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Justice Scalia's "Slash and Burn" Attack on Access to the Courts (4/27/05)

David Sive, a pioneer in environmental law, once said that "in no other political and social movement has litigation played such an important and dominant role. Not even close."

Sive should know. He was one of the attorneys who persuaded the Second Circuit Court of Appeals in 1965 to allow the Sierra Club and the Scenic Hudson Preservation Conference to pursue a lawsuit aimed at blocking construction of a power plant at Storm King Mountain on the Hudson River in New York. Until that time, in order to demonstrate what's known as "standing to sue" a plaintiff had to claim a monetary interest in the outcome of a dispute. The club and the conference claimed no such interest: they wanted to stop the despoliation of Storm King because they liked to hike there, enjoyed the uncluttered view.

For 25 years following the Storm King decision and a subsequent Supreme Court decision involving Mineral King valley in the Sierra Nevada in California -- a case that inspired the creation of Earthjustice -- standing was a virtual a non-issue. Occasionally a government agency or a private company would challenge an environmental plaintiff's claim to standing, but most didn't bother. It was understood that environmental claims deserved their day in court. Indeed, Congress wrote explicit language into a dozen statutes providing, in most cases, that "any citizen" shall have the right to judicial review of agency decisions.

Free entry to court began to be threatened in 1992, however, with a decision by the Supreme Court in a case where Defenders of Wildlife tried to force the Agency for International Development to apply the Endangered Species Act to development projects it was funding abroad. Justice Scalia, who is leading the charge on standing as well as boosting other impediments that can make it difficult for citizens to gain access to the courts, wrote that Defenders did not have standing to pursue the case because it had not proved that the organization or its members would be harmed by dam projects proposed for Sri Lanka and Egypt.

Organizational standing, as it is called, suffered a major setback in early 1998 with another Scalia opinion, this involving a suit brought under the Emergency Planning and Community Right To Know Act concerning a steel manufacturing company in Chicago. Citizens for a Better Environment had sought to have the court impose penalties against the defendant, as provided in the statute, for failing to file pollution reports on time. (The company had not filed a single report in the ten years since the law had begun requiring them.) Justice Scalia found that since the penalties would be paid to the federal treasury, not CBE, that CBE's injury would not be "redressed" by the outcome, therefore CBE lacked standing. CBE's lawyers argued that the future deterrent effect of a large fine, on the defendant and its peers, would redress its injury, but Scalia wasn't having any of it.

Eventually, in 2000, Justice Scalia's run came to an end, at least temporarily. That year, he was in the minority of two in a case known as Laidlaw Environmental Services v. Friends of the Earth. In that case, lower courts had found that FOE did not have standing because a polluter had

cleaned up its discharges after the suit was filed, providing it a way to wiggle out of fines and penalties. The Supreme Court reversed the lower-court finding and ruled for FOE and its standing.

We're not talking about legal technicalities. The environmental community has brought hundreds if not thousands of lawsuits under statutes that involve fees and penalties, and the benefit to the environment has been immense. Factories all across the country have been cleaned up. Sewage-treatment plants have installed modern technology. Coal plants have reduced their air pollution. An old gold mine next to Yellowstone is being cleaned up and the site turned over to the Forest Service. Oil and gas extractors in the Gulf of Mexico have stopped dumping poisonous brine into open water and coastal wetlands.

None of this would have happened without litigation initiated by nonprofit environmental organizations.

And now it could be put in jeopardy, if the balance of power on the Supreme Court shifts further toward the radical right, allowing Justice Scalia to pursue the judicial activism Justice Blackmun, in the Defenders decision, called "a slash-and-burn expedition through the law of environmental standing."

-- *Senior Editor Tom Turner*