

ELI REPORT

Opening Argument

Deference To Congress, Agencies Real Issue In Water Act Cases



Leslie Carothers
President

Judicial activism was a hot topic at the recent confirmation hearings for Chief Justice John Roberts and Justice Samuel A. Alito Jr. Some senators saw activism in decisions allowing abortion or affirmative action. Others were more concerned about decisions by the judiciary overturning laws passed by Congress.

The latter breed of activism is at the heart of two lawsuits before the Court challenging the scope of congressional authority to regulate the discharge of pollutants and fill into U.S. waters under the Clean Water Act, *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*. Judicial deference to precedent, to the scientific expertise of the executive branch, and to the judgment of Congress in regulating commerce among the states should lead the Supreme Court to uphold the decades old federal rules governing wetlands development.

ELI believes it will have contributed to that holding with its first ever brief in pending litigation, an amicus brief filed on the side of the government (for full story, see page 54).

Twenty years ago, the Supreme Court unanimously upheld the corps's jurisdiction over wetlands ad-

acent to navigable waters. The logic of the decision in *Riverside Bayview Homes* also comprehends the need to protect navigable waters by regulating discharges of pollution and fill into tributaries of navigable waters and their adjacent wetlands — the matter at issue in the two new cases.

The legislative history of Section 404 of the Clean Water Act leaves scant room for doubt that Congress intended to define jurisdiction broadly and provided in the statute for regulatory flexibility (exemptions and general permits) and state program delegation explicitly intended to deal with the demands of an expanded program. Senator Howard Baker — a father of the act — explained it best: “The once seemingly separate types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.”

The 5-4 Supreme Court majority in the 2001 *SWANCC* case (involving gravel pits that had become small ponds) eliminated federal jurisdiction over “isolated wetlands,” discounting this legislative history and holding that jurisdiction could not be based solely on the use of the waters at issue by migratory birds. Whatever its merits, the ruling did not purport to define the scope of federal jurisdiction over navigable waters or what would be, in its terms, a “significant nexus” to such waters. Since *SWANCC*, six of the federal circuit courts of appeal have upheld the corps's jurisdiction over tributaries to navigable waters, and the five that dealt with wetlands adjacent to tributaries held the wetlands to be covered as well.

Judicial deference to scientific expertise in executive agencies is also in play in *Carabell* and *Rapanos*. The argument at the Court on February 21 revealed uncertainty about what wetlands are and how they protect navigable waters. The scientific criteria differentiating wetlands from unregulated lands seemed unclear to the chief justice. Justice Stephen Breyer asked how wetlands acted as a “sponge” absorbing flood waters.

Drawing on ELI's expertise in wetlands science, we summarized in our brief the functional connection between wetlands and the health of downstream waters. These functions, including flood control, pollutant filtration, and habitat for fish and wildlife, provide empirical support for the “significant nexus” Chief Justice Roberts was looking for during the argument.

Most of the argument was devoted to parsing the word “tributaries” and whether the term includes manmade ditches, streams with only a “trickle” or a “drop” of water, or storm drains. Several justices sought a sharper demarcation of upstream tributaries not subject to the corps's permitting authority. Solicitor General Paul D. Clement pointed out that whatever the outer limits of the tributary system, the facts of the two cases at bar did not approach them. The argument revealed that drawing such a line is difficult and not a task well suited to the judiciary.

It seems unlikely that the Court will decide that Congress exceeded its constitutional power in authorizing comprehensive federal jurisdiction over wetlands adjacent to tributaries of navigable waters. We believe ELI's brief should lay such a claim to rest. The justices did not dwell on the alleged encroachment on state sovereignty, perhaps because 34 states intervened to support broad federal jurisdiction, and only two intervened to oppose it.

Waiting in line for a seat in the courtroom, I admired an imposing statue of Chief Justice John Marshall and recalled his statement in the first and best case defining the power of Congress under the commerce clause — a power, he said, that was great but ultimately held in check by the “wisdom and discretion of Congress.” The question in these cases is whether the justices will defer to the successful wetlands protection program the Congress and the Corps of Engineers fashioned in the 1970s whether they approve of its scope or not, or whether the opponents of the program will succeed in persuading a majority to reach out to unravel it.