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## Waste Not, Want Not: Upholding the Integrity of Interstate Compacts. *State of Nebraska v. Central Interstate Low-Level Radioactive Waste Compact Commission*

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## CASENOTE

## WASTE NOT, WANT NOT: UPHOLDING THE INTEGRITY OF INTERSTATE COMPACTS

*State of Nebraska v. Central Interstate Low-Level Radioactive Waste Compact Commission*<sup>1</sup>

## I. INTRODUCTION

In this case, the U.S. Court of Appeals for the Eighth Circuit upheld the validity and power of interstate compacts by holding states to an agreement they made between themselves regarding low-level radioactive waste. Following a policy of textualism, the court upheld the validity of the plain meaning of the text of the Compact. The lesson learned from this matter, rightly so, concerns exercising great care in statutory drafting and holding states accountable to their own agreements.

## II. FACTS AND HOLDING

Congress created the Low-Level Radioactive Waste Act (LLRWA or "the Act") of 1980 for the storage and disposal of slightly radioactive materials.<sup>2</sup> A centerpiece of this Act encouraged states to form regional compacts to deal with their waste.<sup>3</sup> In dealing with the Central Midwest Compact,<sup>4</sup> Nebraska, the host state for that compact's disposal site, brought this action for declaratory judgment precluding the imposition of deadlines<sup>5</sup> regarding the Central Interstate Low-Level Radioactive Waste Commission's<sup>6</sup> (Commission) establishing of deadlines for the processing of license applications.

Pursuant to the compact,<sup>7</sup> the Commission selected Nebraska as the host state for the disposal facility.<sup>8</sup> The Commission then contracted with an environmental construction company, U.S. Ecology, to build and operate a disposal plant for the region.<sup>9</sup> The Compact granted the host state authority to

<sup>1</sup> *State of Nebraska v. Central Interstate Low-Level Radioactive Waste Compact Comm'n*, 187 F.3d 982 (8th Cir. 1999).

<sup>2</sup> 42 U.S.C. § 2021b-2021j (1995).

<sup>3</sup> *Id.*

<sup>4</sup> Low-level radioactive waste contains class A, B, or C radioactive waste as defined by 10 CFR § 61.55. 42 USCA § 2021c (1994). The Code of Federal Regulations defines class A, B, and C waste as:

(i) Class A waste is waste that is usually segregated from other waste classes at the disposal site. The physical form and characteristics of Class A waste must meet the minimum requirements set forth in § 61.56(a). If Class A waste also meets the stability requirements set forth in § 61.56(b), it is not necessary to segregate the waste for disposal.

(ii) Class B waste is waste that must meet more rigorous requirements on waste form to ensure stability after disposal. The physical form and characteristics of Class B waste must meet both the minimum and stability requirements set forth in § 61.56.

(iii) Class C waste is waste that not only must meet more rigorous requirements on waste form to ensure stability but also requires additional measures at the disposal facility to protect against inadvertent intrusion. The physical form and characteristics of Class C waste must meet both the minimum and stability requirements set forth in § 61.56. 10 CFR § 61.55 (1999). *See also* 10 CFR § 61.56 (1999) (further elaborating on waste structure and stability).

<sup>5</sup> *Waste Compact Comm'n*, 187 F.3d at 984.

<sup>6</sup> Nebraska, Arkansas, Kansas, Louisiana, and Oklahoma formed the the Central Interstate Low-Level Radioactive Waste Compact pursuant to a 1980 act of Congress. This compact established the the Central Interstate Low-Level Radioactive Waste Commission to establish a framework for the development of low-level radioactive waste facilities and the enforcement of the compact's purposes. *Id.* See NEB. REV. STAT. § 71-3521 (1996) (reprinting and ratifying the compact).

<sup>7</sup> NEB. REV. STAT. § 71-3521 (1996) (reprinting and ratifying the compact). Congress itself approved and ratified the compact. 99 Stat. 1859, 1863-71. (1986).

<sup>8</sup> NEB. REV. STAT. § 71-3521 (1996).

<sup>9</sup> *Id.* Establishing the plant was a rocky road in and of itself. In December of 1987, the Commission chose Nebraska as the host state. The governor of Nebraska at that time, Kay Orr (D), placed a condition on the agreement that required the facility to be built only with the nearby community's consent. On December 29, 1989, U.S. Ecology sent a letter to the Village of Butte Board of Trustees telling them a site near Butte, county seat of Boyd County, had been selected. The Trustees accepted this letter with great enthusiasm. However, the community itself did not. In January of 1993, the Butte Board of Trustees again reaffirmed its support for the facility, and the State filed an action the next day, alleging U.S. Ecology failed to obtain the required

establish procedures and regulations for licensing and review of license standards; Nebraska established such procedures.<sup>10</sup>

Problems quickly mounted in the construction of the facility. U.S. Ecology's original construction plan, submitted in 1990, went through various technical amendments; this and other delays stretched the project over several years and caused the price of the project to raise several million dollars over budget.<sup>11</sup> Becoming tired of these delays, the Commission held a meeting in August of 1996 in order to set an appropriate scheduling deadline for the completion of the facility.<sup>12</sup> The Commission made three demands, to be completed by December 14 of that year but no later than January 14 of 1997: first, Nebraska must issue a first Draft Environmental Impact Analysis; second, Nebraska must issue a Draft Safety Evaluation Report;<sup>13</sup> finally, Nebraska must make its decision regarding license drafts.<sup>14</sup>

In response to the Commission's actions, Nebraska filed this action in November of 1996.<sup>15</sup> It challenged the deadline set by the Commission, arguing it had no binding effect and was contrary to law.<sup>16</sup> Alternatively, Nebraska sought a declaration that the Commission's deadline was unreasonable and thereby invalid.<sup>17</sup>

The Eighth Circuit upheld the District Court's decision, declaring the Commission possessed authority to establish licensing deadlines and said deadlines were reasonable.<sup>18</sup> Ultimately, the Court upheld the Commission's enumerated powers set forth in the Compact, and required the member states to abide by the rules they themselves set.

### III. LEGAL BACKGROUND

#### A. Low-level Radioactive Waste

Radioactive waste tends to call to mind negative, antipathetic reactions containing fear, dread, and revulsion.<sup>19</sup> This reaction leads to a strong "not in my backyard" feeling among citizens living near a proposed disposal site, even if that site is for low-level waste. Part of this feeling can be attributed to misinformation that overemphasizes the lethality of the waste.<sup>20</sup> Some reports have even stated information about low-level waste that is highly exaggerated and contains factual errors and bias.<sup>21</sup> The largest amount of low-level waste comes from packing materials, medical clothing, and laboratory glassware.<sup>22</sup> In the early days of the Atomic Age, circa 1950, industries disposed of such waste without regard to specific quantities of long-lived isotopes. Today, the focus on disposal of low-level waste is on

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community consent. The Eighth Circuit upheld summary judgment in favor of the defendants based on the expiring statute of limitations as well as the grounds of laches and estoppel. *State of Nebraska ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Commission*, 26 F.3d 77, 78-79 (8th Cir. 1994).

<sup>10</sup> NEB. REV. STAT. § 71-3521 Art. III(b) (1996).

<sup>11</sup> *Waste Compact Comm'n*, 187 F.3d at 983.

<sup>12</sup> *Id.*

<sup>13</sup> These two reports are both requirements of the licensing process. *Id.* at 984.

<sup>14</sup> *Id.* In essence, the Commission attempted to get Nebraska moving and over some of the delay in construction problems.

*Id.*

<sup>15</sup> *Id.* at 984.

<sup>16</sup> *Waste Compact Comm'n*, 187 F.3d at 984

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 985.

<sup>19</sup> William F. Newberry, *The Rise And Fall And Rise And Fall Of American Public Policy On Disposal Of Low-Level Radioactive Waste*, 3 S.C. ENVTL. L.J. 43, 44 (1993).

<sup>20</sup> *Id.* Newberry contributes two separate ideas to this feeling. The first idea states how some isotopes in nature, including our own bodies, contain small concentrations of waste with half lives running into the billions of years. This idea combined with the fact some isotopes such as Cobalt-60 emit high levels of radiation if not heavily shielded yield the false conclusion that low-level waste is lethal forever.

<sup>21</sup> National Council on Radiation Protection and Measurements, NCRP Commentary No. 5, *Review of the Publication, Living Without Landfills* (1989).

<sup>22</sup> *Id.* at 43. Such materials can be handled via human contact. *Id.*

the limitation of the long-lived isotopes entering the disposal site.<sup>23</sup>

Low-level waste is a very broad category containing many different types of waste; it is waste that does not fit into the three major categories of radioactive waste.<sup>24</sup> Low-level waste is divided into four classes with specific regulations for the disposal of each class. Such waste includes but is not limited to tools and components of nuclear power plants, equipment and protective coverings from any research environment using radioactive materials, radioactive testing equipment, and animal carcasses used in medical research.<sup>25</sup> A lot of the danger from being exposed to this type of waste comes from the random damage associated with radiation; even though all organisms are constantly exposed to background radiation, being exposed to additional levels may damage organic cells thereby causing a cancerous growth.<sup>26</sup>

### B. Low-Level Radioactive Waste Act

Disposal of radioactive waste has been a perpetual problem for the nation. With the advent of commercial applications of nuclear materials, the Atomic Energy Commission (AEC)<sup>27</sup> started granting licenses to commercial firms for the care and disposal of radioactive waste.<sup>28</sup>

The first disposal approach taken by the AEC allowed seven commercial firms licenses to dump the waste at sea.<sup>29</sup> This scheme lasted from the 1950's until 1960, when the AEC announced the establishment of land burial grounds operated commercially and subject to government licensing restrictions.<sup>30</sup> These sites were simply specially designed landfills.<sup>31</sup> This time period marked a "laissez faire" attitude regarding disposal sites; one would be created whenever and wherever needed.<sup>32</sup> However, this type of attitude quickly faded in the late 1970's with the realization that such unrestrictive management required half of the sites to undergo expensive environmental damage control.<sup>33</sup>

Dissatisfaction among the remaining states with active disposal sites<sup>34</sup> and concern over their becoming a national dump site led to significant lobbying in Congress for the restoration of regional disposal sites via the formation of interstate compacts, making the regional nature of the disposal sites from the 1960's and 1970's a fact of law.<sup>35</sup> Specifically, these states asked Congress for an exemption from the Commerce Clause<sup>36</sup> allowing discrimination regarding access of the disposal sites based on the

<sup>23</sup> *Id.*

<sup>24</sup> Audeen W. Fentiman, Joyce E. Meredith, and Ronald J. Veley, *What is Low-Level Radioactive Waste?* (visited on 2/13/00) <[http://www.ag.ohio-state.edu/~rer/rerhtml/rer\\_10.html](http://www.ag.ohio-state.edu/~rer/rerhtml/rer_10.html)>. Those three categories are high-level waste (from nuclear reactor fuel), uranium milling residues, and waste with greater than specified quantities of elements heavier than uranium. *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Audeen W. Fentiman, Joyce E. Meredith, and Ronald J. Veley, *What are the Health Effects of Ionizing Radiation?* (visited on 2/13/00) <[http://www.ag.ohio-state.edu/~rer/rerhtml/rer\\_24.html](http://www.ag.ohio-state.edu/~rer/rerhtml/rer_24.html)>.

<sup>27</sup> The AEC is a body created by the Atomic Energy Act of 1954 in order to assist in the goals of the Act. 42 U.S.C. § 2103(f) (1995). The goals of the Atomic Energy Act included assisting research, dispersing data, government control of nuclear weapons and materials, encouraging development of nuclear technology, and international cooperation. 42 U.S.C. § 2103(a) – (e) (1995).

<sup>28</sup> The AEC requires a license for the transportation of any and all nuclear materials and waste in the course for interstate commerce. 42 U.S.C. § 2111 (1995). See 42 U.S.C. § 2108 for indemnification and liability limits for licensees.

<sup>29</sup> Newberry, *supra*, note 19, at 45.

<sup>30</sup> *Id.* at 45-46.

<sup>31</sup> Sites were located across six states; each site was regional in nature. Success of these landfills depended on factors like the geological stability of the site, the form of waste, and the degree of operating detail given to disposal procedures. *Id.* at 42-43.

<sup>32</sup> *Id.* at 46.

<sup>33</sup> *Id.* Additionally, it became obvious that no more sites could be developed with such a permissive attitude.

<sup>34</sup> The remaining three states were South Carolina, Washington, and Nevada. *Id.* at 47. Out of this group, South Carolina had the greatest concerns over low-level waste. Richard Riley, running for governor of the state in 1978, campaigned on a promise to reduce the amount of waste entering South Carolina; at that time South Carolina received 80% of the nation's low-level waste.

<sup>35</sup> *Id.* at 47. Compare 42 U.S.C. § 2021d(b)(4) (stating that any compact language that conflicts with federal authority, the language must be construed so that the federal authority will be superior).

<sup>36</sup> U.S. CONST. art. I § 10 (Congress shall have the power to regulate commerce between the states. . . .)

source of the waste.<sup>37</sup> Simply stated, states wanted permission to charge additional funds for waste coming from states outside their compact. Ultimately, in 1980 Congress enacted the Low-Level Radioactive Waste Policy Act,<sup>38</sup> ratifying seven state compacts.<sup>39</sup> In its subsequent sessions, Congress ratified two additional compacts, bringing the current total to nine.<sup>40</sup> The final changes to the LLRWA occurred in 1985 when Congress passed the Low-Level Radioactive Waste Policy Amendments Act, which served to supplement the original act with monetary incentives and additional deadlines.<sup>41</sup>

### C. State Compacts

Article I, § 10 cl. 3 of the Constitution controls agreements such as compacts made between two

<sup>37</sup> Dan M. Berkowitz, *Waste Wars: Did Congress Say "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 HARV. ENVTL. L. REV. 437, 461-66 (1987).

<sup>38</sup> Pub. L. No. 96-573, 94 Stat. 3347 (1980) as codified 42 U.S.C. § 2021b-2021j (1995). The law actually was a committee addition to a much larger high-level radioactive waste disposal bill. The original bill was deleted, leaving only the low-level measures intact. However, the Act did not permit exclusionary authority of state compacts until 1986. Newberry, *supra*, note 19, at 48-49.

<sup>39</sup> The proposed original seven compacts were:

- 1) The Northwest Interstate Compact on Low-Level Radioactive Waste Management: Potential members were Alaska, Hawaii, Idaho, Montana, Oregon, Utah, Washington, and Wyoming;
- 2) The Central Interstate Low-Level Radioactive Waste Compact: Potential members were Arkansas, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska, North Dakota, and Oklahoma;
- 3) The Southeast Interstate Low-Level Radioactive Waste Management Compact: Potential members were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia;
- 4) The Central Midwest Interstate Low-Level Radioactive Waste Compact: Potential members were Illinois and Kentucky;
- 5) The Midwest Interstate Low-Level Radioactive Waste Management Compact: Potential members were Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin;
- 6) The Rocky Mountain Low-Level Radioactive Waste Compact: Potential members were Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming; and
- 7) The Northeast Interstate Low-Level Radioactive Waste Management Compact: Potential members were Connecticut, New Jersey, Delaware, and Maryland. Deborah M. Mostaghel, *The Low-Level Radioactive Waste Policy Amendments Act: An Overview*, 43 DEPAUL L. REV. 379, 396 n.143 (1994). Two compacts, the Northeast and Central Midwest, appeared to be a ruse for the member states to acquire exclusionary authority without any burden of establishing a disposal region; in other words, they wanted to ship waste out but not accept any in. Newberry, *supra*, note 20, at 50.

<sup>40</sup> The current configuration and member states of all compacts is:

- 1) The Northwest Interstate Compact on Low-Level Radioactive Waste Management: Current members include Alaska, Idaho, Hawaii, Montana, Oregon, Utah, and Washington. Wyoming, originally a member, is now affiliated only with the Rocky Mountain Compact. The host state is Washington.
- 2) The Central Interstate Low-Level Radioactive Waste Compact: Current members include Arkansas, Louisiana, Kansas, Nebraska, and Oklahoma. No longer included are Iowa, Minnesota, Missouri, and North Dakota. The host state is Nebraska.
- 3) The Southeast Interstate Low-Level Radioactive Waste Management Compact: Current members include Alabama, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. The host state is currently South Carolina.
- 4) The Central Midwest Interstate Low-Level Radioactive Waste Compact: Current members include Kentucky and the host state Illinois.
- 5) The Midwest Interstate Low-Level Radioactive Waste Management Compact: Current members are Indiana, Iowa, Minnesota, Missouri, Ohio, and Wisconsin. Michigan is no longer a member of this compact, and Ohio is the host state.
- 6) The Rocky Mountain Low-Level Radioactive Waste Compact: Current members are Colorado, New Mexico, Nevada, and Wyoming, with Nevada serving as the host state. Initial potential members Arizona and Utah are no longer in this compact.
- 7) The Northeast Interstate Low-Level Radioactive Waste Management Compact: The current and original members of this compact include Connecticut, Delaware, Maryland, and New Jersey. Both Connecticut and New Jersey have been designated host states.
- 8) The Southwestern Low-Level Radioactive Waste Compact: Current members include California, Arizona, North Dakota, and South Dakota, with California serving as the host state. The Dakotas are both additions to the compact's original configuration.
- 9) The Appalachian States Low-Level Radioactive Waste Compact: Current members are West Virginia and host state Pennsylvania. Deborah M. Mostaghel, *The Low-Level Radioactive Waste Policy Amendments Act: An Overview*, 43 DEPAUL L. REV. 379, 397 n.146 (1994).

<sup>41</sup> Pub. L. No. 99-240, 99 Stat. 1842 (1986) as codified 42 U.S.C. §2101b-2021j (1985).

or more states.<sup>42</sup> The district courts have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. The Supreme Court has held when Congress approves a compact, it “transforms . . . into a law of the United States.”<sup>43</sup>

Even though a ratified compact is recognized as a federal law, it also remains a contract between states.<sup>44</sup> As such, it is a legal document “that must be construed and applied in accordance with its terms.”<sup>45</sup> Due to their contractual nature, courts have and exercise the authority to fulfill the compact’s terms. Courts will order future performance or other specific relief in order to execute the compact.<sup>46</sup> A clear example of the Supreme Court executing a compact occurs in *Texas v. New Mexico*.<sup>47</sup> The compact at issue concerned water rights to the Pecos River on the Texas/New Mexico border.<sup>48</sup> Specifically, the Court agreed with Texas’ complaint that New Mexico withheld more water than allowed by the compact.<sup>49</sup> As such, the Court ordered New Mexico to release more water to Texas over the next few years in order to mollify the shortcomings of the past.<sup>50</sup>

As additional insulation to state compacts, courts are not allowed to substitute their own judgment for the express terms of the compact.<sup>51</sup> The only exception to this general rule regards the Constitutionality of the compact to which Congress has agreed.<sup>52</sup> In this manner of deference to express provisions, the court’s interpretation of compacts is somewhat akin to the two-part test outlined in *Chevron v. Natural Resources Defense Council, Inc.*<sup>53</sup> That case established the principles of administrative deference still used by courts today. Specifically, it held

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.<sup>54</sup>

<sup>42</sup> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

<sup>43</sup> *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (quoting *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)). See also *Rhode Island v. Massachusetts*, 37 U.S. 657, 727 (1838) (“If there is a compact between the states, it settles the line of original right; it is the law of the case binding on the states and its citizens, as fully as if it had been never contested; if there is no compact, then the controversy must be settled, by adjudging where the line of boundary ought to be, by the laws and rules appropriate to the case.”); *Cuyler v. Adams*, 449 U.S. 433, 438 (1981) (“[C]ongressional consent transforms an interstate compact within this Clause into a law of the United States.”).

<sup>44</sup> *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (citing *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 285 (Frankfurter, J., dissenting)).

<sup>45</sup> *Id.* citing *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

<sup>46</sup> *Id.*

<sup>47</sup> 482 U.S. 124 (1987). The same matter appeared before the Court three years earlier in *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

<sup>48</sup> *Id.* at 126.

<sup>49</sup> *Id.* at 129.

<sup>50</sup> *Id.* at 135.

<sup>51</sup> *Arizona v. California*, 373 U.S. 546, 565-66 (1963) (forbidding a court to grant relief inconsistent with the express terms of a water rights compact). See also *Washington v. Oregon*, 211 U.S. 127, 135 (1908) (stating that courts do not have the power to change a boundary established by Congress).

<sup>52</sup> *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (“One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.”).

<sup>53</sup> 467 U.S. 837 (1984).

<sup>54</sup> *Id.* at 842-43. Compare *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) (saying the court is the final authority in statutory interpretation and must reject interpretations of administrations which go against Congressional

This test has popularly become known as the “Chevron Two Step.” Courts generally apply the same amount and type of deference to rulings construing a compact. In *Pievsky v. Ridge*,<sup>55</sup> the court upheld the power of the Pennsylvania governor granting the power to terminate the commissioner of the Delaware River Port Authority (DRPA) according to the terms of the DRPA compact.<sup>56</sup> In upholding this express power, the court noted that federal courts would show deference to prior adjudications in interpreting an interstate compact.<sup>57</sup> The interpretation of the compact must be found in the compact itself and deference will be given to the express terms and rulings of the compact.<sup>58</sup>

#### D. Compact at Issue: the Central Midwest Interstate Compact

The Central Interstate Compact endured significant additional difficulty in getting a disposal site established apart from the case at hand. The text of the Compact is in the Nebraska statutes.<sup>59</sup> The first major challenge occurred in *Concerned Citizens of Nebraska (CCN) v. United States Nuclear Regulatory Commission*.<sup>60</sup> In that case, a group of citizens filed for an injunction for the prevention of the disposal facility's construction in Boyd County.<sup>61</sup> Ultimately, all charges were dismissed for lack of a claim for which relief could be granted<sup>62</sup> or for lack of jurisdiction.<sup>63</sup> The court also dismissed their equal protection and supremacy counts.<sup>64</sup>

The next challenge came from the governor of Nebraska, Kay Orr, attempting to enjoin the construction of the disposal facility.<sup>65</sup> However, the State took too long in filing its actions and time barred its complaint.<sup>66</sup>

In the present action, the court declared any specific relief as moot.<sup>67</sup> Mootness is a Constitutional requirement that there be a genuine case or controversy which exists at the start of the trial and continues throughout.<sup>68</sup> A prime example of this doctrine can be found in *DeFunis v. Odegaard*.<sup>69</sup> In that matter, plaintiff sued the University of Washington, claiming the law school's admission policies discriminated against him.<sup>70</sup> He gained an injunction ordering his admission,<sup>71</sup> and by the time the case made it to the Supreme Court, he was in the final quarter of his studies.<sup>72</sup> The Court rendered the case moot as plaintiff no longer had any personal claim in the matter; he was so near graduation any decision on the part of the Court would have been useless.<sup>73</sup> A court must dismiss a case if it finds that no case or

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intent).

<sup>55</sup> 98 F.3d 730 (3d Cir. 1996).

<sup>56</sup> *Id.* at 734. The DRPA Compact was an agreement between the states of Pennsylvania and New Jersey regarding the building and operation of bridges and ports along the Delaware river.

<sup>57</sup> *Id.* at 733.

<sup>58</sup> *Id.*

<sup>59</sup> NEB. REV. STAT. § 71-3521 (1996).

<sup>60</sup> 970 F.2d 421 (8th Cir. 1992).

<sup>61</sup> *Id.* at 421.

<sup>62</sup> *Id.* at 423. This dismissal occurred at the District Court level.

<sup>63</sup> *Id.* at 424. The Court of Appeals disagreed with the District Court's analysis that the Atomic Energy Act did not apply. The AEA was relevant in that the regulations at issue dealt with the activities of a licensee. *Id.*

<sup>64</sup> The court held there is no fundamental right to be free from radiation, there is equal protection violation between high level and low-level radioactive waste, and the Compact did not violate the Supremacy Clause. *Id.* at 426-27.

<sup>65</sup> *State of Nebraska ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Commission*, 26 F.3d 77 (8th Cir. 1994).

<sup>66</sup> *Id.* at 81.

<sup>67</sup> *Waste Compact Comm'n*, at 753.

<sup>68</sup> U.S. CONST. Art. 3 § 2 cl.1 (the “case or controversy” clause.).

<sup>69</sup> 416 U.S. 312 (1974).

<sup>70</sup> *Id.* at 314.

<sup>71</sup> *Id.* at 316.

<sup>72</sup> *Id.* at 316-17.

<sup>73</sup> *Id.* at 317.

controversy exists.<sup>74</sup>

The court in *Nebraska* correctly stated the parties did not fit into any of the exceptions for the mootness doctrine.<sup>75</sup> There are three major exceptions to this canon. The first is known as “capable of repetition, yet evading review.”<sup>76</sup> This requires that the timespan of the controversy be too short to be completely litigated before its cessation and an expectation that the plaintiff will be again in the same circumstance.<sup>77</sup> Additionally, there is an exception for certified class actions if plaintiff’s personal claim is mooted.<sup>78</sup>

The next major exception to mootness is a voluntary cessation by the defendant. However, there is still a viable cause of action if plaintiff seeks damages. Except for a very small exception, damages never become moot.<sup>79</sup> If there is a chance the alleged violation will again occur after the voluntary cessation, the action is not moot.<sup>80</sup> Regardless of the above factors and arguments, the court settled all of the parties’ claims via their findings of law.

#### IV. INSTANT DECISION

In the instant decision, the court considered whether the Compact granted the Commission the authority to impose the deadline on Nebraska.<sup>81</sup> The court examined the Compact as it appeared in the Nebraska Statutes, specifically, Article V(e)(2) of the Compact.<sup>82</sup> This provision supposedly granted the Commission power to set deadlines; it provided that development and operations of new facilities be completed within a reasonable time.<sup>83</sup> Nebraska argued the authority of the Commission exceeded the boundaries of state sovereignty because it relied on implied language.<sup>84</sup> Ultimately, the court did not accept this interpretation; it stated the authority of the Commission is not exclusive.<sup>85</sup> The authority to license disposal plants still lies within the state, but the Commission is required to regulate this action by obligating the state to process the licensing within a reasonable time.<sup>86</sup> In a similar vein, the court also rejected Nebraska’s claim that the Commission relied on implied powers not expressed in the agreement.<sup>87</sup> The court found to the contrary, deciding the provisions in the Compact “are limited but clear delegations of authority,”<sup>88</sup> and thus upholding them as valid.<sup>89</sup>

Nebraska’s next argument focused on the action taken by the Commission.<sup>90</sup> Specifically, it disagreed with the decision of the Committee to file this action to enforce the imposed deadline instead of taking some other course of response.<sup>91</sup> The only potential remedies for the Commission included an

<sup>74</sup> *Ruocchio v. United Transportation Union Local 60*, 181 F.3d 376, 382 n.8 (3d Cir. 1999). However, a court may consider any unique circumstances involved in making its decision and comment accordingly. *Id.* at 382-83.

<sup>75</sup> *Waste Compact Comm’n*, 187 F.3d at 987.

<sup>76</sup> This phrase originated in *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

<sup>77</sup> *See, e.g., Roe v. Wade*, 410 U.S. 113 (1975). Plaintiff had already given birth, yet the Court heard her claim as “pregnancy . . . will always be with us.” *Id.* at 125. This may have turned out differently had plaintiff been at the end of her child bearing years.

<sup>78</sup> *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 755 (1976).

<sup>79</sup> *National Iranian Oil Company v. Mapco International, Inc.*, 983 F.2d 485, 490 (3d Cir. 1992).

<sup>80</sup> *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

<sup>81</sup> *Waste Compact Comm’n*, 187 F.3d at 985. The court stated if so, it will “engage in plenary review of the district court’s interpretation”.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 986.

<sup>85</sup> *Id.*

<sup>86</sup> *Waste Compact Comm’n*, 187 F.3d at 986.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951).

<sup>90</sup> *Waste Compact Comm’n*, 187 F.3d at 986.

<sup>91</sup> *Id.*



injunction and a revocation of a member state's charter.<sup>92</sup> In agreeing with the district court, the court here found that once the Commission took its action in setting a deadline, the only possible recourse is the enforcement of that decision via the Compact.<sup>93</sup> The court then pointed out revoking a state's membership would be pointless because "it would do nothing to require the State to process the license within a reasonable time."<sup>94</sup> Revoking a membership would be akin to curing the disease by killing the patient; the remaining members of the Compact would have no disposal site and no plans for one, thus leading to more costly delays on behalf of the members.<sup>95</sup>

The court then sidesteps the possible issue of "the frothy mix called legislative history."<sup>96</sup> It decided a review of the Compact's legislative history was not required because the language of the compact is "straightforward and clear," and "no ambiguity justifying departure from the plain language of the Compact" existed.<sup>97</sup>

Lastly, the state challenged the time of the deadline set as unreasonable.<sup>98</sup> Ironically, the state had already taken the action required by the Commission. In the time pending between lawsuits, the state denied the licensing application.<sup>99</sup> Because of this, the court stated it could not give relief because the issue became moot.<sup>100</sup> Due to the deadline and licensing decision both passing, the court stated it could not give any specific relief and denied both parties' claims of a possible exception to the mootness doctrine.<sup>101</sup>

## V. COMMENT

The Court of Appeals demonstrated its wisdom by deferring to the Commission's decision. With great foresight in his decision, Judge Beam stated he "decline[s] the State's invitation into the frothy mix called legislative history."<sup>102</sup> He continued by limiting the judicial inquiry to the text of the compact.<sup>103</sup> The court required no further inquiry into the Compact other than its text. By ignoring the legislative history component of statutory interpretation, the court sidestepped a common pitfall of other benches.

Legislative history is full of snares. "Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."<sup>104</sup> Given the different types of possible legislative history, and the amount (or lack of) weight given to these different varieties, it seems no wonder many judges avoid examining it altogether.<sup>105</sup> Committee reports are a prevalent type of history that is frequently cited and given a great deal of weight. Some judges ignore all legislative history except for the reports from the individual committee that sponsored the bill in question.<sup>106</sup> This is not to say that committee reports do not have problems. There could be no committee report,<sup>107</sup> or the report itself could be ambiguous as the statute

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* See NEB. REV. STAT. § 71-3521 (1996)

<sup>94</sup> *Waste Compact Comm'n*, 187 F.3d at 986.

<sup>95</sup> The court finished its analysis of this issue by saying the compact's language makes revocation optional. *Id.*

<sup>96</sup> *Id.* at 987.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Waste Compact Comm'n*, 187 F.3d at 987.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (citing *Northern States Power Co. v. United States*, 73 F.3d 764, 766 (8th Cir. 1996) (stating a Court's analysis focuses on a statute)).

<sup>104</sup> *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment).

<sup>105</sup> Some of the history recorded actually did occur, but certain items like floor speeches and debates are often inserted by Congressional staffers. Some of individual states, like Missouri, do not even bother keeping track of history due to its amorphous nature. Nebraska apparently does, or the State would not have mentioned it in its brief.

<sup>106</sup> *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring in the judgment) (disregarding the use of all legislative materials except for committee reports).

<sup>107</sup> This occurs when a bill is amended on the floor of the House or Senate, as occurred with the Landrum-Griffin Act. See

and provide little to no help.<sup>108</sup> In addition to the hardline textualist view of Justice Scalia, other courts have followed the letter of the text as the law enacted without searching farther into legislative intent that may or may not exist.<sup>109</sup> The result flowing from this realist and perhaps slightly cynical view of the legislative process shows the courts, and in particular the Supreme Court, relying less on legislative history now than a decade ago.<sup>110</sup>

The court in this matter simply limited its review of an interstate agency's (the Commission) action and properly deferred to its decision.<sup>111</sup> In this fashion, the court appropriately applied the *Chevron*<sup>112</sup> test for an agency decision. As mentioned earlier, the test is composed of two parts: the first question a reviewing court asks is if Congress has spoken to and directly answered the issue in the statute. The second part, if Congress has not answered the issue at question, asks whether the agency's actions are a reasonable interpretation of the statute in question.<sup>113</sup>

The Commission, the overseers of the Compact, forms an interstate agency, one with limited and enumerated descriptions of power.<sup>114</sup> The powers are listed in the Compact as ratified by the Nebraska Legislature.<sup>115</sup> The Supreme Court has recently followed a trend in using the express language of a statute in validating or overturning an agency decision.<sup>116</sup>

The court in *Nebraska* acted correctly by showing the Commission administrative deference. Justice Scalia supports administrative deference to a large degree. In his opinion, when the statute is clear, *Chevron* rarely requires a court to accept a decision the court would not likely make, while if legislative history can be used to contradict the plain meaning of a statute, the more liberal interpretation

Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen and Packers v. Crowley, 467 U.S. 526 (1984).

<sup>108</sup> The report could be misleading, unclear, or heavily edited via the committee process. See JOHN KERNOCHAN, *The Legislative Process* 25 (1981). However, some Justices refuse to put any faith in even these reports:

I am confident that only a small proportion of the Members of Congress read . . . the Committee Reports in question, even if . . . the Reports happen to be published before the vote . . . . As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references . . . [are] inserted, at best by a committee staff member on his or her own initiative, and a worst by a committee staff member at the suggestion of a lawyer-lobbyist . . . and the purpose . . . [is] not primarily to inform the Members of Congress what the bill meant, . . . but rather to influence judicial construction.

*Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in the judgment). Scalia describes his doubts about committee reports also in *Hirschey v. F.E.R.C.*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (severely doubting a house that enacts a bill would also approve (or even knows about) the committee report of the bill).

<sup>109</sup> "The fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is. The propensity of judges to look past the statutory language is well known to legislators. It creates strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process. The potential for abuse is great." *Wallace v. Christensen*, 802 F.2d 1539, 1559 (Kozinski, J., concurring in the judgment).

<sup>110</sup> See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994) (relaying statistical analysis of statutory interpretation arguments before the Court). But see *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991) (other Justices explicitly rejecting Scalia's total lack of faith in legislative history).

<sup>111</sup> "[W]e find no ambiguity justifying departure from the plain language of the Compact. The Compact clearly authorizes the Commission to set a reasonable deadline for the processing of a licensing application." *Waste Compact Comm'n*, at 987.

<sup>112</sup> 467 U.S. 837 (1984).

<sup>113</sup> See note 55, *supra*.

<sup>114</sup> *Waste Compact Comm'n*, at 985. See also *State ex rel West Virginia v. Sims*, 341 U.S. 22, 31 (1951).

<sup>115</sup> NEB. REV. STAT. §71-3521, Article IV(m) (1996). The commission shall:

- (1) Receive and approve the application of a nonparty state to become a party state in accordance with Article VII;
- (2) Submit an annual report to, and otherwise communicate with, the Governors and the presiding officers of the legislative bodies of the party states regarding the activities of the commission;
- (3) Hear and regulate disputes which may arise between the party states regarding the compact;
- (7) Revoke the membership of a party state in accordance with Articles V and VII;
- (8) Require all party states to perform their duties and obligations arising under this compact. . . . ;
- (9) Take action as may be necessary to perform its duties and functions as provided in this compact.

<sup>116</sup> See *City of Chicago v. Envntl. Defense Fund*, 511 U.S. 328, 334 in which the Scalia majority used the plain meaning of the statutory text to overcome deference to the agency's interpretation. Justices Stevens and O'Connor relied on legislative history in their dissent. See also *Dole v. United Steelworkers of Am.* 494 U.S. 26 (1990) (Seven Justice plurality, including Scalia, using legislative history secondarily to statutory language in order to rebut a defense based on legislative history.)

of a statute might be forced on a court.<sup>117</sup> Yet, he still believes *Chevron* will endure because of its usefulness in reflecting the realities of government.<sup>118</sup>

The State made one final argument against bowing to the will of the agency. It argued that the Commission wielded too much power and took whatever steps necessary to carry out its duties.<sup>119</sup> The court was “unpersuaded by this rhetoric.”<sup>120</sup> Scalia referred to the “expertise” of the agencies in the issues involved.<sup>121</sup> He went to say that more than the agency’s familiarity and practical knowledge of a situation is required; reaching a more correct result is insufficient theoretical justification.<sup>122</sup> Instead, he believes the justification for agency deference comes from the separation of powers doctrine.<sup>123</sup> “The extent to which courts should defer to agency interpretations of law is ultimately ‘a function of Congress’ intent on the subject as revealed in the particular statutory scheme at issue.”<sup>124</sup> The major legacy of *Chevron*, then, laid in its presumption that agency discretion is meant in any cases of ambiguity.<sup>125</sup>

The court also showed restraint in dealing with the issue of mootness in the present matter. The particular issue of the deadline and licensing decision was moot because the date set by the Commission had already passed.<sup>126</sup> The court simply saved its time and breath; all Nebraska wanted was a declaration that the deadline was indeed unreasonable and invalid.<sup>127</sup>

Neither one of the exceptions to mootness applied to the present action. The deadline set by the Commission had come and gone; it would be impossible for that particular moment of time to arrive again. There was no class action, neither was there any voluntary cessation of the action. The parties argued the third major exception to mootness: collateral consequences. The court found this argument unconvincing.<sup>128</sup> The collateral consequences exception is usually applied only to criminal cases after a sentence had been completed.<sup>129</sup> Interestingly enough, the court gave one argument propounded by neither party.<sup>130</sup>

In sum, the court made a good decision that keeps the interstate compacts accountable to their own internal audit provisions. To allow otherwise could create a backlog that would leave radioactive waste stockpiling and could possibly lead to a degeneration of the compacts back into the melee era from the 1960’s and 1970’s.<sup>131</sup>

The court in the present matter also reached the correct decision with regard to state sovereignty. Nebraska’s concern is losing some of its individualism.<sup>132</sup> However, Nebraska ignores, and the court correctly realizes, “[b]y entering into a compact, . . . a state surrenders pro tanto a portion of its own

<sup>117</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 521 (1989).

<sup>118</sup> *Id.*

<sup>119</sup> *Waste Compact Comm’n*, 187 F.3d at 987 n.7.

<sup>120</sup> *Id.*

<sup>121</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 514 (1989).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 516.

<sup>124</sup> *Id.* (quoting *Process Gas Consumers Group v. United States Department of Agriculture*, 694 F.2d 778, 791 (D.C. Cir. 1982) (citation omitted)).

<sup>125</sup> *Id.*

<sup>126</sup> *Waste Compact Comm’n*, 187 F.3d at 987. The court reached this decision even though both sides argued the issue was not moot due to possible collateral consequences in a separate lawsuit. *Id.*

<sup>127</sup> *Id.* Even though the court did not address the issue, it did mention in a footnote that it believed the decision was reasonable. *Id.* at n.8.

<sup>128</sup> *Waste Compact Comm’n*, 187 F.3d at 987.

<sup>129</sup> See *Sibron v. New York*, 392 U.S. 40, 57-58 (1968). A plaintiff after serving a sentence could face a great many collateral consequences including possible enhancement for future crimes, a loss of job opportunities, and the general scorn of being a convicted felon. *Id.*

<sup>130</sup> The court, in finding the deadline issue moot as the time had already expired, believed the issue concerning the authority of the Commission over the State to be capable of repetition yet evading review. Schedules come and go, but a close relationship based on power is ongoing; therefore, it is likely these two parties will bump again sometime in the future. *Waste Compact Comm’n*, 187 F.3d at 987 n.9.

<sup>131</sup> Newberry, *supra*, note 19, at 14 (the concept of holding technology hostage).

<sup>132</sup> *Waste Compact Comm’n*, 187 F.3d at 985.

sovereignty.”<sup>133</sup> Nebraska should not be allowed to set its own terms in the construction of the disposal facility. Such asymmetrical action on the part of the state hinders the authority of the compact’s administration.<sup>134</sup> Once specific authority parameters are set by an interstate compact, the members should establish the provisions of the compact above any petty state differences, relying on the simple logical provision of the needs of the many outweighing the needs of the few.

The deadline limit imposed by the Commission was reasonable in and of itself. It had been over well over a year since the Commission established the deadline.<sup>135</sup> This is overlooking the fact the initial project, due to delays caused by Nebraska’s amendments to the licensing application, “began to stretch out over several years, costing millions of dollars more than anticipated.”<sup>136</sup> The Commission gave Nebraska every chance to finish the disposal facility’s licensing. But the court correctly noted “The Commission’s authority is a logical extension of the need for oversight to ensure that a state does not drag its feet indefinitely and thus frustrate the purpose of the Compact.”<sup>137</sup> The deadline itself ran from August 1996 to January 1997.<sup>138</sup> That allows the state about 150 days to make a decision. It did not require something unreasonable like the entire facility be constructed in that time. Such limits are in line with what other courts have deemed a “reasonable time”.<sup>139</sup> To allow a state to shuffle along without taking any decisive action would force other states to send their low-level waste to disposal sites in other compact regions at much higher prices.<sup>140</sup> This could lead to some sites, perhaps the one in South Carolina again, as becoming overused and maybe shorten the disposal facility’s lifespan. It could require new facilities, leading to waste backlog and storage in the interim.<sup>141</sup>

## VI. CONCLUSION

In sum, the court wisely deferred to the Commission’s express authority. To do otherwise would alter the binding nature of interstate compacts and increase a possible backlog of low-level radioactive waste among other states.

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<sup>133</sup> *United States v. Bekins*, 30 4 U.S. 27, 52 (1963). *But see* *New York v. United States*, 505 U.S. 144, 183 (1992) (stating in dicta that agreements between states under the LLRWA do not automatically rise to the position of agreements requiring Congress’ approval; without this approval, the interstate compacts lack the force of federal law).

<sup>134</sup> *See Delaware v. New Jersey*, 222 A.2d 794, 799 (Del. 1985) (holding that a unilateral Delaware statute cannot be applied to a compact with New Jersey because “[t]he power over . . . employees thus placed in the hands of the [interstate compact] Commissioners may not be impaired or diluted by the unilateral action of one member of the compact. . . . (citation omitted). [I]t would weaken the powers of the [interstate commission] Authority in the field of employer relations, including the fixing of terms of employment and the handling of employee grievances.”).

<sup>135</sup> *Waste Compact Comm’n*, 187 F.3d at 985.

<sup>136</sup> *Id.* at 984. The proposed building plans were submitted in 1990. This action was brought in late 1996. This appeal, brought in late 1998, occurred about a year after the passing of the Commission’s deadline.

<sup>137</sup> *Id.* at 986.

<sup>138</sup> *Id.* at 984.

<sup>139</sup> *See Caswell v. Califano*, 583 F.2d 9 (1st Cir. 1978) (Title II social security action having a 90 day time limit); *Barnett v. Califano*, 580 F.2d 28 (2d Cir. 1978) (holding the same); *White v. Matthews*, 559 F.2d 852 (2d Cir. 1977) (disability claimants entitled to hearing and decision within 120 days).

<sup>140</sup> Congress expressly gave the LLRWA the right to allow states to discriminate between others.

<sup>141</sup> *But see Baltimore Gas and Electric Co. v. National Resources Defense Council*, 462 U.S. 87, 108 (1983) (assuming permanent storage of nuclear waste would not have a significant environmental impact). “The decision means that the environmental effect of nuclear waste do not have to be considered each time a new plant is given clearance.” Terry Moorehead Dworkin, *Fear Of Disease And Delayed Manifestation Injuries: A Solution Or A Pandora’s Box?*, 53 *FORDHAM L. REV.* 527, 540 n.8 (1984).