

ELI's Endangered Environmental Laws Program looks at the courts

For more than 30 years, battles over environmental protection have been fought, and largely won, in the Congress. During most of that period, the federal courts have been an important backstop for environmental legislation, affirming the federal government's broad power to set national standards, recognizing the priority of public health over economic considerations, and opening the courthouse door to a wide range of citizen enforcement.

Recently, however, this robust legacy of environmental law has been called into question, even in the courts — traditionally its last line of defense. In a number of high-profile cases, an increasingly conservative federal bench has revived obscure doctrines of administrative and constitutional law that would undermine long-standing environmental statutes. If left unanswered, this selective reinterpretation of foundational principles could dramatically reshape, or even dismantle, federal environmental law as we know it.

In response to this trend, ELI has launched a three-year program that will research the intersection between constitutional and environmental law and educate journalists, judges, advocates, policymakers, and law students about the implications for environmental protection.

The Endangered Environmental Laws Program, led by Senior Attorney Jay Austin, will focus on several problems that have arisen in recent cases, including challenges to the reach of congressional authority under the Commerce Clause; the rise of state sovereign immunity under the Eleventh Amendment; restrictions on citizen standing; and expansive

views of property rights and regulatory "takings."

"Some recent decisions have gone well beyond the normal give-and-take of environmental litigation and statutory interpretation," Austin says. "Instead, they reflect an assault on fundamental principles — on Congress's power to legislate national standards, on agencies' ability to interpret and implement legislative intent, on the power of federal courts to hear certain kinds of cases, and on citizens' federal rights and remedies."



Endangered Laws Director Austin

For example, the D.C. Circuit's decision in *American Trucking Association v. Browner* applied the discredited "nondelegation" doctrine to limit the scope of EPA rule-making under the Clean Air Act. The decision was later reversed by a unanimous Supreme Court.

In *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers*, a divided Supreme Court excluded certain isolated, intrastate waters from Clean Water Act jurisdiction. In *Bragg v. Robertson and Pennsylvania Federation of Sportsmen v. Hess*, the Fourth and Third Circuits held that SMCRA citizen suits against state agencies were barred from federal court by the Eleventh Amendment and its protection of "the sovereignty of the state."

To examine and publicize this growing problem, ELI has formed an unprecedented partnership with other environmental, civil rights, and constitutional law organizations, including the Brennan Center for Justice, Community Rights Counsel, National Environmental Trust, National Wildlife Federation, Alliance for Justice, Constitutional Law Foundation, Earthjustice, and the Natural Resources Defense Council. Working

with these groups and their constituencies, ELI's Endangered Environmental Laws Program will bring much-needed public attention to the cause by tracking and responding to developments in case law, and publishing and disseminating information through journal articles, white papers, advocacy alerts, press releases, op-eds, and letters to the editor. The Endangered Environmental Laws Program has received generous support from the Packard Foundation, Hewlett Foundation, and Kirsch Foundation.

"The program is a bit of a departure for ELI, but is well-suited for an organization whose origins date back to the very beginning of modern federal environmental law," Austin says.

Austin has some experience with tackling complex new topics. In 1997, as director of ELI's Environmental Consequences of War program, he began researching the environmental impacts of the 1990-91 Gulf War. That research led to a much broader attempt to elaborate the role of international laws and institutions for preventing, remediating, and redressing environmental impacts of armed conflict, through an international conference and a companion volume of cutting-edge scholarship. Subsequent conflicts in Kosovo and Afghanistan and the current military action in Iraq have kept a spotlight on wartime environmental damage, and ensured a steady stream of media requests for Austin and his co-author, ELI Senior Attorney Carl Bruch.

Austin hopes to continue ELI's work on war and environment, and has drafted preliminary plans for a second major conference on the topic. Problems yet to be addressed include elaborating legal norms that could constrain wartime environmental damage, and determining the legality of weapons — such as landmines — that persist in the environment.