Does the Environment Need a Court?

George P. Smith II

The Catholic University of America, Columbus School of Law

Follow this and additional works at: http://scholarship.law.edu/scholar

Part of the Environmental Law Commons

Recommended Citation

George P. Smith II, Does the Environment Need a Court?, 57 JUDICATURE 150 (1973).
Does the Environment Need a Court?

George P. Smith II

In one of his last opinions, Mr. Justice Harlan commented that interstate pollution cases were so complex that they might well be beyond the Supreme Court’s power to adjudicate.¹ Such intimations, coming at a time when many claim the American court system is taxed to its capacity² and when environmental litigation is allegedly skyrocketing, prompt the question of whether we need a new environmental court to handle cases in this specialized field.

By the Federal Water Pollution Control Act Amendments of 1972, Congress directed the Justice Department to study


2. Professor Paul A. Freund of the Harvard Law School was chairman of a study group appointed by Chief Justice Burger—in his capacity as chairman of the Federal Judicial Center—to study the case load of the Federal Court and to make necessary recommendations. The report was published in December 1972 and called principally for a new national court to screen all cases which are now filed directly with the Supreme Court. See Freund, Why We Need the National Court of Appeals, 59 A.B.A.J. 247 (1973); Editorial Comment, Help for the Court of Appeals, 59 A.B.A.J. 51 (1973); Editorial Comment, Three-Judge District Courts, 59 A.B.A.J. 279 (1973). See generally, Cannon, Can the Federal Judiciary Be an Innovative System? PUB. A.B.A.J. 247 (1973).


the feasibility of such a court. Since then, this question has been researched by the department’s Land and Natural Resources Division (which handles most environmental litigation) in cooperation with 26 federal agencies and nine private organizations. Surprisingly, there are few unwavering supporters of Justice Harlan’s position; in fact, there is near unanimity against establishing such a new court.

4. It is called upon to prosecute in criminal actions or sue in civil actions private citizens who violate environmental control laws and is responsible for the defense of Federal officials who are accused of attempting to conduct governmental programs in violation of statutes calculated to insure a better environment—especially the NEPA.

Among the principal reasons set forth in opposition to the proposed court were: 1) Difficulty in defining the jurisdiction of an environmental court; 2) A belief that the broad range of issues involved in environmental litigation would defy the acquisition of “expertise” in environmental matters; 3) Fear that an environmental court would lack institutional strength to withstand the pressures likely to be focused upon it by special interest groups; 4) Preference for the outlook of “generalist” courts over the narrower view likely to be developed by a specialist court on environmental matters; 5) Belief that an environmental court would be less accessible to would-be litigants than the federal district courts; 6) Skepticism about an increase in environmental litigation of such magnitude as to warrant treatment as a separate body.
of law; and 7) Concern over the possibility that creation of an environmental court would lead to additional specialized courts and the fragmentation of the judicial system.6

SCIENTIFIC MASTERY

The central argument advanced in favor of establishing an environmental court or court system is that it is necessary for the courts to master, in a total sense, the scientific issues involved in a case in order to ensure that it is decided under the best possible circumstances.7 On the other hand, it is generally regarded as sound practice for the attorneys of record to exert every effort to explain the issues of each case to the court in simple, direct language. Unintelligible jargon can only serve to obfuscate the pleadings and thus penalize the parties.8

Proponents of an environmental court also assert that greater uniformity in interpretation of environmental law would result under such a court system and that a greater degree of efficiency would be achieved in disposing of environmental litigation.9 However, the district courts are accustomed to complex issues of law and to evaluating the testimony of experts in fields with which they are not familiar. There is nothing totally unique in the legal or technological complexity of environmental cases.10

Chief Judge William E. Steckler of the Southern District Federal Court in Indiana has suggested that if environmental case loads become a real burden on the court docket, the most direct way to deal with the problem would be to add more federal judges.11 The judge also proposed that consideration be given to expanding the scope of review and basic powers of the United States Magistrates in order to tackle heavy environmental calendars where they might exist.12

Judge Harold Leventhal of the District of Columbia Court of Appeals, speaking against a separate environmental court system, stressed the need for administrative tribunals to become more sophisticated in their areas of technical expertise.13 Most environmental cases are those of great moment with the court being asked to prevent an imminent action. Reflective consideration cannot be given; “think time” is in short supply. The lower court or administrative record must be complete and tightly organized in order to properly assist the reviewing court in deciding the appeal expeditiously.14

The National Environmental Policy Act and other notable federal statutes in air, water and noise, all euphemistically designated “environmental law” because they purportedly deal with the environment, are in reality, an amalgam of legal principles rooted in administrative law, constitutional law, equity, corporations, evidence, procedure, legislation, natural resources, etc.15 In addition, the issue of standing remains a threshold problem in every so-called, “environmental case.”

ECOLOGICAL DECISIONS

The typical environmental issues which are presented in a case do not directly involve obscure matters of scientific theory or techniques. Rather, they are more commonly primary questions of evidence or of procedure. Such a typical question might

6. Kiechel, supra, note 5.
8. Supra, note 5. David Sive in his speech, “National Environmental Policy—Present and Future,” delivered at the Columbia University Law School in New York City, March 22, 1973, expressed his belief that if a separate environmental court system were to be established, the rather limited technical aspects of the problem area would be too severely magnified. He disapproved of a separate court for the environment.
10. Kiechel, supra, note 5.
12. Id.
14. Id.
be “What do the facts show the effect of a given factor (i.e., concentration of a pollutant, or use of a control method) to be on a variable (i.e., human health or the survival of certain form of wild life).” In the final analysis, the court is invariably forced to balance the equities of the case in making its “ecological decision.”

The most direct resolution of present uncertainties in this area is re-education of federal and state judges alike to the nuances of this new commercially packaged body of law, popularly termed “environmental law.” At the state level, a popular vehicle for such an undertaking could be found in centers for judicial education patterned after the successful one created in Indiana by Indiana University’s Indianapolis Law School. Effective use of other forums such as the National College of the State Judiciary, the Federal Judicial Center, the Northern American Judges Association, the Institute for Court Management in Denver, the American Academy of Judicial Education, the American Judicature Society, state bar association continuing legal education programs, the American Bar Association, the National Association of Attorneys General, to name but a few of the more significant ones for training of both judges and lawyers in the parameters of environmental litigation should be encouraged and developed more fully.

Judicial seminars are conducted annually by the various federal district judges and serve as yet another paradigm of how self-teaching techniques can be employed in educating the members of the bench to current judicial problems. In these seminars, judges teach judges—and sensitive scholars on the bench become equally effective teachers. By educating the bench in this very simple, straightforward way, the bar will educate itself at the same time and thereby assure that the administration of justice in environmental litigation will be both expeditious and consistent with sound principles of due process as it is in every other field of the law.

16. F. Grad, Environmental Law, Chapter 12 (1971); supra note 16.

Disclaimer: This article was written by Mr. Smith in his private capacity. No official support or endorsement by the Environmental Protection Agency is intended or should be inferred.