Thurgood Marshall -- Usually a Reliable Environmental Vote

Sierra Club v. Morton is rightfully viewed as one of the most significant environmental decisions in Supreme Court history. Although it hardly constituted a crimped or anti-environmental decision, it did go a long way to putting the brakes on environmental standing by ruling that the Sierra Club did not have the corporate standing to challenge the Interior Department's policies on the Mineral King development. Perhaps the case is best known for Justice Douglas' eloquent dissent (a rarity for him), in which he argued that inanimate objects should have standing (citing Chris Stone's classic article in the process). Justice Blackmun also authored a stirring and creative dissent.

But here's a question that just occurred to me: why were either of these opinions dissents in the first place?

Take a look at the lineup of the Court that decided the case: Rehnquist and Powell did not participate, perhaps because they had not been confirmed yet. Douglas, Blackmun, and Brennan dissented. That meant that Justice Stewart, writing for the Court, needed three votes, which he got. Whose votes were those? Chief Justice Burger — not a surprise. Byron White — ditto. Then who provided the deciding vote? Thurgood Marshall.

Thurgood Marshall? What was *he* doing lining up with Burger and against Brennan?

Marshall didn't figure to be sympathetic to calls to restrict standing in federal courts. As leader of the NAACP Legal Defense Fund, he pioneered the effort to enlist the federal courts on plaintiffs' side. He was constantly at war with state judges and bar associations accusing the Inc. Fund of barratry. His classic dissent in San Antonio Independent School Dist. v. Rodriguez is a brilliant argument for extending civil rights claims to issues of wealth and poverty: "every child," he asserted, "has a right to an equal start in life."

On the other hand, it many ways he was something of a traditionalist: his statutory interpretation and civil procedure opinions are not full of theoretical pyrotechnics. In his own way, he was a traditional litigator who believed that federal courts

existed to protect civil rights, not to serve as fora for political disputes. And he *did* view civil rights as something more than a political dispute.

At the end of his career, Marshall dissented from the Rehnquist's Court attempts to close to courthouse door to environmental plaintiffs, although cases such as *Lujan* clearly represented a radical departure from *Morton.* But it still something of a mystery as to why Justices Brennan and Douglas could not get him to join with them in *Morton.* The conservative justices of the Rehnquist Court had little use for precedent, and so it might not have mattered in the long run, but had *Morton* come out differently, we might have had a very different environmental standing jurisrprudence than we do now. Marshall's, Blackmun's, and Douglas' Supreme Court papers are available for historical research: an enterprising environmental scholar has an opporunity to solve this puzzle, and I would hope that someone takes it.