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SUPREME COURT | THE ENVIRONMENT

Toad opinion hints at Roberts' stance

Supreme Court nominee John Roberts' record on the environment, particularly his opinion about a 'hapless toad,' leaves activists uneasy about the future of federal regulations.

BY CURTIS MORGAN

The grilling that Supreme Court nominee John Roberts faces in confirmation hearings will focus heavily on hot buttons like abortion rights and privacy rights.

But the obscure issue of toad rights could prove key for senators as a gauge of Roberts' stance on environmental regulation.

Some environmentalists fear those leanings could weaken federal enforcement of everything from drinking water standards to endangered species protection.

The stakes loom large in Florida, where federal agencies and money play major roles in protecting the Everglades, coral reefs of the Florida Keys and the nation's fourth-largest number of threatened or endangered species: 111.

To date, major environmental groups have tempered criticism, saying they want to hear more from Roberts and further study his record as a private attorney and deputy U.S. solicitor general. But they have seized on the case of a rare California toad as the clearest, and they say most troubling, expression of Roberts' environmental views in his two-year tenure as a federal appeals court judge in Washington, D.C.

TOAD TRIGGERS SUIT

The case was brought by a developer fighting demands from the U.S. Fish and Wildlife Service to remove a fence that disrupted movements of the endangered arroyo toad, a two-inch-long amphibian that leaves its upland burrows to breed along streams.

Roberts, in a 2003 dissent, suggested federal law -- in this case, the Endangered Species Act -- did not apply to a creature confined to just one state. As he put it, "a hapless toad that, for reasons of its own, lives its entire life in California."

Glenn Sugamelli, senior legislative counsel for Earthjustice, a Washington, D.C., nonprofit legal arm for numerous environmental groups, said that position -- one also advocated by conservative Republicans as well as industry, business and private-property rights groups -- runs counter to decades of environmental laws and legal rulings.

Roberts' supporters insist critics are wrong to read too much into any judge's single opinion, particularly a four-paragraph dissent asking for a full appeals court review of the case. They call him a brilliant judge who weighs issues on a case-by-case basis.

But Dan McLaughlin, spokesman for Democratic Sen. Bill Nelson, said that while Nelson was reserving judgment for now, the implications of the toad case are troubling.

"Sen. Nelson would not agree that Congress doesn't have authority to protect endangered species, be they in only one state or two. Under that line of thinking, you could wipe out the Florida panther," he said.

Other rare species also exist only within state borders, including the Miami Blue and Schaus swallowtail butterflies, the Everglades kite, North American crocodile and a number of plants.

Florida Sen. Mel Martinez, a Republican, did not respond to questions about Roberts' environmental record, but his office

issued a statement saying he is confident Judge Roberts holds the highest professional qualifications to be the next associate justice."

As a member of the D.C. Circuit, one of Roberts' jobs is to review reams of regulations the federal bureaucracy spits out, said Glenn Lammi, chief counsel for the **Washington Legal Foundation**, a conservative, business-oriented group.

"He has been very down the middle on the issues," Lammi said.

Critically, for example, Roberts noted in his toad dissent that he would consider others grounds for supporting the Endangered Species Act.

Viet Dinh, a friend and professor of law at Georgetown University in Washington, D.C., said Roberts has worked both sides of many issues, including environmental ones.

While business interests were his main clients as a private attorney, Roberts argued a case before the U.S. Supreme Court that helped Lake Tahoe ban shoreline development.

The toad opinion, Dinh said, was less a reflection of "any attitude about the environment" than a question of whether Congress was overstepping states' power.

Roberts' argument focused on the Constitution's "commerce clause" that gives Congress the authority to regulate "interstate commerce," a power that has been broadly applied since the 1930s to create an array of national environmental laws.

NARROW READING

Under the narrow reading Roberts applied to the toad, there was no "interstate" since it existed only in California. There was no "commerce" since the toad, Lammi said, was not a garment or some other article of commerce."

"This whole nothing of a controversy could even be less than nothing if even one of those toads had jumped into Arizona," Dinh said, with a laugh.

But Sugamelli of Earthjustice disagreed, saying such a view, if adopted by the majority of the Supreme Court, could take the backbone out of environmental enforcement.

Environmentalists also say other arguments Roberts made as both a private and federal attorney to favor industry or reduce the scope of environmental regulations raised red flags. Beyond those cases, Sugamelli said a number of groups that have sued to dismantle environmental laws have described Roberts as an ideal candidate."

Senators have held up some federal court nominees that activists opposed -- most notably, William Myers, a former mining industry consultant and lawyer for the Interior Department.

One thing both sides agree on: With a series of important cases pending -- dealing with wetlands, endangered species, water pollution, the power of local governments to enforce zoning and the rights of citizens to sue over environmental issues -- the high court could shape the environmental landscape for decades.

That, and the fact retiring Justice Sandra Day O'Connor was considered a moderating swing vote, magnifies the importance of any future justice, said David Bookbinder, senior attorney for the Sierra Club. "His decisions, his thinking on commerce clause issues, takings laws, all of these things will have big environmental impacts."