Justice Stevens' Abiding Environmental Legacy

By Richard Frank

As Justice John Paul Stevens' distinguished, 35-year career on the U.S. Supreme Court winds down, it's both appropriate and timely to consider his contributions to American environmental law. And those contributions are considerable indeed.

Justice Stevens' influence on the nation's environmental jurisprudence goes well beyond the fact that he has served on the Supreme Court longer than anyone in U.S. history save the justice he replaced: William O. Douglas. And it comes in spite of the fact that — unlike Justice Douglas — Justice Stevens' personal and professional history reveals no particular affinity for the great outdoors or environmental causes.

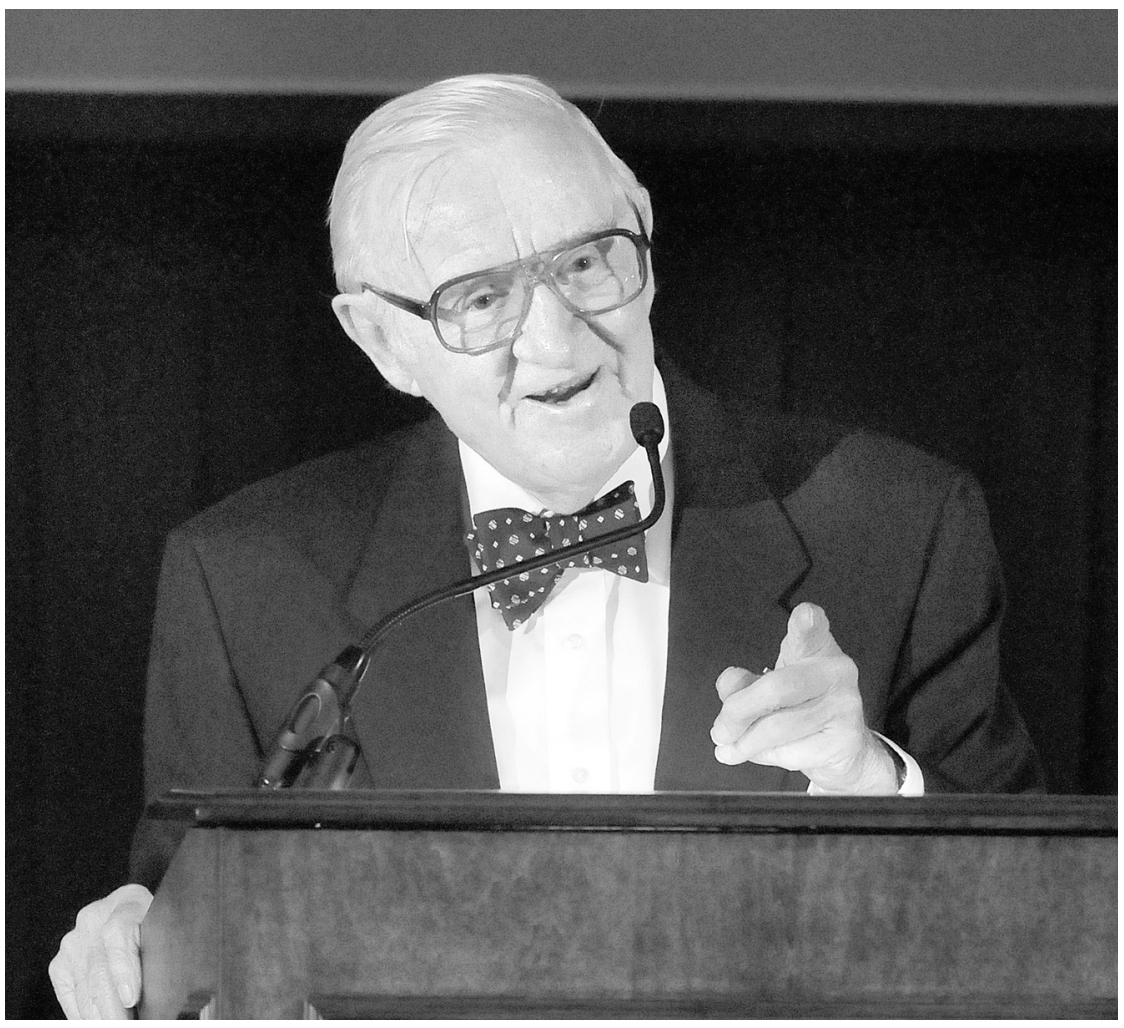
Nevertheless, a key (and largely overlooked) part of Justice Stevens' judicial legacy is the fact that he's responsible for many of the Court's most influential environmental decisions over the past several decades.

That wasn't always the case. Indeed, in his earliest opinions Justice Stevens charted a conservative course when it came to environmental issues. Largely forgotten, for example, is the fact that Stevens dissented from the Court's 1978 decision in *Penn Central Transportation Company v. City of New York*. In that case, the Court rejected a constitutional challenge to the city's historic landmarks preservation law. But Justice Stevens joined then-Associate Justice William Rehnquist's dissent in *Penn Central*, concluding that New York's designation of Grand Central Terminal under the municipal landmarks law constituted a compensable "taking" of private property under the Fifth Amendment to the U.S. Constitution.

Nevertheless, a comprehensive review of Justice Stevens' voting record on the Court demonstrates that, far more often, he charted a progressive course concerning the environmental cases that came before the High Court. And his pro-environment philosophy became far more consistent and deeply ingrained the longer he served as a Supreme Court justice.

Here, in chronological order, are perhaps the five most influential environmental law decisions authored by Justice Stevens over his extended Supreme Court career:

In *Chevron U.S.A. v. Natural Resources Defense Council*, Justice Stevens led a unanimous Supreme Court in declaring the USEPA's "bubble policy" a valid means of implementing the federal Clean Air Act. That policy represented one of the first applications of so-called "market-based" systems of environmental regulation. Yet Stevens'1984 decision in *Chevron* is far more noteworthy as the precedent establishing a now-foundational principle of administrative law: that executive branch agencies' interpretations of less-than-clear congressional statutes they are charged with implementing are entitled to substantial deference by reviewing courts-the so-called "*Chevron* rule." Justice Stevens' *Chevron* opinion has proven to be one of the most frequently-cited in U.S. Supreme Court history.



Associated Press

Justice John Paul Stevens.

A key (and largely overlooked) part of Justice Stevens' judicial legacy is the fact that he's responsible for many of the Court's most influential environmental decisions over the past several decades.

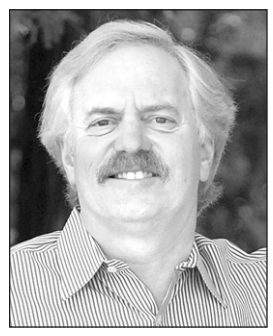
Justice Stevens interpreted the Endangered Species Act expansively in his 1995 decision in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*. There he concluded on behalf of the Court that "harm" proscribed under the ESA includes the damaging of natural habitats upon which listed species depend for their survival.

In *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, Justice Stevens declared on behalf of the Court in 2002 that the Tahoe Regional Planning Agency's moratorium on development in the Lake Tahoe Basin while TRPA formulated a regional plan governing future growth passed muster under the Fifth Amendment's Takings Clause. In rejecting the landowners' regulatory takings claims, Justice Stevens' opinion reiterated the importance in takings jurisprudence of a fact-specific, multifactor analysis of an environmental regulation's effect on private property interests — a somewhat ironic ruling, given that this constitutional analysis was first articulated in the very *Penn Central* decision from which Stevens had dissented a quarter century before.

Justice Stevens' most controversial environmental ruling doubtless was his majority opinion in the 2005 case, *Kelo v. City of New London*. In *Kelo*, he concluded that a municipality's exercise of its eminent domain powers to condemn private property, which was ultimately conveyed to another private party in order to facilitate a community redevelopment project constituted a permissible "public use" under the Fifth Amendment's Takings Clause. Four justices, led by Justice Sandra Day O'Connor, vigorously dissented, arguing that such practices constituted an abuse of government's condemnation authority and trampled private property rights. O'Connor's views ultimately prevailed in the court of public opinion, with most states (including California) changing their eminent domain laws to preclude the type of eminent domain efforts legitimized in *Kelo*. (In a speech he gave shortly after his controversial *Kelo* opinion, Justice Stevens stated that while he would support similar reforms were he a state legislator, he considered himself bound by the Supreme Court's longstanding eminent domain/public use precedents in deciding the *Kelo* case.)

Finally, Justice Stevens authored the Court's decision in the landmark climate change case, *Massachusetts v. USEPA* in 2007. Writing for a bare five-member majority, Justice Stevens held that the state plaintiffs bringing the action had Article III standing to challenge the federal government's failure to regulate greenhouse gases under the Clean Air Act; that the USEPA does in fact have the legal authority to do so; and that the agency had abused its discretion in failed to regulate greenhouse gases under the Act based on the reasons advanced for refusing to do so. But perhaps the single most significant aspect of Stevens' opinion in *Massachusetts* is his unequivocal statement in the decision's first paragraph that climate change is a clear and present environmental danger facing our nation and planet. That declaration has had policy and political ramifications extending far beyond environmental law and lawyers.

Environmental advocates are understandably glum over Justice John Paul Stevens' imminent departure from the Supreme Court. Especially over the past two decades, Stevens has represented the most reliable environmental vote among the justices. In retrospect, and more importantly, Justice Stevens may well go down in legal history as the most influential jurist of the modern environmental law era.



Richard Frank is Executive Director of the Center for Law, Energy & the Environment at the U.C. Berkeley School of Law.

Justice Department Targets Fraud Claims

Continued from page 1

federal share of the civil settlement was nearly $51 million, while state Medicaid received over $24 million. The *qui tam* whistleblowers received in excess of $9 million from the federal civil recovery.

Continuing its streak, the Department of Justice also recently settled for over $26 million with Ciena Capital LLC, a private, non-depository lender in New York City. This resolved allegations that Ciena and a subsidiary "falsely certified" compliance with Small Business Administration regulations by submitting claims for payments on loans they originated, underwrote, and serviced. Finally, the Department of Justice recently intervened in a *qui tam* suit in Texas against Kellogg Brown & Root, a key logistical support provider for the U.S. military in Iraq, and others concerning alleged kickbacks.

The Department of Justice's clear commitment to vigorous FCA enforcement should come as no surprise. In his Senate confirmation hearings, Assistant Attorney General for the Civil Division Tony West stated that protecting taxpayer dollars through vigilant anti-fraud and FCA enforcement was second only to national security and the war on terror on his list of priorities.

Once referred to as "Lincoln's Law," the FCA was enacted during the Civil War in an attempt to curtail then-rampant frauds against the federal government by military suppliers. The *qui tam* — "whistleblower" —provision of the FCA allows private citizens to bring anti-fraud suits on behalf of the government and to potentially share in any eventual recovery. This private attorneys general enforcement scheme went largely unused until 1986, when Congressional amendments incentivized its increased use.

In a typical FCA *qui tam* action, a private citizen — known as the "relator" — files a claim on behalf of the government in accordance with specific and strict procedural requirements. the The Department of Justice must then conduct a "diligent" investigation of the claim. This investigation is generally critical to the success or failure of any claim. At the end of its investigation, the Department of Justice may intervene and prosecute the action, decline to intervene and leave the relator to prosecute the action, or move to dismiss the relator's complaint. When the Department of Justice decides not to intervene, it usually results in the dismissal of the whistleblower suit.

In May 2009, the enactment of the Fraud Enforcement and Recovery Act (FERA) substantially amended the FCA. Specifically, FERA eased enforcement requirements and increased a defendant's potential exposure to liability by empowering the Department of Justice to more easily issue civil investigative demands; eliminating the "specific intent to defraud" requirement; expanding the definition of "materiality"; extending the scope of persons who are protected as whistleblowers; and penalizing "reverse" false claims.

Each of these amendments is significant. Of particular note, however, is the broad expansion of prosecutorial authority to issue civil investigative demands. In March 2010, the Department of Justice invoked its authority under FERA to allow all 93 U.S. Attorneys to issue civil investigative demands. Previously, the Attorney General had to personally approve them. These are powerful pre-litigation discovery tools that can be used by the Department of Justice to compel the production of documents, responses to interrogatories, sworn testimony, or a combination thereof. Because civil investigative demands can be used before litigation has actually commenced, potential defendants may have to respond to these inquiries without the benefits of formal civil discovery. With the recent changes regarding civil investigative demands, federal prosecutors are now even better equipped to investigate fraud under the FCA.

The FERA amendments, civil investigative demand expansion, and large recent settlements all indicate that the Department of Justice will continue to aggressively investigate and clamp down on companies violating the FCA. In this zealous enforcement environment, companies should be extremely vigilant regarding how they conduct business with the government to ensure compliance with the FCA.

There is no substitute for solid preparation. In fact, once the government has initiated an investigation a company may have already missed its best chance to stave off potential exposure under the FCA. Prudent companies and their officers and directors should therefore ensure that comprehensive and effective compliance systems have been implemented throughout the company. Further, these systems should be routinely and rigorously tested to promote ongoing effectiveness. Moreover, if an investigation by the Department of Justice has already commenced, the company and its counsel may be well served by working closely with the Department in an effort to preempt or avoid a possible FCA action.

In light of the recent large recoveries and significant developments under the FCA, undertaking a thorough review of existing policies and procedures will likely place an organization in a significantly better position to avoid the possibility of a *qui tam* suit and the threat of the Department of Justice action.

Thomas P. O'Brien is a partner in the Litigation Department of Paul Hastings and former U.S. Attorney for the Central District of California. **Adam D. Schneir** and **John J. O'Kane** are both associates in the Litigation Department of Paul Hastings Los Angeles office.