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## The Litigation Process in the Development of Environmental Law (1995 Garrison Lecture)

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# First Annual Lloyd K. Garrison Lecture on Environmental Law

## The Litigation Process in the Development of Environmental Law

BY DAVID SIVE\*

It is difficult for me to think of any honor ever conferred upon me that is greater than the honor here today inaugurating a lecture series marking the contributions of Lloyd Garrison to the movement and body of environmental law, of which this law school is now one of the nation's acknowledged leaders. That is so whether I start with my being named the most courteous boy in the 1939 graduating class of James Madison High School in Brooklyn, or proceed to the two Purple Hearts I received for being wounded in World War II (on both occasions of which, I confess, my back faced the enemy) or then go to any of the professional items which have been cited in an introduction.

The reasons for my sentimentalism include purely personal recollections of Lloyd Garrison, as well as those beginning close to thirty years ago of Richard Ottinger and Nicholas Robinson.<sup>1</sup> I recall of Lloyd:

A. His heartening appearances at Scenic Hudson Board meetings, some held in my office, when preparing the *Scenic Hudson* appeal;<sup>2</sup> at one time he presented his new assistant, Al Butzel,

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1. Richard Ottinger is the current Dean of Pace University School of Law and a former Congressman from Westchester County. Nicholas Robinson is a professor of environmental law at Pace University School of Law.

2. *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

with a 1960s wild hair look, who at first frightened me some, in the presence of some fairly conservative board members such as Carl Carmer;

B. Lloyd accompanying Steve Duggan, Brooks Atkinson, Al Butzel, and myself on a windy, frigid wintry day, walking out on little Stony Point to sense the awe of Storm King Mountain, in preparation for Atkinson's expert testimony at the second round of Federal Power Commission (FPC) hearings; and

C. My meetings with Lloyd, about three to four times each year for a number of years, he going south along Park Avenue to his office and I going north to mine; at some of the meetings I felt called upon to tell him that I had been given credit for his 1965 victory and that I had always tried hard to prevent that, whereupon he would graciously assure me that my misgivings were unfounded.

The earliest activities with Dick [Ottinger] included an early 1960s walk along the West Bank of our great River, at the foot of Hook Mountain, led by Justice William Douglas, whom my wife Mary suggested inviting to lead us, with about forty others including David Brower, Tom Hoving, Jr., Mary, and our children. One of my early activities with Nick [Robinson] was a joint appearance for a few minutes on the Today Show, to examine the glamour of environmental law and lawyers, for which we both had to be in the Rockefeller Center studios at 4:30 A.M. to have our faces painted.

Well, all of the foregoing is really part of the sentimental side of this appearance before you, whereas the honor conferred upon me does require me to say more meaningful things. In trying to discharge that assignment, I decided several weeks ago that, as likely as any aspect of my experience of about thirty-five years of environmental advocacy to add a little to the relevant fund of learning, would be thoughts about litigation and the adversary process in the development of environmental law.

I am deeply interested in that subject and do have some definite views about it. It may be ironic that Lloyd Garrison was, in law office parlance, much more of a trusts and estates man than a litigator. That fact, I think, had much to do with his contribution as a litigator of the founding environmental law case.<sup>3</sup> Landmark cases in many fields of law have been fashioned by practitioners who can approach the issues with new and different perspectives from those of specialists in the particular fields. Without any crit-

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3. *Id.*

icism of the fine firm which represented Scenic Hudson Preservation Conference before Lloyd took the appeal, thank goodness he was not a utilities lawyer!

I begin my serious discussion with a statement I made which has been quoted in several environmental law and policy books, including the history of the Sierra Club Legal Defense Fund (SCLDF) by Tom Turner, entitled *Wild by Law*,<sup>4</sup> and Peter Borelli's *Environmental Priorities for the Future*:<sup>5</sup> "In no other political and social movement has litigation played such an important and dominant role [as in the environmental movement]."<sup>6</sup> It is one of those points that delights its maker, because nobody can really disprove it; hence the maker becomes an authority. Perhaps trying to prove it is equally fruitless, but that is precisely what I now want to do.

In addition to trying to prove what I have said, I want, assuming that my first point is correct, to go to the next question: Is that good or bad? The latter question may seem hardly a question at all in these days of the lowest public esteem for lawyers and courts, but I assume that even the lay public will not rest its opinions of lawyers and litigation wholly on the Los Angeles comic opera without music that dominated the media throughout 1994 and 1995.<sup>7</sup>

Let us start with a definition of "litigation." By the term I mean the adversary process. What is the "adversary process?" To answer that question I always refer to a law review article by Judge Henry Friendly entitled *Some Kind of Hearing*,<sup>8</sup> written mainly in the context of procedural due process cases such as *Goldberg v. Kelly*.<sup>9</sup> Judge Friendly analyzed administrative "hearings" to determine what would satisfy procedural due process.

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4. Frederic P. Sutherland, *Preface to TOM TURNER, WILD BY LAW* (1990).

5. PETER BORELLI, *ENVIRONMENTAL PRIORITIES FOR THE FUTURE* (1988).

6. TURNER, *supra* note 4, at xiii; *see also* BORELLI, *supra* note 5, at 58.

7. *People v. Simpson*, \_\_\_ Cal. 3d \_\_\_ (Super. Ct. L.A. Co. 1995).

8. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

9. 397 U.S. 254 (1970) (holding that procedural due process in welfare termination proceedings required notice and the opportunity to confront and cross-examine witnesses). *See also* Mathews v. Eldridge, 424 U.S. 319 (1976) (holding that disability benefits could be terminated without prior evidentiary hearing); Morrissey v. Brewer, 408 U.S. 471 (1972) (holding that the Due Process Clause of the 14th Amendment requires an informal hearing before an inmate is denied parole); Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) (holding that the Constitution requires some kind of a hearing prior to the deprivation of any significant property interest); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 663-768 (2d ed. 1988).

I do not want to discuss here the constitutional question. I refer to the Friendly article to note the eleven procedural aspects,<sup>10</sup> which he considered in his discussion of the "Elements of a Fair Hearing." The statement of the eleven aspects constitutes an analysis and definition of the adversary process. Judge Friendly concludes by stating that:

In the mass justice area the Supreme Court has yielded too readily to the notions that the adversary system is the only appropriate model and that there is only one acceptable solution to any problem, and consequently has been too prone to indulge in constitutional codification. There is need for experimentation, particularly for the use of the investigative model, for empirical studies, and for avoiding absolutes.<sup>11</sup>

That a wholly adversary process is not constitutionally required for an administrative hearing is demonstrated by a line of cases beginning with *Buttrey v. U.S.*,<sup>12</sup> holding that the United States Army Corps of Engineers satisfied procedural due process in section 404 Clean Water Act proceedings.<sup>13</sup> The procedures were "paper hearing procedures, with an informal face-to-face meeting,"<sup>14</sup> not "trial-type procedures, with oral cross-examination of witnesses."<sup>15</sup>

Returning to the history of environmental law, beginning with *Scenic Hudson Preservation Conference v. Federal Power Commission (Scenic Hudson I)*,<sup>16</sup> the earliest group of important

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10. The aspects are:

- (1) An Unbiased Tribunal;
- (2) Notice of the Proposed Action and the Grounds Asserted for It;
- (3) An Opportunity to Present Reasons Why the Proposed Action Should Not be Taken;
- (4) The Right to Call Witnesses;
- (5) The Right to Know the Evidence Against One;
- (6) The Right to Have Decision Based Only on the Evidence Presented;
- (7) Counsel;
- (8) The Making of a Record;
- (9) The Statement of Reasons;
- (10) Public Attendance; and
- (11) Judicial Review

Friendly, *supra* note 8, at 1279-95.

11. *Id.* at 1316.

12. 690 F.2d 1170 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983).

13. Federal Water Pollution Control Act § 404, 33 U.S.C. § 1344 (1988 & Supp. V 1993) [hereinafter Clean Water Act].

14. *Id.* at 1183.

15. *Id.*

16. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

cases were essentially judicial reviews of administrative actions, instituted by environmental advocates, under a statutory review provision of the Administrative Procedure Act (APA).<sup>17</sup> Section 1 of the APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”<sup>18</sup>

Based upon the standing doctrine of *Scenic Hudson I*,<sup>19</sup> and expanding upon that doctrine, the early cases<sup>20</sup> were brought before the enactment of the first of the major federal statutes comprising the body of modern federal environmental law, the National Environmental Policy Act (NEPA).<sup>21</sup> These and other cases were brought, and some were even determined, before the term “environmental law” came into general use. Who first used this term, and exactly when it was used, is probably unknown.

My first experience with the term “environmental law” was in the fall of 1969, at a conference held by the Conservation Foundation and funded by the Ford Foundation in Airlee House, Virginia. It was the first gathering of the then very small number of attorneys who had participated in environmental cases. This group in-

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17. Administrative Procedure Act § 1, 5 U.S.C. § 702 (1994).

18. 5 U.S.C. § 702.

19. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

20. Road Review League, *Town of Bedford v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967) (holding that local civic organizations and conservation groups had standing to challenge a U.S. Dep’t of Transportation-approved interstate highway route); *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970) (holding that resident citizen group, national conservation group and local village had standing to sue to enjoin the U.S. Army Corps of Engineers from issuing a permit to dredge and fill the Hudson River for highway construction); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 41 U.S. 402 (1971) (holding that private citizens and conservation organizations had standing to bring suit to challenge the Transportation Secretary’s authorization of federal funding for a highway through a public park); *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968) (holding that local civic group members and residents could seek an injunction restraining state officials from constructing an interstate highway); *Izaak Walton League of Am. v. St. Clair*, 313 F. Supp. 1312 (D. Minn. 1970) (holding that a non-profit corporation with an aesthetic, conservational and recreational interest in protecting an area, could seek to enjoin a federal agency from giving permission to defendants to extract minerals from the area); *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1979), *aff’d*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 889 (1972) (holding that plaintiffs, local residents and conservation organizations had standing to bring suit enjoining the Forest Service from harvesting timber within a national forest contiguous to a primitive wilderness area).

21. National Environmental Policy Act of 1969 §§ 2-209, 42 U.S.C. §§ 4321-4347 (1988).

cluded Victor Yannocone, who brought an early DDT case<sup>22</sup> and founded the Environmental Defense Fund (EDF), and myself.

The conference was held just two months after the trial court decision in the Hudson River Expressway case.<sup>23</sup> The other two persons who comprised the litigation panel of the conference were Professor Joseph Sax of Michigan Law School, and Russel Brenne-  
man, Esq. of New London, Connecticut, who had written a text on legal techniques to preserve natural areas. The conference participants were mainly: (1) law school faculty who were teaching courses in the context of Administrative Law and Natural Resources Law and referring to *Scenic Hudson I*<sup>24</sup> and its new standing and "relevant factors" doctrines; (2) some consumer and environmental activists, including Ralph Nader; and (3) officials of the Sierra Club, the National Audubon Society and the Izaak Walton League. Perhaps the principal product of the conference, apart from publication of the proceedings and the several papers presented, was the creation of the Environmental Law Institute and its Environmental Law Reporter.

We mark here and now the 25<sup>th</sup> anniversary of Earth Day 1970. It was, as many of us remember and those younger probably have learned, the explosive year of the environmental movement and of environmental law and policy. I want to note some of the events of that year, and then relate them to the early cases, and litigation in general. In addition to the first Earth Day, 1970 witnessed:

A. The effective date, January 1, 1970, of NEPA;<sup>25</sup>

B. The creation by NEPA of the Council on Environmental Quality (CEQ)<sup>26</sup> and its appointment of a Legal Advisory Committee (LAC),<sup>27</sup> whose membership included: Nick Robinson; Joseph Sax; Professor Frank Grad of Columbia Law School; Professor Louis Jaffe of Harvard Law School; Whitney North Seymour Jr., the Committee's Chair; and myself;

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22. *Environmental Defense Fund, Inc. v. EPA*, 489 F.2d 1247 (D.C. Cir. 1973).

23. *Citizens Comm. for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir. 1970), *cert. denied*, 400 U.S. 949 (1970).

24. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

25. *Id.*

26. 42 U.S.C. § 4342 (1988). The CEQ, among other duties, reports to the President at least once each year on the state and condition of the environment. *See* 42 U.S.C. § 4344 (1988).

27. COUNCIL ON ENVIRONMENTAL QUALITY, 1970 ANNUAL REPORT 23 (1970). This report, announced on Apr. 30, advised the Council on a broad range of environmental questions.

- C. The enactment of the Clean Air Act, with the first statutory citizen suit provision;<sup>28</sup>
- D. The creation by Executive Order of the Environmental Protection Agency (EPA);<sup>29</sup>
- E. The creation of the Natural Resources Defense Council (NRDC), Friends of the Earth and the Environmental Planning Lobby of New York State;
- F. A rapid expansion of the number of law schools teaching environmental law and the devotion of a number of law school review issues to the new subject of environmental law;
- G. The beginnings of environmental law continuing legal education programs;
- H. A profusion of lawsuits under NEPA, beginning almost immediately after the January 1, 1970 date of its effectiveness;<sup>30</sup>
- I. The first stirrings of, and popular use of the term, "public interest law," an important aspect of which was the environmental law of the early cases, responding to the public interest in environmental protection; and
- J. The first reorganization by states, including New York,<sup>31</sup> of traditional conservation and fish and game departments into more broadly chartered environmental departments.

I am no sociologist or political theorist. It takes no such expertise, however, to point out that the events of 1970 were in no small measure owed to the drama, excitement and perhaps even the glamour of the early cases. The early cases, including *Scenic Hudson I*,<sup>32</sup> were all David v. Goliath affairs, brought by a few individuals, sometimes the activist lawyers themselves, who took roads not generally taken until a fair number of years later. The cases manifested and represented the rebellion against the vested interests of the regulated communities who, according to Justice William Douglas, in his *Points of Rebellion*,<sup>33</sup> and Professor Charles A. Reich, in his *The Greening of America*,<sup>34</sup> had virtually captured their agency regulators.

One interesting aspect of the events of the late 1960s, noted by Justice Douglas in commenting on the "captive" administrative

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28. Clean Air Act § 304, 42 U.S.C. § 7604 (1988 & Supp. V 1993).

29. Exec. Order No. 11,472, 3 C.F.R. § 792 (1966-1970), *reprinted in* 3 U.S.C. § 301 (1988).

30. *See, e.g.,* Texas Comm. on Natural Resources v. United States, 430 F.2d 1315 (5th Cir. 1970). *See also infra* notes 53-54 and accompanying text.

31. *See* 1970 N.Y. Laws 140.

32. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

33. JUSTICE WILLIAM DOUGLAS, *POINTS OF REBELLION* (1969).

34. CHARLES A. REICH, *THE GREENING OF AMERICA* (1970).



agencies, and perhaps since forgotten by Dean Ottinger, is the following:

The tragedies that are happening to our environment as a result of agency actions are too numerous to list. They reach into every State and mount in intensity as our resources diminish. People march and protest but they are not heard. As a result, Congressman Richard L. Ottinger of New York has recently proposed that a National Council on the Environment be created and granted power to stay impending agency action that may despoil the natural resources and to carry the controversy into the courts or before Congress, if necessary.<sup>35</sup>

Dean Ottinger's proposal was both a precursor of NEPA and a plan for expanding judicial review of environmental administrative actions.

In Professor Reich's book, which made him a virtual folk hero of the young in 1970, he discussed the *Scenic Hudson I* case<sup>36</sup> as one of the early victories over the "established procedures" of various organs of government:

But these same "*established procedures*," which seem so impassible, *may become a route to change* if they are accompanied by even a partial change of consciousness. Sometimes the liberals *have* succeeded by working through structure. One example is in conservation. For a long time, it appeared that no legal safeguards could accomplish much for conservation. The forces of "progress" were just too powerful; the "lawful procedures" bent with the prevailing forces. For example, the Federal Power Commission (FPC), with jurisdiction over hydroelectric projects on rivers, was supposed to protect conservation values, but normally ignored them. Thus, when Consolidated Edison of New York applied to the FPC for approval of its plans to construct a facility on the Hudson River near Storm King Mountain, the FPC approved the facility, ignoring the pleas of conservationists based on damage to aesthetic and historical values. The conservationists appealed to the courts; under established precedents they should have lost. *Instead, the Court of Appeals reversed the FPC. It held that the agency should have given greater weight to conservation values. The structure of the Corporate State gave way to a degree, and a era of greater legal deference to conservation began.*<sup>37</sup>

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35. DOUGLAS, *supra* note 33, at 88.

36. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

37. REICH, *supra* note 34, at 337-38 (emphasis added).

The drama of litigation, even without the violence, sex and race aspects of the case now receiving far wider attention than has ever been accorded *Marbury v. Madison*,<sup>38</sup> *Brown v. Board of Education*,<sup>39</sup> or *Roe v. Wade*,<sup>40</sup> stems in large part from its staged combat, battle-of-wits nature.<sup>41</sup> James M. Landis, in his classic, *The Administrative Process*,<sup>42</sup> refers to "the issue of judicial review over administrative action giving one the sense of battle."<sup>43</sup> Whatever the explanation, litigation can be as it was in the early 1970s: A powerful political instrument in the evolution of all of the major environmental legislation. By statutes and judge made law, "established procedure[s] . . . be[came] a route to change."<sup>44</sup>

Moreover, a principal aspect of the Environmental Movement and environmental law, on April 22, 1970 and for the twenty-five years since—with present problems created by Justice Scalia in the two *Lujan* cases<sup>45</sup>—has been the standing requirement of Article III of the Federal Constitution and of certain "prudential" requirements for standing.<sup>46</sup> An important aspect of the political debate has been the provision for standing, dealt with in virtually every major federal environmental statute in its citizen suit provision, beginning with section 304 of the Clean Air Act of 1970.<sup>47</sup>

More than any other factor, it is the standing of citizens to sue based upon their representation of the public interest in environmental protection first declared in *Scenic Hudson I*,<sup>48</sup> rather than an economic or other traditional personal interest, that has rendered litigation more important in the development of environmental law than in other bodies of law. I can prove this both empirically and analytically.

Empirically, I would first turn to the table of cases in any case and materials book or text of environmental law, and note the number of cases brought by the several major environmental pub-

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38. 1 U.S. (1 Cranch) 137 (1803).

39. 349 U.S. 294 (1955).

40. 410 U.S. 113 (1973).

41. *People v. Simpson*, \_\_\_ Cal.3d \_\_\_ (Super. Ct. L.A. Co. 1995).

42. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

43. *Id.* at 136.

44. REICH, *supra* note 34, at 337.

45. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

46. See *Ass'n of Data Processing Orgs., Inc. v. Camp*, 397 U.S. 150 (1970) (holding that petitioners' standing to sue must be considered under the Cases and Controversies Clause of Article III of the Constitution).

47. Clean Air Act § 304, 42 U.S.C. § 7604.

48. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

lic interest law firms (EPILF), whose charter to litigate has been their standing in court. Taking William Rodgers' Hornbook of Environmental Law<sup>49</sup> as one example, its Table of Cases lists fifty-five NRDC cases, forty-eight EDF cases, seventy-nine Sierra Club cases (brought mainly by SCLDF), and eighteen National Wildlife Fund (NWF) cases.<sup>50</sup> It is also clear to any student or practitioner of environmental law that the EPILF cases include a much higher proportion of the leading cases than do those of other plaintiffs.

Add to those cases all of those brought by other individuals or organizations, including many *ad hoc* groups, the standing of whom rested upon the statutory grant of citizen standing, and one has at least two-thirds of all of the cases in the Rodgers Table of Cases,<sup>51</sup> or in that of any other environmental law case book or treatise.

One may properly ask whether this proves that litigation has been more important in the development of environmental law than in other bodies of law. Other bodies of law have been developed in and by cases, regardless of the basis of the standing of the plaintiffs. I do not have the means at this time to check statistically other bodies of law (since I am only now beginning, after several years' stubbornness born by Wordsworth's preaching that, "[t]he world is too much with us"<sup>52</sup> to embrace the computer world). I believe, however, that such study is not necessary.

Consider the rapid pace at which important cases under the early major environmental statutes arose! The rate at which NEPA, for example, was made meaningful by litigation was truly explosive. One can safely say that no other statute has ever been effectuated by so many cases in so short a time. In one early case based upon NEPA and filed on February 5, 1970,<sup>53</sup> in which the plaintiff sought to enjoin the use of park land for a golf course, a stay pending appeal was granted under Rule 8(a) of the Federal Rules of Appellate Procedure.<sup>54</sup>

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49. WILLIAM RODGERS, ENVIRONMENTAL LAW (1994).

50. *Id.* at 909-27.

51. *Id.*

52. William Wordsworth, *Miscellaneous Sonnet XXXIII*, in THE POEMS OF WORDSWORTH 259 (Thomas Hutchinson ed., 1926).

53. Texas Comm. on Natural Resources v. United States, 430 F.2d 1315 (5th Cir. 1970) (stay vacated for mootness).

54. FED. R. APP. P. 8(a). After the lower court granted the stay in *Texas Comm.*, the plans were abandoned and the golf course was constructed on private land. The appeal to the Fifth Circuit was dismissed as moot because "the judgment [would] spawn no legal consequences." 430 F.2d at 1315. See also *United States v. Knippers and Day Real Estate*, 425 F.2d 1081 (5th Cir. 1970); David Sive, *Some Thoughts of an*

The first and still greatest landmark NEPA case, *Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n (Calvert Cliffs)*,<sup>55</sup> was argued on April 16, 1971 and decided on July 23, 1971. For the first time, a court was confronted with "litigation seeking judicial assistance in protecting our natural environment."<sup>56</sup> Here, the petitioners asserted that the rules of the Atomic Energy Commission (AEC) failed to satisfy the strict guidelines required under NEPA. In remanding the case, the D.C. Circuit held that a revision in the AEC's rules was necessary in order to achieve NEPA's underlying intent.<sup>57</sup>

In *Natural Resources Defense Council, Inc. v. Morton*,<sup>58</sup> the plaintiffs sought to preliminarily enjoin the sale of oil and gas leases. In granting the motion, the district court assessed "the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of ultimate success or failure of the suit [and] the balancing of damages and conveniences generally."<sup>59</sup> The court of appeals affirmed, holding the probable environmental impact of issuing such a lease was too strong to warrant a reversal.<sup>60</sup>

In *Sierra Club v. Ruckelshaus*,<sup>61</sup> the court announced the basic principle of non-degradation under the Clean Air Act of 1970.<sup>62</sup> The EPA Administrator was enjoined from approving a state plan that would essentially degenerate the existing clean air quality because increasing pollution levels would contradict the purpose of the Clean Air Act.<sup>63</sup> This decision was affirmed by the D.C. Court

*Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 649 (1970).

55. 449 F.2d 1109 (D.C. Cir. 1971).

56. *Id.* at 1111.

57. *Id.* at 1129.

58. 337 F. Supp. 165 (D.D.C. 1971).

59. *Id.* at 166 (quoting *Perry v. Perry*, 190 F.2d 601, 602 (1951)). See also *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929) (plaintiff has the burden of proof when seeking a preliminary injunction).

60. 458 F.2d 827 (D.C. Cir. 1972), *cert. denied*, 404 U.S. 942 (1972). For statistical information pertaining to NEPA cases filed from 1974 through 1990, see COUNCIL ON ENVIRONMENTAL QUALITY, 1991 ANNUAL REPORT 142-43 (1992). By June 30, 1975, approximately six years after the Clean Air Act was enacted, 332 cases were completed, 54 of which the court granted similar preliminary injunctions. *Id.* Three hundred thirty-two cases were still pending at this time, 65 of which had motions to enjoin the defendant's activity. *Id.* at 143.

61. 344 F. Supp. 253 (D.D.C. 1972).

62. 42 U.S.C. § 7604.

63. 344 F. Supp. at 256. For an in depth discussion of the Clean Air Act of 1970, see S. REP. NO. 1196, 91st Cong., 2d Sess. at 2 (1970).

of Appeals on November 1, 1972,<sup>64</sup> and re-affirmed by an equally divided Supreme Court on June 11, 1973.<sup>65</sup>

One can turn to any of the other major environmental acts and document the rapidity with which the laws were interpreted and effectuated by the cases, primarily brought by public interest plaintiffs. Many other examples could be cited of the virtually explosive rate at which the cases developed environmental law in the 1970s. In *A Retreat From Judicial Activism: The Seventh Circuit and the Environment*,<sup>66</sup> Professor Robert L. Glicksman describes and explains the rapid expansion of environmental law in the 1970s as follows:

The spate of federal environmental legislation enacted in the late 1960's and early 1970's provided a fertile breeding ground for litigation. *The federal courts reacted to the resulting proliferation of lawsuits by aggressively promoting the new, pro-environmental legislative objectives.* They lowered the barriers to private litigants' access to the federal courts, subjected administrative agencies to procedural requirements not always apparent on the face of applicable legislation, interpreted environmental laws expansively and used common law to fill statutory gaps, and engaged in rigorous review of the substantive merit of agency decisions which seemed to give insufficient weight to legislatively sanctioned environmental values.<sup>67</sup>

At a later point he states that, "[t]he roots of judicial activism in environmental litigation lay in social attitudes toward environmental problems prevailing among the American public in the late 1960s."<sup>68</sup> That judicial activism was brought about by "[t]he relaxation of standing requirements for judicial review of agency actions involving environmental issues. . . [which] began when the courts held that a plaintiff need not prove injury to a personal economic interest to satisfy the 'case' or 'controversy' requirement of Article III of the Constitution."<sup>69</sup> My additional point is that the early cases and judicial activism brought about the social activ-

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64. 2 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,656 (1972). The court affirmed and held that to approve such a plan would allow the current air quality to drastically diminish. *Id.*

65. 412 U.S. 541 (1973).

66. Robert L. Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209 (1987).

67. *Id.* at 209 (emphasis added). The main focus of this article is on the passive role the courts have taken in implementing environmental laws.

68. *Id.* at 214.

69. *Id.* at 219.

ism, *as never before in the development of any other body of public law*, fully as much as the converse. Which was the hen and which the egg is unimportant.

At the "roots of judicial activism in environmental litigation,"<sup>70</sup> described by Glicksman, were NRDC *et al.* How and why was such a uniquely important role in the development of environmental law, by litigation, played by them? Consider first the mission of NRDC, born out of the Scenic Hudson Preservation Conference; of EDF, born out of the DDT controversy and Rachel Carson's *Silent Spring*;<sup>71</sup> and of SCLDF, born out of the Grand Canyon Dams controversy and the resultant withdrawal of the tax deductibility of contributions to the Sierra Club itself. The *raison d'être* of each was *the development of the law*, not the advancement of the personal interests of the individuals whom they represented or upon whose membership they rested their clients' standing.

These public interest environmental groups had, of course, to satisfy the standing requirements of: (1) a personal stake of themselves, their members or of other plaintiffs in any controversy which they chose to bring to court constituting the injury in fact; (2) the traceability of the injury to the action challenged; (3) the redressability of the injury by the relief sought; and (4) the inclusion of the interest they claim was injured in the zone of interests of the statute which it was claimed was violated.<sup>72</sup> As long as these requirements have been satisfied, however, these groups have had the power to choose when and where to litigate.

Public interest groups have not been required to accept a *passive* role, as does the ordinary attorney who responds to a client. They have been their own clients or been in a position to represent clients whose particular interests are in accordance with their mission. Moreover, they have been able to choose the proceeding to bring on the basis of the sheer importance of the issues, the probability of success and a number of other factors including, within certain limits, the possible political consequences. *All of this never existed before in the development of any other body of law.*

Subject to their overall financial means, the groups have not been bound by the financial considerations with respect to each

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70. *Id.* at 214.

71. RACHEL CARSON, *SILENT SPRING* (1962).

72. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472-75 (1981) (holding that plaintiffs did not have standing due to a lack of injury in fact).

particular action, as must the more traditional attorney. They must operate within their general budgets and means when choosing the types of and particular proceedings to bring. These choices have been based in part upon the ability to secure the greatest impact on the developing law without being bogged down in long and expensive trials.

The ability of NRDC, EDF, and SCLDF to develop the law under the major environmental statutes has been remarkable. Avoiding long trials and other factual hearings, their major cases have generally been comparatively inexpensive. I emphasize the word "comparatively," because the issues of law as well as of fact may be multitudinous and complex in any litigation. The fair value of services of the attorneys involved and their support staffs may be high, regardless of the nature of the issues, legal or factual or the nature or structure of the proceedings.

It is nevertheless axiomatic that the litigation of issues of law is far less expensive than that of issues of fact. In the latter case the expenses of depositions, trials, and other factual hearings can rapidly accumulate, at the rate of several thousand dollars per day, to tens and hundreds of thousands. Much of the important law has been developed in statutory review proceedings before courts of appeal,<sup>73</sup> in which there has been no fact finding, or in district court actions reviewing informal agency action, in which the courts have been limited to the administrative record. The groups' statutory review practice, much of which consists of challenges to EPA regulations, has resulted in a vast body of law. This comparative simplicity and inexpensiveness have appreciably accelerated the pace at which the major statutes have been interpreted.

Another aspect of environmental litigation that has accelerated the development of the law (and thus increased substantially the extent to which the law, at any given point in time, has been created by litigation) is the frequency of preliminary injunction motions. Many of the important cases have been decisions on preliminary injunction motions or appeals therefrom.<sup>74</sup> Whether the injunctions were granted or denied, the cases, an example of

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73. See, e.g., *Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

74. See, e.g., *Natural Resources Defense Council, Inc. v. Morton*, 337 F. Supp. 167 (D.D.C. 1971); *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1972).

which was the *Citizens Comm. for the Hudson Valley v. Volpe*,<sup>75</sup> proceeded to early disposition. Early in environmental cases, the rule was established that the undertaking as security for a preliminary injunction might be in a nominal amount because requiring a bond in the usual amount would be tantamount to denying standing to a plaintiff.<sup>76</sup>

Still another feature of any consideration and appraisal of the importance of litigation in the development of environmental law is that of the extent to which that body of law is part of the common law. In this connection most of us are familiar with the teaching of *City of Milwaukee v. Illinois*,<sup>77</sup> that there is no federal common law of water pollution. There is, on the other hand, a federal common law which developed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund).<sup>78</sup>

As to contribution, under CERCLA, among potentially responsible parties, for example, a specific list of factors to be applied in what was, and still is, referred to as the "Gore Amendment," was dropped in the final language of § 113(f)(1). The language could hardly vest more importance and authority in the litigation process than it does. "In resolving contribution claims" under § 113(f)(1), the court "may allocate response costs among liable parties *using such equitable factors* as the court determines are appropriate."<sup>79</sup> What is "equitable" and "appropriate" in tort law is stated in section 433 (among other sections) of the Restatement Second of Torts,<sup>80</sup> and is also found in other sources of tort law.<sup>81</sup>

Much of the law of hazardous and toxic substances is tort law. Many environmental law professors have in recent years resumed

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75. 425 F.2d 97 (2d Cir. 1970). In that case a preliminary injunction was denied, but the defendants, pursuant to the Court of Appeals' request, agreed to stay construction until after trial, expediting the proceedings. *Id.*

76. See *Friends of the Earth v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975).

77. 451 U.S. 304 (1981).

78. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) §§ 101-405, Pub. L. No. 96-510, 94 Stat. 2767 (1980), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993). See, e.g., CERCLA § 107 (addressing liability under the Act).

79. 42 U.S.C. § 9613(f)(1) (emphasis added).

80. RESTATEMENT (SECOND) OF TORTS § 433 (1965).

81. See, e.g., *RODGERS*, *supra* note 49, at 764, 768-90; *GNB Battery Technologies, Inc. v. Gould*, 65 F.2d 615 (1995); *Westwood Pharmaceuticals, Inc. v. Nat'l Fuel Gas Distribution Corp.*, 964 F.2d 85 (1992); *In re Sterling Steel Treating, Inc. v. Becker*, 94 B.R. 924 (1989).



or commenced teaching torts, and most of the attorneys and judges involved in Superfund and toxic tort cases have searched for, and if lucky found, their law school notes on *Rylands v. Fletcher*.<sup>82</sup> In doing so they have become experts on liability without fault and legal causation as between joint tortfeasors.

A chapter of the law of torts, especially the common law of nuisance, is also the subject of a significant portion of any environmental law casebook or text. Rodgers, in his introduction to Chapter 2, entitled "Common Law and the Variations," states:

Environmental law as it is known today is an amalgam of common law and statutory principles. The impact of technology on humans has contributed in no small way to doctrinal developments in nuisance, trespass, negligence and strict liability for abnormally dangerous activities.<sup>83</sup>

All of this leads me to return to the prior statement of mine which I quoted at the outset: That litigation has been more important in the development of environmental law than in any other body of public law.<sup>84</sup> I think that I have demonstrated it. To do so is the simpler of the two tasks I have assumed in order to merit the honor extended to me in initiating this lecture series. The harder task is that of answering the question, "Is it good or bad?" Is litigation and the adversary process a good means of making law, both directly, through the very cases declaring the law, and indirectly, by influencing the political processes out of which the legislation evolves?

In any attempt to answer the question, it is important first to broaden and deepen it. The question of whether a considerably more important role for litigation is good or bad may be posed generally, not simply in the field of environmental law. It necessarily involves fundamental aspects of our system of government under our Constitution. Just as war is too important for only the generals to manage, the place of litigation in law making is far too important to be addressed wholly or even primarily by litigators or other lawyers and law scholars. The wisdom needed is at least equally that of political scientists, sociologists and historians.

Turning to a non-lawyer, De Tocqueville, perhaps still the greatest scholar of the American democracy, it has been clear

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82. L.R. 1 Ex. 265 (1966), *aff'd*, L.R. 3 H.L. 330 (1868).

83. RODGERS, *supra* note 49, at 100 (citations omitted).

84. *See supra* note 5.

since the year of his classical treatise<sup>85</sup> that no nation in the world vests as much power and importance in the judiciary and its processes as we do. The power begins with that of the courts to invalidate legislation for its unconstitutionality. De Tocqueville's study preceded by about a half century the origin of the administrative process and of judicial review of administrative action.<sup>86</sup> Any abolition of such review, as distinguished from its expansion or restriction would be, if not unconstitutional, a political impossibility.

Having rejected the scenario at one end of the spectrum, namely that of any drastic limitation of the functions of the judiciary, including that of judicial review of administrative action, one must, on the other hand, accept the proposition stated above: That lawyers, the adversary process and courts in general are probably at their lowest level of public esteem in the history of at least my lifetime. One must consider some curbing of the adversary process in the development of environmental law. Where between the two scenarios do we search for wisdom?

The question involves: (1) attitudes toward "judicial activism" versus "strict construction," and (2) appraisal of the adversary process as one by which to seek sound answers to issues of law and fact. Both matters should be considered in view of some special aspects of environmental law making.

Let me first turn to judicial activism. In the 1980s, highlighted perhaps by the positions taken by then Chief Justice Burger and others, there were strong warnings of the flooding of the courts, particularly the federal courts, with lawsuits.<sup>87</sup> It was claimed that the result of this flooding was the courts' determinations of many questions of economic and social policy.<sup>88</sup> The danger of the flooding of the courts with such problems was indeed one of the strongest arguments against permitting citizen suits in the environmental field.

85. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835).

86. The Interstate Commerce Commission (ICC), the first federal administrative agency in the United States, was created by Congress in 1887 as an exercise of its Constitutional power to regulate interstate commerce. *See* Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified at 49 U.S.C. §§ 10301-10388 (1988)); JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 10 (1938).

87. *See, e.g.,* *Norris v. United States*, 687 F.2d 899 (7th Cir. 1982) (addressing how the federal courts were drowning in litigation); Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982).

88. Burger, *supra* note 87, at 275.

Judicial activism had been defended eloquently by D.C. Court of Appeals Judge J. Skelly Wright, four years before his *Calvert Cliffs* opinion,<sup>89</sup> in *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*<sup>90</sup> Speaking of the courts' incapacity to legislate he stated:

But whatever one may think of the Court's attempts to mitigate the effects of its institutional incapacities, what is clear about these incapacities is that, where relevant, they counsel deference to the legislature but do not require it. Where the choice is between the Court struggling alone with a social issue and the legislature dealing with it expertly, legislative action is to be preferred. All too often, however, the practical choice has been between the Court doing the job as best it can and no one doing it at all. *Faced with these alternatives, the Court must assume the legislature's responsibility.* If the legislature simply cannot or does not act to correct an unconstitutional status quo, the Court, despite all its incapacities, must finally act to do so. For "nature abhors a political vacuum as much as any other kind," and if the legislatures do not live up to their constitutional responsibilities, the Court must act to fill the vacuum.<sup>91</sup>

The points made by Judge Wright were addressed to the *constitutional* lawmaking of the Warren Court. However, they fit very well into the *environmental* lawmaking of the early cases brought before NEPA was passed, as well as cases brought under NEPA and the later major environmental statutes. Moreover, each of those statutes, particularly NEPA, which has no citizen suit provision, had to be adjudicated, since Congress did not intend NEPA to be such a "papertiger."<sup>92</sup>

Judge Wright distinguished the activism of the Warren Court from that of "The Nine Old Men"<sup>93</sup> of the New Deal era, as follows:

There is, however, an obvious difference between the two Courts. The Nine Old Men were trying to halt a revolution in the role of government as a social instrument, while the Warren Court is obviously furthering that effort. Its most significant pronouncements have decreed change in the status quo, not its

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89. *Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

90. J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society – Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968).

91. *Id.* at 5-6 (emphasis added) (citation omitted).

92. 449 F.2d 1114.

93. Wright, *supra* note 90, at 2.

preservation. Rather than invalidate legislative efforts at social progress, its decisions have ordered alternation of widespread and long accepted practices, including many which had not been legislatively sanctioned in the first place. In Professor Berle's phrase, the Warren Court has functioned as a "revolutionary committee."<sup>94</sup>

I have almost always distrusted warnings about judicial activism and flooding of the courts, even though, to the extent of my own environmental advocacy and contributions to the growth of standing, I have felt some pangs of guilt over the extension of standing in court from the environmental field to cases such as those brought by fathers of Little Leaguers suing over decision-making on the ball fields.

My feeling has always been that the advocates of strict construction and limited access to the courts have not really been against courts' activism and the adversary process *per se*, but are against them so long as the results advanced causes which they did not favor, such as the civil liberties and racial equality causes served by the Warren Court<sup>95</sup> and environmental protection. I believe that advocates of strict construction would have a different view if the courts could be used, in part by judicial review of administrative actions, to inhibit environmental regulation and other governmental actions which they have deemed undesirable.

My suspicion has been confirmed by some of the bills passed by the House of Representatives and currently being considered by the Senate, to implement the "Contract with America" (Contract).<sup>96</sup> Without going too deeply into detail, it appears absolutely clear that the regulatory reform bills, H.R. 1022<sup>97</sup> and H.R. 450,<sup>98</sup> would, if they become law, open the federal courts to floods

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94. *Id.* (quoting A. BERLE, *THE THREE FACES OF POWER* vii (1967)).

95. See, e.g., *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955); *United States v. Miranda*, 384 U.S. 436 (1966).

96. REP. NEWT GINGRICH ET AL., *CONTRACT WITH AMERICA* (Ed Gillespie & Bob Schellhas eds., 1994).

97. H.R. 1022, 104th Cong., 1st Sess. (1995). This version of risk assessment legislation, which is known as the "Risk Assessment and Cost-Benefit Act of 1995," passed the House of Representatives on February 28, 1995. 1995 U.S.C.C.A.N. No. 8, tbl. 9, at 45. Senator Robert Dole (R-KS) introduced his own version, known as the "Comprehensive Regulatory Reform Act of 1995," in the Senate on February 2, 1995. When this article went to press, the Dole bill was still being considered by the Senate. See S. 343, 104th Cong., 1st Sess. (1995). 1995 U.S.C.C.A.N. No. 8, tbl. 9, at 45.

98. H.R. 450, 104th Cong., 1st Sess. (1995). This bill is known as the "Regulatory Transition Act of 1995," and would establish a moratorium on regulatory rule-making

of litigation far more onerous for courts to handle. In fact, these bills would be far more effective in inhibiting, perhaps paralyzing, governmental action, than any which have stemmed from the opening up of the courts, by *Scenic Hudson I*<sup>99</sup> and the citizen suit statutes,<sup>100</sup> to environmental advocates.

I only wish that political commentator and satirist Russel Baker would write a column about how item 9 of the Contract, purportedly designed to "stem the endless tide of litigation,"<sup>101</sup> contradicts the "regulatory reform" of item 8.<sup>102</sup> The former is the "loser pays," restrict-product-liability item.<sup>103</sup> The latter would add to major rule-making affecting public-health, public safety and the environment, as new relevant factors: (1) risk analysis and characterization; and (2) cost/benefit analysis.<sup>104</sup> H.R. 1022 adds those factors in statutory language which renders the environmental assessment process of NEPA a childishly simple one, by comparison.<sup>105</sup>

At a recent annual environmental law course in Washington, D.C., which I chair every February, I asked Representative David McIntosh (R-IN), who is the intellectual leader of "regulatory reform" whether the reform under item 8 would work to increase the volume and complexity of litigation. His answer was that it might do so, but no more than the "loser pays" legislation under item 9 would decrease litigation.

Having pointed out, however, that the "regulatory reform" advocates now are willing to promote floods of litigation, it is only fair that I point out that the EPA General Counsel, Jean Nelson, Esq., at the same February conference, stated the dangers of new floods of litigation which would issue from "regulatory reform." Other environmental advocates have also pointed out the dangers of hamstringing environmental regulation.

There are other aspects of the inconsistencies of both pro-environmental and anti-environmental advocates. Those inconsis-

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actions. The bill, which is known as S. 219 in the Senate, had passed both houses of Congress at the time this article went to press. 1995 U.S.C.C.A.N. No. 8, tbl. 9, at 45.

99. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

100. *See, e.g.*, Clean Air Act § 304; Clean Water Act § 505.

101. GINGRICH, *supra* note 96, at 11. This Contract item has been codified as the "Common Sense Legal Standards Reform Act of 1995." H.R. 956, S. 565, 104th Cong., 1st Sess. (1995). At the time this article went to press, the bill had passed both houses of Congress. 1995 U.S.C.C.A.N. No. 8, tbl. 9, at 45.

102. GINGRICH, *supra* note 96, at 18.

103. *Id.* at 145-48.

104. *Id.* at 131-35.

105. *See* H.R. 1022, 104th Cong., 1st Sess. tits. I & II (1995).

tencies may tend to render moot any effort to either limit or expand the adversary process in the environmental, or any other field of regulation, by any legislation. It is highly improbable that enough political strength could ever be assembled to move the law either way if the political force for reform is limited to that of administrative law and political science professors, assuming that *they* could agree.

Assuming, however, that there is some movement possible, by the gradual process of influencing courts, the authors of law review articles and other critical sources of the law, the question still remains: How valuable is the adversary process in environmental decision making? My view is that it is of great importance, more so than in most other areas of public and private law.

To support that view requires consideration of both the administrative process and the judicial process. The first aspect involves the issues of whether the principal elements of the adversary process, as stated by Judge Friendly, should be used by environmental administrative agencies in their decision making. Since courts are necessarily employing the adversary process, the second aspect involves the question of whether the availability, scope and depth of judicial review of administrative action should be greater in the environmental field than in most other substantive areas of public law.

Both considerations, to my mind, raise issues concerning the proper function of scientific and other technical (including economic) expertise. Such expertise and the delineation of its role are, in my opinion, more important in environmental decision-making by administrative agencies and courts than in other fields, for two reasons: (1) the issues of fact are generally issues of conclusions drawn from undisputed perceived facts, rather than issues of perceived facts, as to whether one person may be telling the truth and another deliberately or simply erroneously not telling the truth; and (2) it is particularly important in the environmental field that scientific and other expertise be distinguished—and doing so is often difficult line drawing—from value judgment.

I believe that cross-examining an expert on the specific factual basis and logic of his or her conclusions is more likely to be productive, either in affirming or disproving those conclusions, than in disproving the testimony of lay witnesses testifying as to perceived facts. Others may disagree about this, and certainly demonstrating that a witness is lying, rather than simply stating an unsound opinion, is more fun for the cross examiner. But I do

not think that the latter really occurs very frequently, even when the cross examiner is F. Lee Bailey or someone else with far greater cross-examination skills than those of merely competent trial attorneys such as myself.

Moreover, whether the demeanor of a witness and other aspects of a witness and his or her testimony indicate he or she has been lying or telling the truth is generally regarded as the particular province of a jury. Administrative proceedings never, and environmental civil court cases, except for hazardous waste and toxic tort damages cases, hardly ever, involve juries.

Turning to the second aspect, that of technical expertise in environmental proceedings, which often involved the fusion or confusion of expertise with value judgments, I believe that no process comes close to that of direct examination and cross-examination in drawing the correct line. My first experience with such value judgments in a case was in the second round of the *Scenic Hudson* FPC proceedings,<sup>106</sup> when the value of the unbroken river shoreline of Storm King Mountain had to be balanced against the need of an affluent society for more power. Another example of such value judgments would be in administrative or judicial review proceedings under the Contract's "regulatory reform" provisions, which would require EPA and other agencies to perform risk analysis and cost benefit analysis in their environmental decision making.<sup>107</sup>

If, for example, a cost/benefit analysis is based upon the valuation of life, as it must be in some cases, does it not clarify the issue to have that valuation exposed, dissected and weighed under cross-examination of the analyst, whether in the administrative or the judicial review process? In using the illustration of valuation of life I am not speaking solely of an expert who I thought might have valued life too *little*. The cross-examination might as well demonstrate that life has been valued too *much* to justify a particularly stringent regulation, considering the costs of the regulation.

The function and value of non-specialist judges in reviewing the conclusions of experts, of both the agencies themselves and of those upon whose opinions they rely, is described by Court of Appeals Judge Patricia Wald, in a paper presented at the 1991 Bellagio Conference on U.S.—U.S.S.R. Environmental Protection

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106. *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 453 F.2d 463 (2d. Cir. 1971).

107. See *supra* notes 96-104 and accompanying text.

Institutions.<sup>108</sup> On the subject of the function of "non-specialist judges," and the role of the environmental public interest law firms, she says:

Although some worry that nonspecialist judges cannot understand the arcane subject matter of environmental law, for the most part judges have proven themselves capable of mastering its essentials in the same degree as elected legislators and agency policy makers. In cases brought to compel the federal or state government to act, trial courts on occasion have exercised dramatic powers, stopping timber sales, immediately enjoining all disposal of wastes, or barring the addition of new sewer hookups. Such rulings have a significant effect on agency decision making, but in the absence of such judicial exercises of power, it is difficult to see how agencies can be controlled. *Fortunately, judicial oversight is possible because of the major environmental organizations that can go face to face with government in court.* Ordinary citizens rarely have the resources to conduct such litigation because of the excessive time and money that trials and appeals consume.<sup>109</sup>

If we accept the premise that scientific and other expertise, and the delineation of its use, are of particular importance in environmental administrative and judicial decision making, we can conclude that the adversary process is thus particularly useful.

The second aspect of the value of the adversary process, especially in the realm of environmental administrative action, is the availability, scope, and depth of judicial review. Turning to that subject, I confess a certain uneasiness, born of the fact that I will be saying in much briefer form (for which I am certain everyone is now thankful) what I stated in a Columbia Law Review Article in April, 1970.<sup>110</sup> I feel this uneasiness because I do not really know whether, on the one hand, I should credit myself with some degree of prophecy, or whether, on the other hand, I am demonstrating that I have no or few new ideas twenty-five years later.

Whichever deduction is correct, I would point out that one of the grounds for my taking the position in 1970, that the scope and depth of judicial review should be greater in the environmental field than in most others,<sup>111</sup> applies to some extent at this time. I

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108. Patricia M. Wald, *The Role of the Judiciary in Environmental Protection*, 19 B.C. ENVTL. AFF. L. REV. 519 (1992).

109. *Id.* at 545-46 (emphasis added).

110. Sive, *supra* note 54.

111. *Id.* at 614.



say "to some extent" but would say, "equally as much or even more," if some version of the Contract's "regulatory reform"<sup>112</sup> becomes law. A court applies *Chevron, U.S.A. Inc. v. NRDC* (*Chevron*),<sup>113</sup> directing the acceptance by courts of any reasonable constructing by an agency of the statutes administered by it. Issues in the review of environmental decision-making are more frequently issues of law or mixed issues of law or fact, and less frequently wholly issues of fact, as compared to most other fields of public and private law. Subject to *Chevron*, determinations of issues of law may be reviewed *de novo*.<sup>114</sup>

Due to the relationship between environmental law and the terms of the statutes declaring it, such as the clause in NEPA which requires an environmental impact statement (EIS) for all agency actions "significantly affecting the quality of the human environment,"<sup>115</sup> an issue of the application of the once new statutory term may change from one of law to one of fact. The relationship of the newness of a statutory term to the question of whether a determination of its application is one of law or of fact is clearly seen from *Marsh v. Oregon Natural Resources Council*.<sup>116</sup> The "respondents maintain[ed] that the question for review center[ed] on the legal meaning of the term 'significant',"<sup>117</sup> in connection with their claim that there was a duty to supplement an environmental impact statement, because "new information suffice[d] to establish a 'significant' effect [upon the environment]."<sup>118</sup> The Supreme Court responded that "[t]he dispute . . . does not turn on the meaning of the term 'significant' or on an application of [a] legal standard to settled facts."<sup>119</sup> Rather, the Court ruled, "resolution of this dispute involves primarily issues of fact."<sup>120</sup>

There is little doubt that in the early NEPA days, an issue as to the meaning and application of the word, "significantly,"<sup>121</sup> in the determination of whether an impact statement is required, would have been at least a mixed issue of law and fact. The Coun-

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112. See *supra* notes 96-104 and accompanying text.

113. 467 U.S. 837 (1984). As to the current status of the law of this case, see *The Supreme Court, EPA and Chevron: The Uncertain Status of Deference to Agency Interpretations of Statutes*, 25 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,127 (March 1995).

114. 467 U.S. at 842-43. See also *FED. R. CIV. P.* 50.

115. 42 U.S.C. § 4332(2)(C) (1988) (emphasis added).

116. 490 U.S. 360 (1989).

117. *Id.* at 376.

118. *Id.*

119. *Id.* at 377.

120. *Marsh*, 490 U.S. at 377.

121. 40 C.F.R. § 1508.27 (1994).

cil on Environmental Quality (CEQ) regulations<sup>122</sup> set forth a definition of some complexity, after several early cases ruled upon the meaning.<sup>123</sup>

In connection with the newness of statutory concepts and terms, consider the issues of law the courts will have to face in reviewing administrative agency applications of any new law requiring risk analysis and cost/benefit analysis. Examine, for instance, the problems of a court reviewing an EPA strategy determination required to be based upon a cost/benefit analysis. Perhaps, one valuing life and weighing it against the costs of preventing death, with EPA being required to certify, among other things:

That other alternative strategies identified or considered by the agency were found either: (A) to be less cost-effective at achieving a substantially equivalent reduction in risk; or (B) to provide less flexibility to state, local, or tribal governments or regulated entities in achieving the otherwise applicable objectives of the regulation along with a brief explanation of why alternative strategies that were identified or considered by the agency were found to be less cost-effective or less flexible.<sup>124</sup>

The prospect of a regulated community advocate, perhaps even (to use a more strident term) a *polluter*, bringing a judicial proceeding to review an EPA rule, in which the reviewing court would have to determine the meaning of the above quoted, Gingrich inspired, paragraph, poses a dilemma for me. On the one hand, the broader and deeper the court review and the weaker the *Chevron*-inspired presumption of reasonability of statutory interpretation accorded to EPA, the worse it may be for the environmentalists. On the other hand, I favor more intensive review in environmental cases.

In this connection it is reasonable to anticipate that such judicial reviews would delay implementation of EPA regulations to

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122. *Id.*

123. See *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) (holding that in determining whether the erection of a jail, a major federal action, will affect the quality of the environment, the review must determine whether adverse environmental effects would exceed existing impacts); *Louisiana Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044, 1045 (5th Cir. 1985) (holding that Army Corps of Engineers must reconsider its assumption that 17,200 acres to be cleared and converted from wetlands to agricultural use would be cleared by landowners regardless of a flood control project).

124. See H.R. 1022, 104th Cong., 1st Sess. § 202(a)(3) (1995).

the point of rendering permanent the moratorium against EPA major rulemaking of another Contract inspired "regulatory reform," H.R. 450.<sup>125</sup> It might at least delay implementation many more years than I, by judicial review, helped delay a case in which I represented communities opposing the I-287 cutting away of whole mountainsides in the Highlands of Passaic and Bergen counties of New Jersey.<sup>126</sup>

Here is my second dilemma. Am I at this lecture more or less of an administrative and environmental law teacher or student than an environmental advocate? I think that my role here is more the former, however difficult it is not to be overwhelmed by a resurgence of youth, thinking back to the fun days with Dick Ottinger spreading our environmental gospel from his Volkswagen bus.

Imagining myself again as a member of the Administrative Conference of the United States, and discharging the function I might thus discharge if the Contract<sup>127</sup> schedule were slowed down to *two* hundred days, I continue to take the position that broader and deeper judicial review of environmental administrative actions should be the rule. Such review is important enough to suffer the slowing down or reversal of EPA rulemaking actions, as well as to delay the implementation of mountainside cutting or of U.S. Forest Service lumbering contracts.

There is still another reason, in my opinion, for more intensive review of environmental agency actions than of most other agency actions. As described in my 1970 Columbia Law Review effort,<sup>128</sup> there is legal authority for broadening and deepening judicial review in cases where a claimant of a constitutional right came before an agency. A 1922 Supreme Court opinion by Justice Brandeis, in a deportation case, so held.<sup>129</sup> The reason was that the right to avoid deportation was said to be "all that makes life worth living."<sup>130</sup>

Environmental rights may not always be quite in the same category. However, if the scope and depth of judicial review are even roughly proportionate to the relative irrevocability and im-

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125. See *supra* note 101.

126. *County of Bergen v. Dole*, 620 F. Supp. 1009 (D.N.J. 1985), *aff'd*, 800 F.2d 1130 (3d Cir. 1986).

127. GINGRICH, *supra* note 96.

128. Sive, *supra* note 54.

129. *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

130. *Id.* at 284.

portance of administrative determinations to be judicially reviewed, environmental determinations frequently meet the test. This may have been more the case in the earlier years when the cases, more frequently than today, involved projects to be built or not built, *e.g.*, power plants,<sup>131</sup> massive dams,<sup>132</sup> or interstate roads.<sup>133</sup> It still is the case, however, that environmental decisions are generally less revocable than those in other fields of law. If, for example, the "regulatory reform" of item 8 of the Contract<sup>134</sup> becomes law, the cost of death and the benefit of life will be appraised in the consideration of the cost-effectiveness of each new regulation.<sup>135</sup> The administrative decisions may well involve for some affected persons little short of "all that makes life worth living" for a candidate for deportation.<sup>136</sup> Stated otherwise, and with some admitted triteness and sentimentality, excusable on this anniversary day: "There is only one Earth."

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131. See *supra* notes 1-2, 107 and accompanying text.

132. See *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (holding that the Endangered Species Act prohibited the completion of a dam which would have either eradicated a known population of an endangered species, the snail darter, or destroyed its critical habitat).

133. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (holding that the Secretary of Transportation may not authorize funds for construction of a highway through a public park if a "feasible and prudent" alternative route exists; and if no such route exists, construction may only be approved if there has been "all possible planning to minimize harm" to the park).

134. GINGRICH, *supra* note 96, at 18.

135. *Id.* at 132.

136. *Ng Fung Ho v. White*, 259 U.S. 284 (1922).