

Report Finds Activist Judges Are Threatening Environmental Protections, Disregarding Judicial Fairness

Green Groups Pledge Scrutiny of Bush Nominees

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Washington – As Senate hearings get under way for President Bush's judicial nominees, a study of federal court rulings over the past decade reveals a pattern of anti-environmental judicial activism that threatens long-standing environmental protections. In response, leaders of the nation's top green groups announced a coordinated effort to begin monitoring President Bush's nominees for the federal bench.

An analysis of federal rulings from the last 10 years found that a group of highly ideological judges – most appointed by former Presidents Reagan and Bush – has disregarded norms of judicial conduct to shape a new judicial philosophy that threatens core environmental protections. The analysis, conducted by the Alliance for Justice, Community Rights Counsel and the Natural Resources Defense Council, was released today at a press conference on Capitol Hill.

A dozen national environmental organizations, led by **Earthjustice**, also called on members of the U.S. Senate to consider the views of nominees on issues related to environmental protection, including citizens' access to the courts. This is the first time environmental organizations have mounted a national effort to scrutinize the records of those named to the federal bench.

"In pursuit of anti-environmental activism, judges have repeatedly ignored basic principles of judicial fairness to shut citizens out of the courthouse and create new rights for polluters," said Greg Wetstone of the Natural Resources Defense Council. "We will be urging our senators to look for judges who won't ignore the rule of law and substitute their personal views for democratically adopted environmental laws."

"This pattern of anti-environmental rulings is disturbing to anyone concerned about protecting our environment," said Nan Aron of Alliance for Justice. "These judges are striking down long-standing safeguards for our air, water and land, even though these laws enjoy overwhelming support from the American people."

The findings are detailed in the report, "**Hostile Environment: How Anti-Environmental Federal Judges Threaten Our Air, Water and Land.**" According to Community Rights Counsel's Doug Kendall, one of the report's authors: "Our analysis found that activist federal judges are developing a broad array of questionable legal theories to try to justify the results they want at the expense of environmental protection."

There are currently 112 vacancies on the federal bench, giving President George W. Bush an immediate opportunity to significantly shape the federal judiciary. Bush has named as "model" judges Supreme Court Justices Antonin Scalia and Clarence Thomas – both cited in the report

for promoting anti-environmental activism.

Environmentalists expressed concern that if Bush's appointees follow in the footsteps of his father's and Ronald Reagan's, they will dismantle federal statutes passed by Congress and further limit the ability of citizens to file suit against polluters.

"The judicial appointment process is rarely thought of as an environmental issue, but it should be," said Buck Parker of Earthjustice. "Federal judges play a critical role in the implementation and enforcement of the laws that protect our nation's clean water, clean air, communities and special natural places. Environmental groups and concerned citizens expect that the judges appointed to the federal bench will uphold rather than undermine the important environmental laws passed by Congress."

Legal areas under assault by activist judges include:

- **The Commerce Clause.** Anti-environmental activists are undermining the Constitution's Commerce Clause as the source of Congress's authority to enact safeguards to protect our air, water and land. The Supreme Court recently invalidated protections for millions of acres of lakes and wetlands and suggested that Congress may lack authority to enact new safeguards. In another case, an Alabama judge declared that a toxic waste cleanup was a local matter, not subject to federal control.
- **"Standing."** Anti-environmental activists are inventing novel theories limiting the rights, or "standing," of citizens to go to court to prevent environmental damage. Under this view of standing, advanced most notably by Justice Scalia, timber companies, mining conglomerates and manufacturers have open access to the courts to challenge regulations they dislike. Citizen groups, on the other hand, are excluded, leaving widespread environmental harms unaddressed.
- **Takings Clause.** Anti-environmental activists are rewriting the Constitution's Takings Clause in a way that requires taxpayers to pay corporations for complying with environmental protections. In recent cases, courts have required compensation for laws restricting mining in the Everglades and the use of powerful motorboats in wilderness areas. The result is taxpayers must pay polluters not to pollute.
- **The 11th Amendment.** Anti-environmental activists have twisted the Constitution's 11th Amendment to excuse states from complying with federal environmental laws. In one recent case, an appeals court used the 11th Amendment to allow mining companies in West Virginia to continue "removing" mountaintops by blasting them off and dumping their waste into nearby streams.
- **Statutory Construction and Administrative Law.** Anti-environmental activists have applied a double standard to rule against the environment on questions of statutory interpretation and administrative law, such as determining the intent of Congress or whether an agency action has been adequately explained and corroborated. Over the past decade, judges have used this double standard to undermine environmental protections under the Clean Air Act, Clean Water Act, Endangered Species Act and other laws.