



By Richard Lazarus

Learning Law Not (Always) Politics

It should not be surprising that law students (and lawyers) readily embrace the cynical notion that judges do little more than apply their own political preferences under the guise of neutral legal reasoning. After all, that is the drumbeat of much commentary that routinely identifies federal judges by the political party of the president who nominated them. The implication is that such partisan identification explains the judge's vote in individual cases. The debacle of *Bush v. Gore*, when both majority and dissenting justices too willingly embraced legal views in tension with their normal jurisprudence, is seen as the norm rather than the exception.

For this reason, the D.C. Circuit's ruling this spring in *Mingo Logan v. EPA* surprised many and provided this legal academic with a pedagogical opportunity. The case concerned the agency's authority to veto, in effect, a Clean Water Act Section 404 permit previously issued by the Army Corps of Engineers. The permit in question authorized the largest mountaintop removal operation in the United States. The district court's ruling that EPA had overstepped its statutory authority was sufficiently stunning that I wrote a prior column a year ago (predicting reversal on appeal) and had my Advanced Environmental Law class this spring spend four weeks studying the case in great detail, including attending the oral argument.

By a wide margin, the students concluded that EPA had the stronger argument on the merits, but they nonetheless predicted by a wide margin (20 to 2) before oral argument that EPA would most likely lose on the merits. Their reasoning was straightforward and likely identical to that of many seasoned lawyers. The decisive factor was that the three D.C. Circuit judges on the panel were all known conservatives — Judges Elizabeth LeCraft Henderson, Thomas Griffith, and Brett Kavanaugh — appointed by conservative Republican presidents.

Less than five weeks after the oral argument, however, the D.C. Circuit unanimously reversed the district court. The court held that Section 404's plain meaning clearly supported EPA. The court had no need to consider EPA's backup argument that its construction of the statutory language was, at the very least, entitled to judicial deference pursuant to the Supreme Court's 1984 ruling in *Chevron v. Natural Resources Defense Council*. For all three judges, the law was clear and that was the end of the matter. EPA wins and Mingo Logan loses, notwithstanding the enormous industry amicus support the latter enjoyed.

Further confounding pundits, the district court judge who had ruled in favor of Mingo Logan is an Obama appointee. Yet, the judge had ruled in a high profile case against the same president that had appointed her, and only a few months after she became a judge. While coming to different conclusions, none of the judges on either court had voted along predictable political lines.

Nor are such outcomes nearly as anomalous as law students (and lawyers) might suppose. Environmental cases are littered with instances in which so-called liberal and conservative judges vote in a manner strikingly inconsistent with the simple partisan labeling used by media commentators and many academic scholars. Only one Supreme

Court justice wrote an opinion this March in *Decker v. Northwest Environmental Defense Center* that would have ruled significantly in favor of the environmental respondent. Justices Ruth Bader Ginsburg, Sonia Sotomayor, or Elena Kagan? No. They all voted in favor of "industry." The lone dissenting justice was that bastion of environmentalism appointed by President Ronald Reagan: Antonin Scalia. The same Justice Scalia who wrote a sweeping opinion in 2001 rejecting a massive industry challenge to EPA's claim that it must set national ambient air quality standards without considering compliance costs.

Does this mean Justice Scalia is a closet environmentalist or liberal Democrat? Perish the thought. No, it simply underscores that law and legal arguments are complicated and nuanced. They cannot readily be converted, notwithstanding the frequent efforts of political scientists, to simple Democratic/Republican or liberal/conservative dichotomies. Good legal advocates understand that. Every case offers a discerning advocate the potential for multiple and sharply contrasting analytical frameworks divorced from simple bipolar political lenses.

Does politics therefore never matter? Of course not. Sophisticated legal analysis does not require naivete. Presidents' judicial appointments are highly influential. The important lesson is instead that legal advocates should not so readily acquiesce in the misleading notion that judges do no more than impose their partisan politics in deciding cases. Such an assumption does a disservice both to our judges and to the skills of our effective advocates. Both law and effective advocacy do matter — a lot.

In *Mingo Logan*, the D.C. Circuit taught my students that important lesson.

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When judges confound the popular wisdom and rule contrary to party expectations