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Changing the Way Government Views Environmental Justice (Keynote Address)

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KEYNOTE ADDRESS:

CHANGING THE WAY GOVERNMENT VIEWS ENVIRONMENTAL JUSTICE

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I want to thank the organizers of this symposium, because the issue of environmental justice has begun to take on the kind of prominence that it deserves. It is an interesting idea because it is still evolving, both as a conceptual matter and as a legal matter. Symposia like this are necessary to be able to engage and to work out the problems that are inherent in an evolving concept. When I say that it is evolving, both socially and legally, I really do mean that, because there are a lot of terms out there, ranging from environmental justice to environmental equality to environmental racism, which claim to speak of a specific phenomenon. That phenomenon, however, remains contested.

Similarly, the legal remedies for the phenomenon that is beginning to be identified remain in dispute. It is the evolution of the

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legal response to the social phenomenon that is most interesting for people like me, who are principally academics, although as I was saying to my friend, Professor Lazarus, we are really just lawyers. We are just trying to figure out what we see, and that is what lawyers do. The environmental justice movement or the idea of environmental justice, for me, goes back to 1978. Its origins actually go back a little farther.

In 1975, the U.S. Commission on Civil Rights chided the Environmental Protection Agency on its failure to take into account the implications of its policies on minority people and poor people. However, the EPA did not really respond directly to that criticism, except to say that its programs did not require it take into account issues like those raised by the Commission on Civil Rights.¹

In 1978 in Detroit, the Sierra Club, the Urban League, and the Environmentalists for Full Employment, a group that I do not think exists any more, put together the conference called The Urban Environment Conference. It was a landmark conference in many ways, because it brought together environmentalists, the Sierra Club, who had not really thought about urban issues, and the Urban League, who had not really thought about environmental issues, and asked where the communion is for these two groups. It also combined the perspective of Environmentalists for Full Employment, who were concerned about the impact of environmental policies on the working people. The environmentalists at that point said, "Well, the contest between environmental quality and economic vitality is not necessarily a zero sum game." Similarly, the debate now rages over whether a zero sum game exists in the context of environmental justice. We are confronting an old argument again in a different guise.

In 1982 Representative Fauntroy asked the General Accounting Office ("GAO") to study the impact of siting policies and discovered that the waste disposal sites in the South were located primarily, three out of four, in poor black areas.² In 1987, prompted by this study and other inquiries, the United Church of Christ conducted

¹ U.S. COMM'N ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974* (1975).

² U.S. GEN. ACCOUNTING OFFICE, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* (1983).

its landmark study on environmental justice.³ In 1990, the University of Michigan convened a symposium on environmental justice, and in 1991 there were conferences at Washington University in St. Louis and again in Michigan. Therefore, from 1978 to now there has been an increasing focus on the issue of environmental justice. The reason I point out the history is that I think it is important to locate this symposium in the time line, both intellectually and socially. We are now at a much later stage in articulating the problem; the process of getting to this point is not just an academic interest.

Until the Michigan symposium, those early meetings were primarily conferences of grassroots people who saw a problem, attempted to give it a name, and attempted to articulate responses. The turn to academia marked by the Michigan conference has begun to bring people from various disciplines together to analyze and construct a response that gives, in some small measure, a kind of academic cross-disciplinary cut. This is social construction of knowledge. It allows academics to be able to label and analyze what the grassroots participants in this movement have been identifying all along. Simultaneously with this grassroots movement was a movement in the courts, and the movement in the courts really took two major tacks.

The first was what I call the constitutional civil rights model. The constitutional model made a very simple argument. The argument is that we observe these identifiable communities being disadvantaged by being made to carry a greater environmental burden than other communities.⁴ That distribution of burdens offends the constitutional principal of equality or the principal of equality that is found in the applicable civil rights statutes. Unfortunately, the legal analysis that goes with that simple and very plain observation was not exactly parallel. Thus, the civil rights

³ UNITED CHURCH OF CHRIST, COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

⁴ See, e.g., R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991) (rejecting Equal Protection challenge to siting of landfill in predominantly black neighborhood), *aff'd*, 977 F.2d 573 (4th Cir. 1992); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibbs County Planning & Zoning Comm'n, 706 F. Supp. 880 (M.D. Ga.) (same), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979) (refusing to grant preliminary injunction against construction of solid waste disposal facility near predominantly black school and neighborhood), *aff'd*, 782 F.2d 1038 (5th Cir. 1986).

or constitutional discrimination model for attacking the environmental injustices that people were documenting were largely unsuccessful. The evolving jurisprudence in the civil rights area meant that the frontal assault using an equality-based analysis was going to be ineffective. It has proven largely to be ineffective, although it has been effective both in raising consciousness and for organizing communities.

The second major line of cases are those that took the environmental regulatory approach.⁵ The challenge based on the environmental statutes took existing environmental statutes and tried to use them to address the equality question or the maldistribution of burdens. They have had a mixed bag of successes and failures. They have attempted to build into the existing structure of environmental laws a concern for issues that were not there before, even when they are not successful. I am going to suggest that the cases play an important role, not because they are constructing a legal analysis that will yield the results, but because they build a framework within which the regulatory culture—the regulatory framework that gives birth to the underlying claims—can be changed. Transforming that framework is critical.

One of the ways the environmental justice movement has been successful, one of the signal events in its evolution, was the signing on February 11th of the Executive Order on Environmental Justice.⁶ The Executive Order is very simple, and I want to outline it because it is going to lead me to my last point. My last point is that this transformation of the regulatory framework or regulatory culture, within which decisions get made, is a critical and important thing, even though it is not clearly articulable within either the social model that I began with or the legal model. It ultimately will result, if my analysis is correct, in important changes in the way decisions get made and the distribution of burdens occur. This is not to suggest that it is automatic or purely mechanical, but it is to suggest that the game is not over merely

⁵ See, e.g., *Dioxin/Organochlorine Ctr. v. EPA*, No. C93-33D (W.D. Wash. Aug. 10, 1993) (challenging EPA's establishment of total maximum daily load for release of dioxin in Columbia River basin); *Houston v. City of Cocoa*, No. 89-92 Civ. ORL-29 (M.D. Fla. Dec. 22, 1989) (finding city violated NEPA by not considering impact of proposed development on black neighborhood); *El Pueblo Para el Aire y Agua Limpio v. County of Kings*, 22 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,357 (Cal. App. Dep't Super. Ct. 1991) (finding proposed hazardous waste incinerator in Latino community violated California Environmental Quality Act).

⁶ Exec. Order No. 12,898, 59 *Fed. Reg.* 7629 (1994).

because certain causes of action have been found to be ineffective. The vigilance which gave rise to the production of the issues as a social movement will now have a new and different forum in which to take root.

The Executive Order has three basic purposes. One is to focus the attention of federal agencies on the human health and environmental conditions in minority communities and low income communities with the goal of achieving environmental justice. The second purpose is to foster nondiscrimination in federal programs that substantially affect human health and the environment. The third purpose is to give minority communities and low income communities greater opportunities to participate in the public decisionmaking with greater access to public information on matters relating to human health and the environment.⁷

These goals are going to be achieved in a very straightforward way, at least we hope they will. The first is to form an interagency working group comprised of agencies in the federal government, headed by EPA, to work out and administer the commands of the Executive Order.⁸ The responsibilities of the working group are fairly plain. First, to develop guidelines and criteria for identifying disproportionately high and adverse human health effects or environmental effects on minority populations or low income populations.⁹ Second, to coordinate the federal agencies in the development of environmental justice strategies to insure consistent implementation of the Order.¹⁰

Now that, which sounds very plain, is actually important because each agency under the Executive Order is required to produce an environmental justice strategy; that is, a strategy for achieving the goals outlined in the Executive Order.¹¹ Each agency, like the Department of Justice, like the Environmental Protection Agency, like the Defense Department, like the Department of the Interior, are going to construct their strategies, and these strategies are going to be debated and worked through in the interagency working group. That means that, at least from

⁷ *Id.* § 1-101 (agency responsibilities).

⁸ *Id.* § 1-102(b)(1) (creation of interagency working group).

⁹ *Id.*

¹⁰ *Id.* § 1-102(b)(2).

¹¹ Exec. Order No. 12,898, 59 Fed. Reg. 7629 § 1-103 (discussing development of agency strategies).

the federal perspective, the various conceptions of environmental justice at the agency level are going to have to be reconciled.

It is the process of reconciliation within the working group that has the greatest potential for good. The interagency subcommittee is also going to be required to assist in coordinated research,¹² in coordinating data collection,¹³ holding public meetings for fact finding,¹⁴ receiving public comments, making inquiries about environmental justice, preparing for the public review of comments and recommendations that the working group gets, examine existing environmental justice studies,¹⁵ and developing interagency model projects to demonstrate coordination between and among the agencies.¹⁶ Of that list, the two things that are important are: One, the coordination of strategies; and two, the holding of public meetings and having a place where public comments can be distributed to the appropriate federal agencies or for incorporation in the environmental justice strategies at the agency level. That process is critically important. The last step is to develop this interagency cooperative project to demonstrate the coordination of the environmental justice strategy. Each agency has to produce, under the Executive Order, an internal administrative process for developing environmental justice strategy.

We have now convened a group that is putting in place a process for generating a strategy. The strategy will tell us, once we construct it, how we can best comply with the objectives of the Environmental Justice Executive Order. What we are also doing, of course, is to coordinate within our own department, and work at producing guidelines so that the lawyers in the department can begin to identify and collect those cases that are identifiable as environmental justice cases. That is important, at least in the Department of Justice, because most environmental justice cases do not come in the door wearing environmental justice lapel stickers, and they are not denominated as such. The lawyers in the various divisions have got to be able to think about what would constitute an environmental justice claim even if the plaintiffs have not identified their claim as such.

¹² *Id.* § 1-102(b)(3).

¹³ *Id.* § 1-102(b)(4).

¹⁴ *Id.* § 1-102(b)(6).

¹⁵ *Id.* § 1-102(b)(5).

¹⁶ Exec. Order No. 12,898, 59 Fed. Reg. 7629 § 1-102(b)(7).

What are the elements in this piece of litigation that make it or give it environmental justice implications? Certainly our coordination with EPA will result in a process that allows us to collect and analyze our treatment of those cases. So we are producing both an internal administrative process, including guidelines within each division for the line attorneys to be able to identify and collect data on these cases, identify these cases, and guidance on how to treat these cases. Then we must combine these two factors into the general strategy for achieving the objectives of the Environmental Justice Executive Order. Part of the strategy, of course, will be to collect the data about litigation we do, and to use it to accomplish the nondiscrimination goals and the other goals we find in the Order.

That, in a nutshell, is what the Executive Order does. It is a little more complicated, but that is basically it. Certainly, from the standpoint of the Department of Justice, that is what it accomplishes. Some people will say, "This is just another process remedy. What we want are concrete results, and getting another process remedy is insufficient." They point to things like the National Environmental Policy Act ("NEPA"),¹⁷ and they say NEPA is just a process remedy; it does not guarantee any specific environmental results. They also point to the Supreme Court and they say there has never been a substantive NEPA victory in the Supreme Court. So if all that is being offered is a process remedy, why is it not limited in the same way that every other process remedy we see is limited? That is the argument.

The response, of course, is not completely defensive and not completely persuasive. I think the attack is not completely persuasive, because if you look at NEPA, you discover a couple of things. One is that, while it is not a "substantive remedy," it has caused agencies to consider the environmental implications of their actions, even when they did not conceive of themselves as having an environmental mission. It also allows citizens to engage in that process and to hold agencies up to the procedural standards that NEPA implies. The very process of expanding the mandate of the agencies by NEPA, which is a general mandate-expanding statute, has improved the environmental decisionmaking of the agencies. But it is a continual process of refining the

¹⁷ 42 U.S.C. §§ 4321-4370 (1988 & Supp. II 1990).

environmental decisionmaking as the agencies continue to satisfy their basic underlying mandate. The Executive Order will eventually accomplish a similar result, which is to put an environmental justice mandate into the general mandate of all the agencies that have an impact on the environment, both directly and indirectly.

That process then will do, if my analysis is correct, an important thing. It will do what NEPA has done to a certain extent, and that is to transform the decisionmaking culture within the agencies; and the transformation of the decisionmaking culture is critical to getting good decisions.

What do I mean by transforming the decisionmaking culture? Well, what I mean is that every agency has a way of looking at problems. In a study that I have done of the Environmental Protection Agency and the Department of Agriculture, I asked a simple question. If I give an identical problem to one agency and an identical problem to another agency, and I say "solve this problem," the first step in solving the problem is to redefine the problem in terms of the basic organizing analytical categories of that agency.

The only way you get communion, if you will, is to challenge the basic analytic categories, so that at its root, the decisionmaking gets changed. Transforming the regulatory culture means transforming the basic analytical categories so that they incorporate things that they would not normally think would be part of the range of issues that they have to consider as they come to their substantive decision. The Executive Order, in my view, promises to do that. That is both a substantive and a procedural effect, and they are linked. It is also, of course, a relatively undramatic and a relatively slow process. It is undramatic because it is happening internally to the agencies. It is not something that a reporter would write a story about, but it deals with the way the bureaucracy works, and it attempts to introduce in that process a new set of issues to consider and to produce remedies for problems that they identify.

The mark of success is transformed, because the Executive Order says that you have to produce both an internal administrative strategy and coordinated strategy that identifies the problem that I have pointed out to you. Saying that you do not have a responsibility for that problem or that you do not recognize that problem is

an insufficient answer; you have to respond to a problem that we have identified.

Furthermore, the working group is going to be able to gather public commentary. If you have not sufficiently identified the problem, well, there are a number of people out there at work in the country who have identified the problem. Now there is a forum for them to introduce this problem into the workings of agencies through the process of the working group. So those functions hold great promise, at least for the governmental side. The reason this process will work or has promise of working is because there is a movement called the environmental justice movement. The environmental justice movement continues to raise issues and define social categories that need to have or will produce the legal analogs or the administrative analogs that are going to lead to their remedies.

The important thing to remember is that there is no one solution that is going to achieve the goals that symposia like this identify. When you think back to the Civil Rights Movement, which is still ongoing, there is no one strategy that can achieve every result sought by the movement, and the movement helps to define what the goals are and what remains to be achieved. That interactive process is what we will see unfold as the environmental justice movement continues to mature.

This issue has been around for almost twenty years; it is a process that started for me as far back as 1978 and continues to evolve. I thank all of you for being here today and participating in this symposium. Meetings like this play a concrete role in the evolution of the ideas that will produce an environmental strategy and agenda to guide us into the next generation. Thank you for allowing me to address you, and thank you for giving me the opportunity to be here.

