In the United States, judges are usually considered to be "above the fray" -- somewhat removed from politics and money. Of course we all know this is not completely true because judges are humans like everyone else; they are influenced by current events and many of them relax at the country club where they rub elbows with the owning class. Still, judges in the U.S. are usually thought to be fair-minded, independent, and to the extent possible for any human, unbiased.

Unfortunately, since about 1980, groups of wealthy right-wing extremists have been conducting organized campaigns to change all this, and now it is apparent that they have largely succeeded.

Increasingly, our federal judiciary is flagrantly partisan and beholden to corporate money. As a result, environmental laws and regulations in the United States are being gutted. For 30 years environmental protection -- even environmental protection at the local level -- has relied on lawsuits, or the threat of lawsuits, to bring violators into compliance, to require reluctant officials to enforce the law, and to hold the wealthy and the powerful liable when they harm air, water, land, wildlife and humans. Fear of legal liability has been a major restraint -- perhaps THE major restraint -- on the worst tendencies of both individuals and corporations.

Now three recent reports reveal that the independence and impartiality of the judiciary has been systematically compromised by wealthy right-wing extremists.[1,2,3] As a result, many laws intended to protect the environment, and intended to give citizens access to the courts, have been rendered ineffective.

In a new report, Natural Resources Defense Council (NRDC) -- the nation's best-known environmental litigation group -- says, "A group of highly ideological and activist sitting judges are already threatening the very core of environmental law.... In the last decade, judges have imposed a gauntlet of new hurdles in the path of environmental regulators, slammed the courthouse doors in the face of citizens seeking to protect the environment, and sketched the outline of a jurisprudence of 'economic liberties' under the Takings and Commerce Clauses of the Constitution that would frustrate or repeal most federal environmental statutes."[1,pg.v]

Here are the outlines of the problem:

** Judges appointed to the federal bench during the past 20 years have radically reinterpreted both the U.S. Constitution and the laws passed by Congress. Evidently motivated by libertarian, anti-government, free market theology, a generation of radical activist judges has intentionally gutted many environmental laws, regulations and citizen safeguards.

** Many state judges have been compromised by organized wealth. The election -- rather than appointment -- of many judges was promoted during the 1840s to extend democracy. Now, however, the rise to power of super-wealthy right-wing extremists has opened state judicial elections to the influence of organized wealth. A report last year from the Georgetown University Law Center reveals that many state judges must now raise $1 million or more just to run for election. No matter who wins such an election, corporate money gains a seat on the bench.[2]

** At least three right-wing extremist organizations have spent tens of millions of dollars during the past decade sending federal judges to all-expense-paid "educational seminars" in resort locations where they learn to interpret the law according to libertarian (anti-government), free-market theology. Over the past decade, a majority of the nation's federal judges have undergone such training at the hands of libertarian, free-market extremists. A former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, Abner Mikva, says, "It may be a coincidence that the judges who attend these meetings usually come down on the same side of important policy questions as the funders who finance these meetings.... But I doubt it."[3,pg.iv]

As a result of all this, the U.S. Supreme Court and the lower federal courts have spent the last 10 years reinterpretting the Constitution and federal laws, in these ways:

** The Commerce Clause of the Constitution: The basis for federal environmental protections has always been the Commerce Clause of the Constitution, which gives the federal government the right to "regulate commerce among the several states."

The Supreme Court ruled this year that the Army Corps of Engineers has no authority to prevent construction of a landfill in wetlands needed by migratory birds. Such birds have substantial interstate economic effects. They protect crops and forests by holding insect populations in check. Furthermore, millions of people spend more than a billion dollars each year on recreation related to migratory birds. Nevertheless, the Supreme Court decided that migratory birds have nothing to do with interstate commerce, making this a state matter, not federal.

This was not the first Supreme Court ruling to reinterpret the Commerce Clause to reduce the power of the federal government. As a result, lower courts are experimenting with new ways to deny federal authority over environmental matters. For example, a federal judge in Alabama decided that the federal Superfund law (requiring cleanup of toxic dump sites) did not apply to closed dumps where there is no current economic activity; he decided that a closed chemical dump was a local real estate matter, beyond federal jurisdiction. This decision was overturned on appeal, but it signals very clearly that reinterpretation of the Commerce Clause is on the nation's judicial agenda.

As NRDC says in its new report, a string of recent court attacks on the Commerce Clause shows that "our federal environmental protections already hang in precarious balance."[1,p.g.8]

** The Takings Clause of the Constitution: The fifth amendment of the Constitution says, "nor shall private property be taken for public use, without just compensation." Over the years, this has been interpreted to mean that a land owner must be compensated if the entire use of his or her property is destroyed by a federal action. If any uses of the land remain after the federal action, compensation is not required. Thus a zoning decision that denies commercial use of land does not require compensation, so long as the property can still support other uses.

Now, however, activist judges have spent 15 years reinterpretting the takings clause in a series of high-profile cases. For example, a federal judge ruled that a company seeking to mine limestone out of the Florida Everglades had to be compensated tens of millions of dollars when the federal government denied a mining permit. The rock company admitted that it would still be able to sell its land for twice the amount it had paid for it, but the court overturned a hundred years of precedent and awarded the company compensation for the "taking" of its mining rights.[1,pg.12] Under this interpretation of the takings clause, the federal government must pay every polluter to comply with environmental laws.

In another case, federal protection of endangered salmon reduced one California landowner's water rights somewhere between 8% and 22% -- nowhere near the 100% taking that traditionally has triggered compensation. The judge in this case concluded, "The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so." As NRDC said, "This conclusion tolls the death knell for effective federal protections for our nation's freshwater species," 30% of which are in danger of extinction.[1,pg.13]

** The 11th amendment to the Constitution prevents federal courts from hearing lawsuits brought against a state government "by citizens of ANOTHER state" or by citizens of a foreign country.

Now the U.S. Supreme Court has radically reinterpreted this clear
language, removing the word "another." Here's one example of how the new interpretation of the Constitution helps corporate polluters and their servants in state governments:

The first stated goal of the federal Surface Mining Control and Reclamation Act (SMCRA) is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." The law says no mining can occur within 100 feet of a stream unless the mining company can show that no adverse effects will occur to the stream. Despite this language, West Virginia state officials have repeatedly issued "mountain top removal" mining permits to coal companies. As the name implies, "mountain top removal" means huge machines remove the tops of mountains, dumping thousands of tons of rock and soil into nearby valleys, burying streams beneath rubble, killing all the life they support.

SMCRA also contains a citizen suit provision, so a W. Va. citizen named Bragg sued in federal court to force West Virginia state officials to comply with federal law. A federal appeals court ruled against Bragg, saying the 11th amendment prevented him from suing his state in federal court. So West Virginia officials are free to ignore federal mining law.

** Citizens' standing to sue: Many federal environmental laws contain a "citizen suit" provision giving citizens the right to sue in court to enforce the law. Now the citizen right to sue has all but disappeared, thanks to recent federal court rulings. The courts have ruled that most citizens have not been personally harmed to a sufficient degree to give them "standing" to file a lawsuit. For example, citizens who want the Endangered Species Act enforced must show that failure to enforce the law has caused them substantial personal harm. Few citizens (if any) can meet such a test. Because of this and similar rulings by federal judges, citizen suits are largely a thing of the past.

The worst part of all this is that the traditional environmental movement is powerless to reverse these trends. Because the movement has spent 30 years pursuing narrow legal and scientific strategies, playing an insider's game of lobbying and rulemaking in Washington, the movement has no real political base of active citizens across the country who could rise up united and send a strong message to the judiciary (and to Congress) that the American people want environmental laws strengthened, not gutted. In this important venue -- the courts -- wealthy corporations are now holding almost all the cards and the traditional environmental movement is powerless to stop them.

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