

Report Finds Anti-Environmental Activism by Federal Judges

By Cat Lazaroff, Environment News Service

WASHINGTON, DC, July 19, 2001 (ENS) - As the U.S. Senate and the legal community debate whether ideology should be a consideration in judicial confirmations, a new analysis finds a decade long pattern of judicial activism by judges ideologically opposed to environmental protections. In response, leaders of the nation's top environmental groups have announced a coordinated effort to begin monitoring President George W. 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 Ronald Reagan and George 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, 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," added 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 now 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 President 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."

Environmental areas now under legal assault by judges include:

- The Commerce Clause. Anti-environmental activists are undermining the Constitution's Commerce Clause as a source of Congress's authority to enact safeguards to protect the air, water and land. Under the Commerce Clause, resources with interstate value, such as moving waters and migratory birds, can be protected in order to protect their economic values, such as recreation dollars.



The Supreme Court recently invalidated protections for millions of acres of isolated 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." 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 Antonin 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 and individuals 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. In May, a federal court ruled that water diversions to benefit endangered species constitutes a taking of property, and that water customers must be compensated.



Earlier this month, the U.S. Supreme Court ruled last week that landowners can sue the federal government for compensation when environmental regulations reduce their ability to profit from their properties - even if the restrictions were in place before they bought the property.

- The 11th Amendment. Activists have interpreted the Constitution's 11th Amendment, which protects the sovereign powers of the states, as excusing 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 the practice of mountaintop removal mining, in which the rock shielding

seams of coal is blasted off using explosives. The resulting debris is deposited in nearby valleys and 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.

Members of the Senate Judiciary Committee vowed today to push for greater scrutiny of judicial nominees. Speaking at today's press conference, Senator Russell Feingold, a Wisconsin Democrat, called the new report a "valuable tool" for members of the committee.



"As a senator with a deep commitment to environmental protection, I strongly believe that the environmental views of public servants must be fully vetted and evaluated," Feingold said. "I also believe that the Senate, in fulfilling its constitutional role of providing advice and consent on nominees, should apply the highest standards and the strictest scrutiny to judges, and certainly to Supreme Court justices, who will serve for life."

Senator Edward Kennedy, a Massachusetts Democrat, responded to the report with a statement.

"In recent years, the Supreme Court has issued decisions that undermine some of our country's most important laws, including ... environmental legislation enacted by Congress," wrote Kennedy. "Whether provisions of the Clean Air Act, the Clean Water Act, the Americans with Disabilities Act, or the Age Discrimination in Employment Act, the tendency to undermine federal statutes is clear and worrisome."

In the first coordinated effort by environmental groups to monitor judicial nominees, 12 national organizations also called on the U.S. Senate to consider the views of nominees on issues related to environmental protection.