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THE ENVIRONMENT AND THE JUDICIARY: A NEED FOR CO-OPERATION OR REFORM?

By George P. Smith, II*

I. INTRODUCTION: PROPOSALS FOR AN ENVIRONMENTAL COURT

The recent increase in environmental litigation, the detailed specialized legislation which has been enacted on the subject, the highly sophisticated technology involved in new methods of pollution control, and the increasing involvement of the judiciary in reviewing the beneficial and adverse effects of ongoing programs have resulted in a number of proposals for the establishment of an independent environmental court. Such a court, it is claimed, would be able to develop a technical expertise analogous to that of the Tax Court, an expertise which is necessary for the just resolution of the complex environmental issues presented by current litigation.

The impetus for one such proposal was supplied by the Supreme Court’s refusal, in 1971, to exercise its original jurisdiction in Ohio v. Wyandotte Chemicals Corp., because of complex technical questions in which it had no expertise. This decision has been cited as a justification for the development of a special environmental court which would have sole jurisdiction over environmental lawsuits. Whatever potential there may be for developing environmental expertise in the lower Federal courts, it can never be realized, according to this argument, because of the pressure of increasingly crowded dockets. The alleged complexity of environmental cases is said to create a need for uniformity and consistency similar to that created by the Federal tax system. Finally, it is asserted that excessive delays in preparing and submitting scientific evidence at the administrative and judicial levels hinder the entire judicial decision-making process, a defect which could be remedied by the creation of a specialized court.

In the same year in which the Wyandotte decision was handed down, the President’s Advisory Council on Executive Organization came out with a proposal for the establishment of a new Administra-
tive Court, whose functions would bear some similarity to those of
the environmental court in the proposal discussed above. The pur-
pose of the Administrative Court would be to review the determina-
tions of several agencies involved in the proposed reorganization of
the independent regulatory commissions, specifically the proposed
Transportation Regulatory Agency, Federal Power Agency, and Se-
curities and Exchange Agency.

One strong supporter of an administrative court system has been
Judge Henry J. Friendly. According to Judge Friendly's design,
such a system would discard the present review of administrative
action by the ordinary courts, and substitute instead an entirely
new set of tribunals modeled on the French system of administrative
courts which culminates in the Conseil D'Etat. Together with this
proposal, the Judge has suggested that it might well be desirable to
have a Court of Environmental Appeals which would promote deci-
sional uniformity in the field and develop an expert staff to handle
unfamiliar problems, thus lifting the complexities of environmental
law from the shoulders of the general courts.

Judge Friendly's proposal has not been universally applauded. In
a recent article, Judge Harold Leventhal has pointed to several
serious weaknesses in it. First, there is the danger that the selec-
tion of judges would become a political event, with the possibility
that one or the other interest group might dominate the choice and
thus "capture" the court. Second, Judge Leventhal asserts that a
generalist is required in the judicial reviewing process to ensure a
balance which is coupled with tempered restraint, for it is only the
generalist who can penetrate scientific data in order to arrive at a
principled decision which transcends the immediate factual situa-
tion. A specialist, on the other hand, tends to direct his attention
almost entirely to his own area of expertise, a tendency which dis-
torts the otherwise objective attitude which he might bring to bear
on environmental issues. Arguing against an activist role for the
courts in environmental matters, on the grounds that recent federal
legislation directs implementation through administrative rulemak-
ing and the issuance of orders, the Judge would limit the role of
the courts in this area to a review of the initial actions of executive
officials and independent regulatory agencies. Together with these
agencies, he sees the courts as forming a "partnership" to further
and protect the public interest. In cases where special objective
expertise is needed, Judge Leventhal would advocate the more fre-
quent use of expert witnesses, Masters, or even the appointment of
full-time scientific experts to serve the appellate courts in the review process.\footnote{15}

The issues raised by these and other similar proposals prompted Congress to authorize, in Section 9 of the Federal Water Pollution Control Act Amendments, a study of the feasibility of establishing an environmental court which would have exclusive jurisdiction over environmental matters.\footnote{16} This mandate was devoid of any hint as to the shape and functions of the proposed court,\footnote{17} and made no attempt to define the contours of an "environmental issue". An examination of the legislative history of the Act is no more helpful in illuminating the Congressional intent.\footnote{18} The study\footnote{19} was carried out by the Land and Natural Resources Division of the Justice Department which, because of the absence of concrete guidelines and of a definition of an environmental issue in the statute, was given the responsibility for transforming the broad, abstract mandate into concrete form. Unfortunately, the study itself, although it does present guidelines for the court, never defines an environmental issue; and the lack of such a definition remains a central problem in understanding and analyzing the findings of the report.

The remainder of this article will deal with the results of that study, summarizing the methods employed as well as the specific findings. Since the study does not recommend a separate environmental court as a solution, an alternative approach aimed at sharpening the contours of environmental law through education of the judiciary will be discussed briefly. It is not the aim of this article to present a full-blown conceptual alternative to the idea of an environmental court, but rather to suggest further areas for consideration.

II. History and Method of the Study

The approach of the Justice Department study was to explore the feasibility of establishing an environmental court system, compare it with the existing judicial system, and make recommendations as to whether a specialized court could better handle environmental litigation than the existing system.\footnote{20}

A. Analytical Approach

In order to transform the abstract mandate into concrete recommendations, the study developed three models of specialized court systems as analytical tools, and presented these models to various private groups and Federal agencies known or believed to have an
interest in environmental problems, for comments.\textsuperscript{21}

Briefly, the first model was an environmental court which would hear environmental cases generally. It would be fashioned along the lines of the Court of Claims in that it would have original jurisdiction, handled by a group of commissioners or trial judges, and appellate jurisdiction consisting of a panel of judges. The court would have exclusive jurisdiction over environmental cases. Exclusive appellate jurisdiction would exist as of right from the decisions of its trial court, as well as from environmental orders of federal agencies.

The second model was an environmental court whose sole function would be to review orders of federal agencies affecting the environment. It would consist of a panel of judges, and would have exclusive jurisdiction to review such administrative orders.

The third model also consisted of a panel of judges having exclusive jurisdiction to review orders of designated federal agencies, or of specified types of matters handled by such agencies. It differed from the second in that the second model revolved around a definite institutional structure—i.e., a court—while the third involved merely a loose or unstructured grouping of judges.

For each model it was assumed that the court would have exclusive jurisdiction; that once jurisdiction was exercised the court would have exclusive jurisdiction to resolve or review all related legal issues, the environmental court’s decisions being reviewable only by the Supreme Court upon certiorari; that they would be constitutional courts (under Article III) rather than legislative courts; and that there would be no change in the scope of judicial review now available in the federal courts.\textsuperscript{22}

\section*{B. Empirical Approach}

Although the model systems provided an analytical approach to the problem, the study also collected empirical data in order better to understand the area of environmental litigation. The data was collected by soliciting comments from federal agencies and non-governmental organizations.\textsuperscript{23} The following information was sought from each organization:

1. Its total litigation experience in terms of new cases since January 1, 1970.
2. The percentage of such cases having significant environmental issues.
3. The percentage of such cases having minor or tangential environmental issues.
4. Its opinion of the ability of the courts generally to handle technical environmental issues.
5. Its preference among the three model court suggestions.
6. Any suggested alternatives it might have to the proposed models.²⁴

C. Definition of an Environmental Case

It is undisputed that the number of environmental cases has increased recently, but the initial question is what exactly constitutes an “environmental case”. This term remains undefined throughout the study, yet it is critical to an accurate analysis of the empirical and analytical data. How can an agency speak of the percentage of its cases having significant environmental issues when the term “environmental issue” remains undefined?²⁵ How can one discuss the practicality of an environmental court having exclusive jurisdiction over environmental cases, when one is not really sure what constitutes an environmental case? The statistical problems of the report and, more importantly, the jurisdictional problems of the environmental court are so clearly present throughout the study as to give it an air of fantasy. Attempting to study the feasibility of an environmental court system without first defining what is an environmental issue and an environmental case, is putting the proverbial cart before the horse.

D. Jurisdiction of an Environmental Court

A serious jurisdictional problem in setting up an environmental court follows from this definitional dilemma. Since such a court would have exclusive jurisdiction over environmental cases, the definition of an environmental case would have to be concrete and precise.²⁶ “The fact is that nearly any controversy may have an environmental aspect to it, especially if it involves actions of the Federal Government,”²⁷ and almost any environmental case would also involve non-environmental issues. Therefore, the lines to be drawn between environmental and non-environmental cases for jurisdictional purposes are ones of degree rather than kind, and create a very serious potential for forum-shopping. If a case would be deemed environmental or non-environmental on the basis of its pleadings, an attorney could choose to emphasize the environmental or non-environmental aspects of the case, depending on whether or not he felt it desirable to have that particular case decided by the special court. The decisions of the special environmental court...
would be studied to determine whether or not it would be advisable for the plaintiff to invoke the jurisdiction of that court. Such forum-shopping would inhibit the development of any definable and consistent body of environmental law. This problem is the direct result of the lack of any definition of an "environmental case," and the requirement of exclusive jurisdiction of the environmental court over all environmental cases.

A corollary to this problem is the situation in which an environmental court might gain jurisdiction over a case that involved environmental issues only tangentially. The main issue might not be environmental, but because of the nature of the complaint, the case would fall within the exclusive jurisdiction of the environmental court. It is assumed that the court, once jurisdiction is invoked, would have jurisdiction to decide all related issues. As the Council on Environmental Quality observed, this could lead to the establishment of two lines of precedent between the environmental court and the federal district courts on similar issues. "The result would be that separate lines of precedent would grow up on important issues that often arise in environmental cases, such as questions of administrative law."

E. Growth of Environmental Litigation

The study indicated that although environmental litigation has had a dramatic impact upon the government and upon society generally, it has not had a very significant impact upon the total case-load of the federal courts. "As of June 30, 1972, there were 101,032 civil cases and 25,483 criminal cases pending in the U.S. district courts. In addition, there were 9,939 cases pending in the courts of appeals. At the same time, there were approximately 860 cases pending before those courts which could be identified as environmental. These constitute, then, less than seven-tenths of one percent of the total case load." In addition, the responses of the agencies solicited indicated that the proportion of the total agency litigation represented by environmental litigation was small. Two exceptions to this pattern were the Environmental Protection Agency and the Atomic Energy Commission. The figures demonstrate that even environmentally active agencies are involved in much non-environmental litigation. Also, a sampling of non-environmental agencies indicates that the percentage of cases with environmental issues is insignificant. The study thus suggests that environmental litigation cannot be seen as a serious burden on the existing court
system, nor has it had a numerically significant impact on the total agency litigation workload. These statistics appear to comprise all environmental cases, those whose central issue is environmental, as well as to those in which environmental considerations are only tangentially involved. Assuming, arguendo, that a court with exclusive jurisdiction over environmental cases would handle only the former category (i.e., where the central issues are environmental), it appears that only a very small percentage of the federal court workload would be alleviated thereby. The environmental court, therefore, does not seem to be any solution to the increasingly heavy caseload of the federal courts revealed in the Freund report.

III. PROBLEMS OF AN ENVIRONMENTAL COURT

The agencies solicited in the study were asked whether the proposed environmental court could handle environmental litigation better than the existing court system, and the reasons for their conclusions. The comments given by the agencies outline a number of problems, in addition to the jurisdictional ones cited above, which such a specialized court would encounter.

A. Lack of Institutional Strength

While the federal court system is a central institution indispensable to our system of government, other specialized court systems have existed contemporaneously with it, for instance the Tax Court and the Court of Claims. In order for these specialized courts to survive and succeed, it has been necessary for them to develop "institutional strength." Institutional strength is initially derived from active support for the establishment of such courts by the specialized bar interests who would be involved in practice before them. This initial support is vitally important for the subsequent evolution of "institutionalized" strength, following the establishment of the court. Once established, the court can draw on this strength in order to develop its own character.

The comments of the agencies solicited reflect their lack of enthusiasm for the proposed environmental court. The emphasis of the comments was not on problems the court might create or suffer from, but rather on the lack of any need for its establishment in the first place. The view of the Environmental Protection Agency was typical: "We see no need for the establishment of a court or a court system . . . we think it would be a mistake to view environmental matters as a specialized and isolated field of law." The report
expresses the prediction that without the necessary institutional strength, the court would not be able to withstand the pressures likely to be thrust upon it by special interest groups.\textsuperscript{42}

\textbf{B. Judicial Difficulties—Rigidity and Inefficiency}

Another concern of the agencies, expressed eloquently by the Conservation Foundation, is the possibility that the judges may develop rigid approaches to the issues and become partial to certain parties involved in environmental litigation. The Conservation Foundation predicted that the appointment of judges to deal exclusively with environmental issues would involve more political pressures from interest groups than the appointment of judges to decide a variety of issues, and because these judges would decide only environmental cases they would lose the broad perspective so necessary to the decision of an environmental case. The Conservation Foundation concluded that the result would be "the loss of perspective, of broad experience, of learning and of intellectual cross-fertilization which must necessarily result from the segregation of environmental litigation . . ."\textsuperscript{43}

One of the principal arguments in favor of the establishment of the environmental court is that it might be more efficient in dealing with environmental litigation. A part of this efficiency would be the ability to respond quickly to environmental complaints—using that word in its technical, pleadings sense. Yet the study concludes that just the opposite result would occur with a special court. It argues that because of the numerically small caseload of the court, it would be reasonable to assume that the court would be centrally located, rather than spread throughout the country as are the federal district courts. If it is true that much environmental litigation arises out of conflicts of local concern, having significant localized repercussions, it would seem that a central court would be less accessible to most plaintiffs, and to that extent less responsive to their concerns. The net result would be the actual discouraging of local plaintiffs from bringing suit in the central environmental court, and those who did would have to shoulder, at least initially, the increased cost of such litigation attributable to increased transportation expenses for witnesses, etc. Efficiency might also be diminished by the lack of knowledge of local affairs and factual settings on the part of the judges. "As to the speed with which the court could act, the Conservation Foundation stated that local judges frequently have direct knowledge of many local situations and as a result could act more quickly and with confidence in emergency situations."\textsuperscript{44}
C. Criminal Jurisdiction

A consideration closely related to the efficiency and jurisdictional problems of the proposed environmental court is the question of whether or not it would have criminal jurisdiction. Because of constitutional requirements, any criminal trial would have to be held before a jury in the state where the crime was committed. Therefore, for a small percentage of cases the criminal environmental court would duplicate the existing district courts, with the obvious result of an unwarranted duplication of judicial effort. It might be suggested that the environmental court have jurisdiction over civil but not criminal suits. However, a closer examination of this possibility shows it to be unfeasible. For instance, a significant number of federal environmental statutes provide for both civil and criminal enforcement, and if the criminal enforcement were left to federal district courts, there would be two distinct lines of authority interpreting the same act.

D. Need for Expertise

The proponents of an environmental court rely most heavily on the theory that a special court is necessary to bring needed expertise to the complex technical issues in environmental cases. However, the report found that in the opinion of the environmental agencies and groups solicited, courts now in existence were able to handle all technical issues adequately. A variety of explanations were offered for these opinions: that it has not been demonstrated that a judge needs detailed technical knowledge to perform his function; that environmental issues involve a mix of statutory interpretation, policy and fact that are no different from issues which arise in all areas of civil litigation; that the scope of review is usually limited to difficult procedural and legal questions; and that the courts have not readily substituted their judgment for that of governmental agencies. Furthermore, there are methods available to courts for the resolution of complex technical problems which may be central to a decision. The court may call upon parties and their experts to explain the matters involved; it can require that each party submit detailed proposed findings of fact; it can ask each party to submit briefs on troublesome points; it can appoint special masters or advisory juries.

There is also concern that the call for an environmental court to handle expertly the technical problems involved in environmental litigation might have an adverse affect on resolution of environmen-
tual cases. Specifically, it is argued that an environmental court would concentrate on environmental issues in cases that involve many other important, if not crucial, considerations. This overemphasis on environmental issues would not be present in a general court which would weigh various competing factors. The judiciary, skilled in weighing various factors in order to reach a decision, is best suited to deal with complex environmental cases because of this ability to balance various interests. In order to facilitate this process, it would be desirable to educate the judiciary in the complexities of environmental law so that this balancing process can be accomplished with more efficiency. Thus, instead of creating a special court to deal exclusively with the as yet undefined body of cases called “environmental,” it would be far more effective to educate the judiciary in the nuances of environmental issues so that they can resolve cases involving these issues with more facility.

E. Judicial Review

The agencies expressed the added concern that the environmental court might tend to become a superagency, freely substituting its judgment for that of the administrative agencies. The courts usually will not overturn an administrative determination unless it is arbitrary and capricious or unsupported by substantial evidence. As stated by the Environmental Protection Agency, “... the expert court could move in the direction of a superagency, usurping functions properly delegated to the agencies. This would be particularly so if the court were to regard itself as an expert at least equal to that of the agency.”

F. Uniformity of Law

Lastly, where it might be argued that an advantage of the court would be to provide uniformity of law in environmental litigation, the agencies expressed the view that at this stage, such uniformity would not be advantageous. Because of the many unresolved legal issues in the area, as well as the undefined contours of the body of environmental law, it is important to have various approaches to the same issue by lower courts. In addition, it was suggested that the need for uniformity might better be served through legislation than through judicial action. The impact of legislation in the environmental area is a recent phenomenon. Since 1969, Congress has enacted NEPA, the 1970 Amendments to the Clean Air Act and the 1972 Amendments to the Federal Water Pollution Control Act, all
of which are viewed as landmarks in the area of environmental legislation. The impact of these new statutes has not been to define and resolve environmental issues, and thus to create a uniform body of law. Because of the difficulty of defining and outlining environmental matters, the statutes are of necessity broad, leaving a great deal of interpretation and discretion in the hands of the agencies and the courts which administer them. In discussing NEPA, the Department of the Navy stated, “while a single environmental court might gradually evolve a workable set of guidelines through a judicial decree, it would be a far more productive effort to amplify the statute so that the duties and obligations of the agencies are set forth in greater detail and with greater clarity.” The ability of legislation to define concisely the guidelines to follow in resolving an “environmental issue” has yet to be demonstrated. However,

Nothing about the new generation of detailed and specialized environmental legislation raises serious questions about the competency of the existing federal courts to function effectively in their implementation or suggests any particular advantage to be gained through assignment of the necessary judicial functions to a specialized court. . . To the extent these new statutes place additional responsibilities on the courts, it will be because the added administrative duties create a greater likelihood for judicial challenges of agency performance.

IV. Conclusions

The study strongly recommends that a special environmental court not be established at this time. It addressed itself to the main arguments advanced by the proponents of the court, i.e. greater efficiency, alleviation of the workload of the federal system and the need for expertise, and concluded that an environmental court would not be the recommended alternative. This conclusion will deal with the question the report did not address, that is, is there an alternative to an environmental court which will satisfy the demands environmental litigation presently places upon our system?

Before this question can be answered, an “environmental” case must be defined. If such a definition can be developed an alternative solution may be more clearly suggested.

A. Legislative Definition

It can be suggested that environmental issues may be defined legislatively, by the enactment of statutes which resemble the Internal Revenue Code more than they do NEPA. NEPA is written in
broad and general terms calculated to invite interpretational dispute,\textsuperscript{63} while the Internal Revenue Code, adopted to deal with matters involving technical expertise of at least comparable magnitude and complexity to that required in environmental litigation, is specific and not subject to many varying interpretations. The Internal Revenue Code has been clarified by the Regulations which provide readable interpretations and illustrations of the difficult sections of the Code, while no such parallel is as yet available to aid in the interpretation of NEPA.

It is argued that complex environmental matters tend to take significantly more judicial time per case than other matters and that there is a definite trend toward an increasing volume of environmental cases.\textsuperscript{64} It is therefore apparent that if there were specific environmental statutes, they might reduce the amount of time spent on each case, or at least help minimize the volume of interpretative disputes on environmental matters. Some states have already attempted to define an environmental cause of action legislatively,\textsuperscript{65} although the language is broad and, therefore, often does not delimit the area with any degree of certainty. In fact, the sampling of state statutes presented in the report appears to increase the present problems of ambiguity and vagueness rather than alleviate them. By defining the environmental cause of action broadly and by legislatively relaxing the standing requirement, the statutes increase the volume of environmental cases without creating any new guidelines or helping to maintain the present level of efficiency. One trend in these statutes has been to give the state courts considerable flexibility in resolving the issues. Therefore, it would seem that through legislation the states have helped increase the volume of environmental litigation and placed an increased burden on the judicial system. One must ask whether this trend is necessary in the area of environmental litigation, or is NEPA, with its broad policy statements, the best approach in this area?

As a point of comparison, it must be remembered that the Internal Revenue Code was enacted to enforce the policy of a constitutional amendment and that the tax regulations are really a legislative product, generally subject to legislative whim. The body of "environmental law", on the other hand, is, at best, a conglomeration of different problem areas with one similarity: their resolution involves some relationship between human action and the natural environment, whether or not that relationship is the deciding factor. What we find when we look at "environmental law," therefore, is a
balancing of competing interests. When one of these interests concerns the environment, a case is considered to be environmental litigation. This balancing process is no different from the process involved in the resolution of most judicial questions. To attempt to define by specific statutory language a term such as “environmental issue” or “environmental case” would merely complicate the task of the courts, and reduce the ability of judges to grapple effectively with the application of basic legal concepts to equally basic legal problems within an environmental context.

Obscure matters of scientific theory are not the typical issues presented in a so-called environmental case. Instead, the most common or central questions are those which arise from evidentiary or procedural matters. A typical question might be: “What do the facts show the effect of a given factor (concentration of a pollutant or use of a control method) to be on a given variable (human health, or the survival of certain forms of wildlife)?” Inevitably, the court will be forced to balance the equities of the particular case, as it does in deciding any other type of case.66

B. Judicial Definition

The judiciary is the only branch of government capable of this case-by-case balancing procedure, and thus it is within this branch that any solution to the problems of environmental law must be based. This is not to say that in the future legislative alternatives will not be successful, but merely that at the present time a legislative alternative appears premature, since it would inject an unnecessary rigidity into a body of law which is now in a state of development and flux. A special environmental court having been rejected as a solution, another possible approach is the “re-education of federal and state judges to the nuances of this new commercially packaged body of law, popularly termed environmental law.”67 For present purposes this alternative is the most advantageous from the point of view of increasing efficiency and uniformity, and especially of facilitating the definition of environmental law. Only by educating the judiciary in the complexities of this new area can we begin to unravel these complexities effectively, and to formulate a definitive approach to environmental problems.

Unquestionably, the most direct way to undertake the business of educating the judiciary is through the establishment of centers for judicial education along the lines of that established by Indiana University’s Indianapolis Law School.68 There are also other meth-
ods presently open for exploration and development. The National College of the State Judiciary, the Institute for Court Management in Denver, the American Judicature Society, the Federal Judicial Center in Washington, the American Academy of Judicial Education, the Northern American Judges Association, the National Association of Attorneys General, the American Bar Association, together with the state bar association continuing legal education programs, are but a few of the most significant tools for training judges and lawyers alike in the parameters of environmental litigation.

The New York University Law School’s annual Seminar for Appellate Judges—coordinated by judges themselves in a “self-teaching” situation—serves as yet another example of an educational forum for realization or strengthening of environmental skills. Federal district court judges also meet on a regular basis to discuss ways in which new techniques in judicial administration can be used in order to solve current problems.60

McManus and Associates, a management consultant firm in Washington, D.C., has recently completed a proposal—undertaken at the request of the United States Environmental Protection Agency—for a very bold and imaginative training program for state and local attorneys involved in environmental litigation. When funded, this program will go a long way toward educating a large segment of the bar to the subtleties of environmental law. When both the bench and the bar are totally educated in environmental law, a higher standard for the administration of justice will be achieved with relative ease, and no reliance upon complex legislative proposals will be necessary.

Footnotes

* B.S., 1961; J.D., 1964, Indiana University. University Fellow, J.S.D. Program, Columbia University. This article was organized and written while the author was an Adjunct Professor of Law at Catholic University, 1973-74. He acknowledges the assistance of Janice S. Pohl, a former student there, in its preparation.


3 Whitney, supra n.1.

4 Id. at 484.


Leventhal, supra n. 10, at 510-2. See also, Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, at 597-98 (D.C. Cir. 1971), per Bazelon, C.J.

Leventhal, supra n. 10, at 550-4.


Report of the President Acting Through the Attorney General, on the Feasibility of Establishing an Environmental Court System (1973) (hereinafter cited as Report).

Report, at I-3.

Id. at V-2; Kiechel, Environmental Court Vel Non, 3 E.L.R. 50013 (May 1973). The author is Deputy Assistant Attorney General, Lands and Resources Division, U.S. Department of Justice.

REPORT, at V-4. The agencies solicited were asked to comment on the models and to select their preference for one of the three. After expressing a preference for one over the others, nearly every
agency made it clear that it did not want any one of them. The most significant and common response was that the courts would create jurisdictional problems because of the different definitions of an environmental case. This problem would be solved by the third model, but because of its limited jurisdiction it would be of doubtful utility. Another great concern was that the establishment of any of the courts would lead to forum-shopping because of the ability of a litigant to stress environmental or non-environmental issues, and therefore, choose an environmental or non-environmental court, depending on the needs of the client.

23 Report, at I-5 lists the agencies, both private and governmental, whose comments were received. There were 23 governmental and 11 private agencies.

24 Kiechel, supra n. 21, at 257-8.

25 Each agency, on the basis of its own statutory scheme and regulations, determined what matters should be classified as "environmental".

26 Report, at III-2. The third model would avoid this because it reviews only orders of designated federal agencies, but "such a jurisdictional limit would sacrifice much of the rationale for creation of an environmental court." Id. at V-4, V-5.

27 Kiechel, supra n.21, at 10.

28 A serious question would be whether a case could or should be transferred or removed to the environmental court when an environmental issue is injected into it for the first time by the answer or other pleading filed subsequent to the complaint. Report, at V-5, V-6, note V-6.

29 Id. at V-6.

30 Id. at V-7.

31 Kiechel, supra n.21, at 15. The statistics which follow must be interpreted by the reader with caution. They are at best based on a definition of "environmental litigation" which lacks uniformity. No definition of environmental litigation was offered in the study to explain the basis of these statistics, and therefore they must be viewed as mere descriptions of the volume of environmental litigation, instead of as scientifically accurate measurements.

32 Kiechel, supra n. 21, at 15.

33 Report, at III-2. The AEC reported that roughly two-thirds of its 32 litigated cases involved environmental issues, mostly involving interpretation of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq.

34 Id. at III-4. The Department of Agriculture reported less than
one-fourth of its litigation as having environmental "overtones."

Id. at III-5. The General Services Administration reported that less than 2% of its cases involved significant environmental issues, yet the GSA stated that "these seven are among the most significant cases involving this agency and are the most time consuming and complex." The REPORT notes, therefore, that although the percentage of environmental cases may be low, the cases may demand an inordinate amount of time and resources, thus making the data somewhat misleading. The fact that the data is sparse, and dependent on agency interpretations of environmental cases, nevertheless does not mean that an overall picture cannot be discerned.

Id. at III-6.

Id.


REPORT, at VI-3. All but one of the agencies, the GSA, stated that the establishment of an environmental court would be undesirable.

Id. at VI-4.

Id.

In a section of the study devoted to a brief look at various special courts, the experimental commerce court is cited as a classic example of the pitfalls that may await a special court. One of these pitfalls was a lack of institutional strength commanded by the court.

Id. at II-11.

Id. at VI-7.

Id. at VI-11.

U.S. Constitution, art. III, §2, clause 3; U.S. Constitution, amend. VI. The first cited clause requires that the trial of all crimes, except impeachment, shall be by jury, "and such Trial shall be held in the State where said crimes have been committed." The Sixth Amendment provides that in all criminal prosecutions the trial must be before a "jury of the State and district wherein the crime shall have been committed."

REPORT, at VI-13.


REPORT at VI-13.

Id. at VI-15.

Id. at VI-16. It has been demonstrated that in most environmental cases the number of "environmental" issues is small and can
be explained adequately to the court in layman’s terms. Therefore, the cry of the court’s need for technical knowledge is not founded on the practical experience of the agencies involved in environmental litigation.

51 Id. at VI-16. Unlike tax and patent law, environmental law involves many different statutes and varying factual and technical situations. It is not meaningful to speak of a court being expert in “environmental law,” as a tax court is expert in tax law, because the multiplicity of statutes and diverse factual situations that can give rise to environmental litigation preclude the possibility of delimiting the field and thus becoming an expert. As has been repeated throughout this paper, because the dimensions and contours of environmental law are yet to be drawn, it is impossible for one to become an “expert” in the field.

52 Id. at VI-17. The court in Calvert Cliffs Coordinating Comm. Inc. v. U.S. Atomic Energy Comm., 449 F.2d 1109, 1115 (D.C. Cir. 1971) expressed this methodology on the part of the courts by stating, “reversal of a substantive decision is appropriate only to situations where the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.” This methodology is desirable because it prevents the court from becoming a “superagency,” and instead limits judicial review to the procedures of the agencies, rather than to the substantive decisions.

53 REPORT, at VI-19, VI-18. Depending on the issues involved and the complexity of the case, any of these methods would prove a helpful aid to the court system in deciding cases involving complex technical issues.

54 Id. at VI-21. As discussed above, the environmental court may have exclusive jurisdiction to handle cases with environmental issues which are tangential to its disposition, and yet, since it is a special court, its perspective may cause it to concentrate disproportionately on such secondary environmental matters. Therefore, it is conceivable for a plaintiff to plead environmental issues that are drummed up to invoke the jurisdiction of the environmental court (as long as the case has some environmental aspect to it) and have the decision centered around such environmental considerations, instead of having their significance and import balanced with those of other non-environmental issues as might happen in a general court. In sum, combining the opportunity for forum-shopping with the political pressures of interest groups upon such a court, it might become the instrument for the disposition of complex cases without
a proper analysis of the complexities, if the theory of the court’s narrow environmental perspective is correct. In the absence of a definition of an environmental case it seems imperative that the classification be made, if at all, after the decision and that the open perspective of a general court not be impaired.

55 Id. at VI-23.
56 Id. at VI-24.
60 Hines, supra n. 17, at 9.
61 Report, at VI-27.
62 Hines, supra n. 17, at 11.
63 Whitney, supra n. 1, at 489.
64 Id. at 485.
65 Report, at IV-4.
67 Id.
68 Ind. St. Bar J. (Res Gestae) at 8 (March 1972).