary judgment and the imposition of the penalties.[21] In his appeal, Gurley challenged the amount of the fine, claiming that it was not proportional to his crime and thus violated the Excessive Fines Clause of the Eighth Amendment.[22] He also challenged the verdict on res judicata grounds and questioned the constitutionality of the EPA's authority to issue information requests under CERCLA, claiming the requests violated the Due Process Clause of the Fifth Amendment.[23] On appeal, the Sixth Circuit upheld the rulings of the district court and failed to find the challenged provisions of CERCLA unconstitutional.[24]

III. LEGAL BACKGROUND

The Excessive Fines Clause ("the Clause") of the Constitution's Eighth Amendment has a surprisingly brief judicial history. However, America's founding fathers considered it worthy of placement among the revered Bill of Rights. An examination into the history of the Clause and the existing case law provides interesting insight and guidance into proper application of the Eighth Amendment.

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[12] *Id.* at 319.

[13] *Id.* at 320. The United States asserted a belief that although Gurley answered some of the questions in the information request, many of his responses to those questions were incomplete. *Id.*

[14] *Id.* at 321. *See supra* note 8.

[15] *Id.* at 320. The approximately five year delay from the filing of the suit to the eventual grant of summary judgment was due in part to bankruptcy proceedings filed by Gurley in July, 1995. The court dismissed the bankruptcy petition in 1997. *Id.*

[16] *Id.* at 321. Liability for failing to comply with an information request is codified at 42 U.S.C. § 9604(e)(5)(B):

> The President may ask the Attorney General to commence a civil action to compel compliance with a request or order referred to in subparagraph (A). Where there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant, the court shall take the following actions:
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> (ii) In the case of information or document requests or orders, the court shall enjoin interference with such information or document requests or orders or direct compliance with the requests or orders to provide such information or documents unless under the circumstances of the case the demand for information or documents is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.
>
> The court may assess a civil penalty not to exceed $ 25,000 for each day of noncompliance against any person who unreasonably fails to comply with the provisions of paragraph (2), (3), or (4) or an order issued pursuant to subparagraph (A) of this paragraph.

42 U.S.C. § 9604(e)(5)(B) (2000).

[17] *Gurley*, 384 F.3d at 319.

[18] *Id.* at 320.

[19] *Id.* Gurley answered the information request on February 2, 1999. *Id.*

[20] *Id.*

[21] *Id.* at 319.

[22] *Id.*

[23] *Id.*

[24] *Id.*

A. Historical Background

Stating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,"[25] the text of the Eighth Amendment originated from the Virginia Declaration of Rights of 1776.[26] Remarkable in similarity to the final language of the Eighth Amendment, section nine of the Virginia Declaration of Rights read: "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[27] Similarly, the language found in the Virginia Declaration arose from a nearly identical provision in the English Bill of Rights of 1689,[28] which developed in response to abuses by the King's judges during the reign of the Stuarts in Great Britain.[29] By the time the prohibition against excessive fines was codified within the Bill of Rights, eight other states and the federal government had joined Virginia in adopting the clause.[30]

Although the revolutionary colonists clearly valued protection against excessive fines, debate and discussion of the Clause received little attention from the First Congress.[31] In spite of this seeming "uncritical acceptance" of the Excessive Fines Clause,[32] the theoretical origins of the protection date back much further than the English Bill of Rights of 1689.[33] Most notably, ancient Hebrew law, codified in the Old Testament of the Bible, required an eye for an eye and a tooth for a tooth.[34] Often interpreted today as a command concerning punishment and retribution, the "eye for an eye" restriction also demands proportionality between offense and punishment.[35] Joining the ancient Hebrews in demanding proportionate offenses and punishments were the Greeks, the Angles and Saxons of pre-Norman England, the Germanic peoples of the Middle ages, and even the Norse Vikings.[36] In fact, the Saxon system was explained in such detail that "almost every conceivable injury or offense carried with it a corresponding financial punishment."[37]

By the early seventeenth century, however, the idyllic prohibitions against excessive fines and punishments established by these early governments had slowly faded away – especially in England.[38] Instead the Stuart kings established a system where the kings used the courts to impose crippling fines as a means of punishing their political enemies.[39] By 1641, courts were forbidden from levying excessive fines, but this restriction was frequently ignored.[40] Indeed, a committee appointed by the House of Commons in 1680 reported that while imposing fines, judges acted "arbitrarily, illegally, and partially."[41] It was this system of judicial abuse that led to the inclusion of the prohibition of excessive fines in the English Bill of Rights of 1689, its later inclusion in the Virginia Declaration of Rights of 1776, and the eventual codification of the Clause in the Eighth Amendment of the United States Constitution.

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[25] U.S. CONST. amend. VIII.

[26] Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233, 1240 (1987). The Virginia Declaration of Rights of 1776 was adopted by the Virginia Convention of 1776, during which the convention decided to "instruct its delegates to the Continental Congress to propose a declaration of independence of all the colonies" from Great Britain. *Id.* at n.41.

[27] *Id.* at n.41.

[28] *Id.* at 1240. *See also* United States v. Bajakajian, 524 U.S. 321, 335 (1998).

[29] *Bajakajian*, 524 U.S. at 335.

[30] Massey, *supra* note 26, at 1240-41. The federal government had adopted the excessive fines clause in the 1787 Northwest Ordinance. *Id.*

[31] *Bajakajian*, 524 U.S. at 335.

[32] Massey, *supra* note 26, at 1242.

[33] *Id.* at 1250.

[34] *Id. See Exodus* 21:23-25 (King James) and *Leviticus* 24:19-20 (King James).

[35] Massey, *supra* note 26, at 1250.

[36] *Id.* at 1250-51.

[37] *Id.* at 1251.

[38] *Id.* at 1253.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 1253-54.

B. Summary of Relevant Case Law

As late as the end of the twentieth century, the Supreme Court "had little occasion to interpret, and ha[d] never actually applied, the Excessive Fines Clause."[42] This changed, however, in 1998, when the Court decided *United States v. Bajakajian*.[43] In *Bajakajian*, the Supreme Court articulated – for the first time – the test for determining whether a fine violates the Excessive Fines Clause of the Eighth Amendment.[44] Holding that the "touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality," the Court ruled that a fine "violates the Excessive Fines Clause if it is *grossly disproportional* to the gravity of a defendant's offense."[45]

In reaching its holding, the Court acknowledged that the text and history of the Clause provided "little guidance" as to exactly how disproportional a fine must be to become unconstitutional.[46] Turning to prior interpretations of the Cruel and Unusual Punishment Clause[47] for guidance, the majority provided two considerations that they found relevant.[48] First, the Court noted that "judgments about the appropriate punishment for an offense belong . . . to the legislature."[49] Second, the Court further articulated that "any judicial determination regarding the gravity of a particular . . . offense will be inherently imprecise."[50]

Bajakajian involved the violation of a statute requiring individuals leaving the country with more than $10,000 to report that amount to customs officials.[51] Bajakajian, who attempted to leave the country with $357,144, was convicted of violating the statute and faced forfeiture of the entire amount pursuant to the statute.[52] The district court failed to require Bajakajian to forfeit the entire amount, and the United States appealed the decision, seeking complete forfeiture.[53] Bajakajian argued that full forfeiture would amount to a violation of the Excessive Fines Clause.[54] Applying the newly created test, the Supreme Court, for the first time in its history, held that adherence to the statute would constitute a violation of the Excessive Fines Clause.[55] Full forfeiture, they continued, would be grossly disproportional to Bajakajian's offense.[56]

Writing for the four justice dissent, Justice Kennedy chastised the majority for the seeming hypocrisy they created.[57] Kennedy noted that the majority suggested "substantial deference" should be afforded to the judgment of Congress and then, "ignoring its own command, the Court swep[t] aside Congress' reasoned judgment and substitute[d] arguments that [were] little more than speculation."[58] The dissent clearly favored following Congress' judgment and would have ordered the complete forfeiture of Bajakajian's funds.[59]

Following *Bajakajian*, the Sixth Circuit adopted the Supreme Court's proportionality test,[60] as did an overwhelming majority of jurisdictions around the nation. In 2000, the Fifth Circuit adopted somewhat of a

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[42] *Bajakajian*, 524 U.S. at 327.
[43] 524 U.S. 321 (1998).
[44] *Id.* at 334.
[45] *Id.* (emphasis added).
[46] *Id.* at 335.
[47] U.S. CONST. amend. VIII.
[48] *Bajakajian*, 524 U.S. at 336.
[49] *Id. See e.g.*, Solem v. Helm, 524 U.S. 277, 290 n.16 (1983) (stating that the reviewing courts should grant deference to the broad authority that the legislature possesses).
[50] *Id.*
[51] *Id.* at 324. Bajakajian violated 31 U.S.C. § 5316(a)(1)(A) in failing to report money in excess of $10,000. *Id.* at 325.
[52] *Id.* at 325-26. The statute that orders full forfeiture of "any property, real or personal, involved in such offense" is 18.U.S.C. § 982(a)(1). 18 U.S.C. § 982(a)(1) (2000).
[53] *Bajakajian*, 524 U.S. at 326.
[54] *Id.*
[55] *Id.* at 344.
[56] *Id.*
[57] *Id.* at 348-50 (Kennedy, J., dissenting).
[58] *Id.* at 350 (Kennedy, J., dissenting).
[59] *Id.* at 356 (Kennedy, J., dissenting).
[60] *See* United States. v. 415 E. Mitchell Ave., 149 F.3d 472 (6th Cir. 1998).

bright line test, holding that "[n]o matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment."[61] Similarly, the Seventh Circuit also chose to adhere to the majority's suggestion to give legislative judgments substantial deference regarding the amount and imposition of fines.[62] Like the Fifth Circuit, the Seventh Circuit held that a "fine is [not] grossly disproportionate to the gravity of the offense when Congress has made a judgment about the appropriate punishment."[63]

In addition, the Eighth Circuit has delineated a two-pronged approach for determining whether a fine is unconstitutionally excessive.[64] First, the party claiming the fine is excessive must make a "prima facie showing of 'gross disproportionality.'"[65] If the first prong is met, the court will then consider "whether the disproportionality 'reaches such a level of excessiveness that in justice the punishment is more criminal than the crime.'"[66] Moreover, the Eighth Circuit has also established a list of factors to be considered[67] in making the determination under the second prong and has indicated that if the fine is near or within the statutory guidelines, it "almost certainly is not excessive."[68]

IV. INSTANT DECISION

In the instant case, Gurley presented a number of different arguments on appeal, none of which were adopted by the court.[69] The Sixth Circuit's analysis of the case was essentially a three-part consideration: (A) whether Gurley was liable for failing to respond to the information request,[70] (B) whether the civil penalties were imposed in error or were unconstitutionally excessive,[71] and (C) whether § 104(e) of CERCLA violates the Due Process Clause of the Fifth Amendment.[72]

A. Liability for failing to respond to the information request

The district court granted the United States' summary judgment motion regarding Gurley's liability for failing to respond to the EPA's information request.[73] As such, the grant of summary judgment is reviewed de novo by the appellate court, which must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[74]

Gurley's initial argument on appeal claimed that the information request issued by the EPA was invalid.[75] The court noted that the validity of an administrative request for information is generally determined by the reasonableness of the request.[76] In *United States v. Pretty Products, Inc.*,[77] an EPA information request

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[61] Newell Recycling Co. v. U.S. Envtl. Prot. Agency, 231 F.3d 204, 210 (5th Cir. 2000).
[62] Kelly v. U.S. Envtl. Prot. Agency, 203 F.3d 519, 524 (7th Cir. 2000).
[63] *Id.*
[64] United States v. Dodge Caravan Grand Se/Sport Van, 387 F.3d 758, 763 (8th Cir. 2004).
[65] *Id.* (quoting United States v. Bieri, 68 F.3d 232, 236 (8th Cir. 1995)).
[66] *Id.* (quoting United States v. 6040 Wentworth Ave., 123 F.3d 685, 688 (8th Cir. 1997)).
[67] The factors to be considered include the gravity of the offense weighed against the severity of the sanction, the value of the property forfeited, an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct, and any other factors that an excessive fines analysis might require. *Id.*
[68] *Id.* (quoting United States v. Sherman, 262 F.3d 784, 795 (8th Cir. 2001); *vacated in part by* United States v. Diaz, 296 F.3d 680 (8th Cir. 2001) *reinstated on rehearing by* United States v. Diaz, 296 F.3d 680 (8th Cir. 2002)).
[69] *Gurley*, 384 F.3d at 319.
[70] *Id.* at 320-24.
[71] *Id.* at 324-26.
[72] *Id.* at 326.
[73] *Id.* at 319.
[74] *Id.* at 320-21 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)).
[75] *Id* at 319.
[76] *Id.* at 321.
[77] 780 F.Supp. 1488 (S.D. Ohio 1991).

was upheld as reasonable when "(1) the investigation is within the EPA's authority; (2) the request is not too indefinite; and (3) the information requested is relevant to legislative purposes."[78] Gurley focused his argument on appeal on the third prong of the test.[79]

Gurley contended that on January 4, 1989, the EPA deposed him in conjunction with another case, at which time Gurley provided all the relevant information that the EPA again requested in the present action.[80] Because the EPA already had the information it was requesting, Gurley reasoned that the true motive behind the information request was not to determine a response action at the site.[81] As such, no relevant legislative purpose was served by the request.[82] In an argument adopted by the court, the government explained that the 1989 deposition, on which Gurley relied, related to a separate contaminated site.[83] At that deposition Gurley expressly refused to answer any questions pertaining to the South Eighth Street site now in question.[84] Accordingly, the Sixth Circuit found that the request was related to a relevant legislative purpose and failed to find the request invalid.[85]

Gurley's second argument was that he was exempt from compliance with the information request because he was a service station dealer under 42 U.S.C. § 9601(37)(A)(ii)[86] and was therefore exempt from complying with the information request because of the statutory exception.[87] The court explained that the service station dealer exemption upon which Gurley relied pertains only to liability under other sections of CERCLA that are not relevant to information requests.[88] Reading section 9604(e)(2) plainly, the Sixth Circuit noted that the statute held "any person" with relevant information responsible for answering an information request and thus found that Gurley was indeed such a person.[89]

Gurley's final argument attacking the validity of the information request was that the doctrine of res judicata barred the action.[90] Gurley argued that a prior criminal action brought against Gurley Refining Company under the 1970 Rivers and Harbors Act precluded the EPA from filing the current action.[91] The district court adopted the reasoning of the Eighth Circuit in an "almost identical contention" from *United States*

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[78] *Gurley*, 384 F.3d at 321 (quoting *Pretty Products*, 780 F.Supp. at 1506).
[79] *Id.* at 322.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* Gurley also advanced an unsuccessful argument that even if the information request had been valid at the time it was issued, it was no longer valid at the time he filled it out because whatever purpose the EPA needed the information for had already been accomplished. *Id.* The court noted that Gurley failed to assert any authority for that proposition and held that the agency would still need the information to determine its ability to recover incurred response costs. *Id.*
[86] *Id.* 42 U.S.C. § 9601(37)(A)(ii) defines a "service station dealer" as any person

> [W]ho accepts for collection, accumulation, and delivery to an oil recycling facility, recycled oil that (I) has been removed from the engine of a light duty motor vehicle or household appliances by the owner of such vehicle or appliances, and (II) is presented, by such owner, to such person for collection, accumulation, and delivery to an oil recycling facility.

42 U.S.C. § 9601(37)(A)(ii) (2000).
[87] *Gurley*, 384 F.3d at 322.
42 U.S.C. § 9614(c) reads in relevant part:

> No person (including the United States or any State) may recover, under the authority of subsection (a)(3) or (a)(4) of section 107 [42 USCS § 9607(a)(3) or (4)], from a service station dealer for any response costs or damages resulting from a release or threatened release of recycled oil, or use the authority of section 106 [42 USCS § 9606] against a service station dealer other than a person described in subsection (a)(1) or (a)(2) of section 107 [42 USCS § 9607(a)(1) or (2)], if such recycled oil--
>
> (A) is not mixed with any other hazardous substance, and
>
> (B) is stored, treated, transported, or otherwise managed in compliance with regulations or standards promulgated pursuant to section 3014 of the Solid Waste Disposal Act [42 USCS § 6935] and other applicable authorities.

42 U.S.C. § 9614(c) (2000).
[88] *Gurley*, 384 F.3d at 322.
[89] *Id.* at 322-23.
[90] *Id.* at 323.
[91] *Id.*

v. Gurley,[92] decided in 1994, and held that because Gurley had not been a named party in the previous suit he could be sued in his individual capacity in a subsequent action.[93] Gurley contended on appeal that the district court had "improperly assumed that the Eighth Circuit decision was law of the case" and, as such, had committed reversible error.[94] On appeal, the Sixth Circuit held that they found no indication that the res judicata claim was decided inappropriately.[95] Instead, the court noted that the district court had simply adopted the same reasoning that the Eighth Circuit had previously articulated and again upheld the validity of the information request.[96]

B. Civil Penalties and the Excessive Fines Clause

The district court imposed fines on Gurley totaling over $1,900,000 for his failure to comply with the EPA's information request.[97] Authorized under 42 U.S.C. § 9604(e)(5)(B), the fines could have totaled as much as $25,000 per day.[98] Gurley challenged the imposition of the fines, claiming that the penalties violated both the Excessive Fines Clause and the Due Process Clause of the Constitution and that the district court abused its discretion in imposing the fines.[99] The Sixth Circuit stated that it would only overturn the district court if it had abused its discretion and if the court is "firmly convinced that a mistake has been made."[100]

Gurley argued that the fines imposed on him were unconstitutionally excessive.[101] He relied on *United States v. Bajakajian*[102] for the proposition that a "punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."[103] The court, however, gave little consideration to this claim, noting Gurley's "wilful noncompliance" for seven years and the fact that under the statute the fines could have totaled "tens of millions of dollars . . . but only a fraction of that amount was ultimately levied."[104]

Gurley's due process claim received equally short shrift, as the Sixth Circuit noted only a rational basis need exist for imposing penalties on individuals who ignore EPA information requests.[105] Holding that the penalties encourage parties to comply with information requests, the court failed to find the imposition of fines unconstitutional.[106]

Gurley further argued that the district court abused its discretion in determining to impose the fines.[107] Relying on *United States v. Taylor*[108] and *United States v. Barkam*,[109] the court noted that, among others, the following factors "bear[ ] on the amount of a penalty: (1) the good or bad faith of the defendant, (2) the injury to the public, (3) the defendant's ability to pay, (4) the desire to eliminate the benefits derived by a violation, and (5) the necessity of vindicating the authority of the enforcing party."[110] Holding that most of the factors as applied to Gurley are "self-evident," the court discussed at length only Gurley's ability to pay.[111] The court

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[92] 43 F.3d 1188 (8th Cir. 1994).
[93] *Gurley*, 384 F.3d at 323-24.
[94] *Id.* at 324.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 320.
[98] *Id.* at 324.
[99] *Id.* at 324-26.
[100] *Id.* at 324 (quoting Adcock-Ladd v. Sec'y of Treasury, 227 F.3d 343, 349 (6th Cir. 2000)).
[101] *Id.* at 325.
[102] 524 U.S. 321 (1998).
[103] *Gurley*, 384 F.3d at 325 (quoting *Bajakajian*, 524 U.S. at 334).
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 325-26.
[108] 8 F.3d 1074, 1078 (6th Cir. 1993).
[109] 784 F.Supp. 1181, 1189 (E.D. Pa. 1992).
[110] *Gurley*, 384 F.3d at 325-26 (quoting *Taylor*, 8 F.3d at 1078).
[111] *Id.* at 326.

found that even though Gurley had filed for bankruptcy, he still had over four million dollars available for distribution from the estate.[112] Accordingly, the Sixth Circuit held that all of the necessary factors had been met, that Gurley had the ability to pay, and that the district court had not abused its discretion in imposing the fines.[113]

C. Fifth Amendment Due Process Clause Violation

Gurley's final argument on appeal is that § 104(e) of CERCLA, which authorizes information requests, is an unconstitutional violation of the Due Process Clause of the Fifth Amendment.[114] Gurley based his argument on the Eleventh Circuit decision of *Tennessee Valley Authority v. Whitman,*[115] which held that "penalty provisions of the Clean Air Act are unconstitutional because they can be assessed as part of an administrative compliance order."[116] The Sixth Circuit, however, found the instant case "easily distinguishable" from *Whitman.*[117] The court reasoned that in *Whitman*, the fines were imposed based upon the Tennessee Valley Authority's own determination that that the Clean Air Act had been violated.[118] In contrast, Gurley's fines were imposed not by the EPA but by a judicial determination, which included due process protection and a "full and fair hearing before a federal judge."[119] Accordingly, the Sixth Circuit did not find the questioned provisions of CERCLA unconstitutional.[120]

V. COMMENT

When the Supreme Court decided to issue its first ruling on the Eighth Amendment's Excessive Fines Clause, the majority left us with a rather confusing message. In *United States v. Bajakajian*, the Court held that if a fine is within a statutory guideline, it is unlikely to violate the Excessive Fines Clause.[121] The Court stated that "judgments about the appropriate punishment for an offense belong . . . to the legislature" and that "any judicial determination regarding the gravity of a particular . . . offense will be inherently imprecise."[122] Quite inexplicably then, the Court chose to overturn the legislature's judgment and proceeded to enter its own damage award.[123] In effect, the nation's most powerful judicial body joined parents everywhere in declaring "do as I say and not as I do."

Torn between following the Supreme Court's words (and deferring to legislative judgments) or following the Court's actions (and entering their own judgments), jurisdictions began to articulate their own bright-line tests. Overwhelmingly, jurisdictions adopted the Court's words and deferred to the legislatures.[124] Despite the Supreme Court's hypocrisy, *Bajakajian*'s holding survived.

In the instant decision, the Sixth Circuit implicitly appears to join a growing number of jurisdictions in holding that if a fine is imposed within the statutory guidelines, it is unlikely to violate the Excessive Fines Clause.[125] The court's holding is both sound and reasonable and most certainly adopts the better of *Bajakajian*'s two options. Four reasons stand out as particularly strong justifications for deferring to legislative

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[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] 336 F.3d 1236 (11th Cir. 2003).
[116] *Gurley*, 384 F.3d at 326.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Bajakajian*, 524 U.S. at 324-44.
[122] *Id.* at 336.
[123] *Id.* at 344.
[124] *See supra* Sec. III(B).
[125] *Gurley*, 384 F.3d at 325.

judgments when evaluating the potential excessiveness of a fine: (1) The legislature is the voice of the people. Legislative bodies are elected by American citizens and serve the express purpose of representing them in governmental decision-making. A legislative judgment as to the reasonableness of fine is, in effect, a judgment by the people themselves. A judicial decision, however, is not. (2) The legislature has infinitely more resources available to make a reasoned judgment as to how large a fine is appropriate in a given situation. Legislative bodies have staff members, committees, hearings, numerous members, and budgets that allow for extensive research. Courts, on the other hand, are much more limited in both available resources and available time. (3) Constant second-guessing by the judiciary would eventually undermine legislative authority. If courts frequently undertake an independent determination of whether or not a legislative judgment as to the reasonableness of a fine is valid, it seems inevitable that legislatures will tire of having their judgments overturned and eventually stop making them. (4) Statutes can be changed more easily than court decisions. Given the nature of both statutes and judicial decisions, statutes are created to be the more flexible of the two. If a legislative judgment turns out to be a bad decision, it can be altered much more quickly and efficiently than can a similarly situated judicial decision.

The Sixth Circuit was faced in the instant decision with the imposition of an almost two million dollar fine – leveled basically because an individual refused to file some paperwork.[126] The court could have easily decided that the fine was excessive and refused to enforce it. Instead, the court noted that the legislature had authorized fines that would have totaled "tens of millions of dollars" and found that the fines imposed were therefore not excessive.[127] The Sixth Circuit refused to substitute its own judgment for that of the legislature and in doing so upheld the Supreme Court's holding in *Bajakajian*. By deferring to legislative judgment, the court not only made the most reasonable decision but also chose to uphold the voice of the people.

By upholding the multi-million dollar fine, the Sixth Circuit also sent a strong message to environmental contaminators like Gurley: ignoring the EPA and information requests is a risky bet to make. Under CERCLA, fines for failing to comply with an information request can total up to $25,000 per day of noncompliance. The court gave no indication that any amount under the statutory maximum would be excessive. Clearly, the Sixth Circuit approves of the priority that the legislature has placed on encouraging compliance with information requests.

The court's decision makes it unlikely that fines for failing to complete information requests will be deemed unconstitutional. As such, the Sixth Circuit has let it be known that mandatory compliance is expected from parties justifiably receiving the requests. And rightly so. Without a hefty price tag for noncompliance, it is unlikely that parties like Gurley would ever cooperate with the EPA. Establishing potential liability at $25,000 per day should certainly serve as an adequate incentive to complete an information request. In the event it doesn't, knowing that the fine probably won't violate the Excessive Fines Clause and will thus be upheld should definitely ensure compliance from even the most stubborn offender.

VI. CONCLUSION

The Sixth Circuit did more than establish a rule for determining when judgments would violate the Excessive Fines Clause by refusing to overturn the fine imposed on William Gurley. The court upped the ante against Gurley and his fellow environmental contaminators and established a strong precedent: deliberately failing to comply with the EPA will not be tolerated. Arguably, a two million dollar judgment for failing to answer an information request could be considered excessive. However, the Sixth Circuit chose to defer to the legislature and, in turn, placed a premium on EPA compliance.

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[126] *Id.* at 319-20.
[127] *Id.* at 325.