



Justice John Paul Stevens
(from scheme-root.org)

When I sat down to write this blog posting, I started by going through my environmental law casebook and noting down the cases in which Justice Stevens had written the majority opinion or a major dissent. When I got done, I was startled by the central role Justice Stevens had played in creating modern environmental law.

I'll explain that central role in a minute, but first, why I was startled? Two reasons. First, Justice Stevens still retains some of the "brilliant maverick" reputation that he gained in his first year on the Court. That is, someone with a lot of sharp insights but no overall theme. Second, so far as I know, he has no particular passion for environmental law as such. His life before he became a judge never included environmental law, and so far as I know he has no special attachment to the outdoors.

Here are some examples of key environmental law opinions by Justice Stevens (not all of them on the side of the environmental angels):

*In the *Benzene Case*, he put the Court's stamp of approval on quantitative risk analysis, holding that the agency needed a numerical estimate of risk as a prerequisite to regulating toxics.

*In *Chevron*, which is among the Court's most heavily cited opinions, he held that administrative agencies like EPA have discretion in interpreting environmental statutes, so long as they do not contradict a clear congressional mandate.

*In *Massachusetts v EPA*, he rejected the Bush Administration's position on climate change, which he found contrary to the clear language of the statute, and ordered EPA to make a

finding under the Clean Air Act on whether greenhouse gases endanger human health or welfare.

*In *Sweet Home*, he upheld the government's power to restrict habitat destruction in order to protect endangered species.

To these blockbusters, you can also add others on environmental impact statements (*Robertson*), on takings (*Tahoe-Sierra*), and on the Clean Water Act (*DuPont*). In a host of other cases, he has written concurrences or dissents in favor of the power of governments to regulate and of access to courts by environmental plaintiffs.

There is a clear theme in these opinions: a strong preference for democracy and agency expertise over judicial policymaking. Thus, Justice Stevens generally seeks to enforce Congressional decisions when they are clear, and beyond that to uphold considered decisions by the executive branch. (The one case that doesn't entirely fit, to my mind, is *Benzene*, but his reading of the statute was obviously different than mine.)

This philosophy of judicial restraint, which is the essence of the *Chevron* doctrine, has often led him to the environmental side of cases, simply because major environmental statutes tend to favor the environment more often than not. Similarly (although this ebbs and flows between presidencies), agencies like EPA and Fish and Wildlife often use their discretion in favor of the environment. But at the end of the day, his allegiance is not to the cause of environmentalism but to a vision of responsible democratic government.

It doesn't seem like much to ask judges to respect decisions made by the other branches of government pursuant to the appropriate legal process. Yet a willingness to do so is all too rare. The irony is that Justice Stevens was often in the position of reminding so-called "textualists" that the language of a statute was clearly opposed to their preferred outcome.

The moral is simple. To protect the environment, we don't need environmental crusaders on the Court. We just need judges who understand that the paramount role in environmental law is played by Congress (with an assist from administrative agencies), not by the courts. Alas, it is much easier to find judges who play lip-service to this idea than those who honestly carry it out.