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Bush's Judicial Nominees Alarm Conservationists

By J.R. Pegg

WASHINGTON, DC, January 28, 2003 (ENS) - Several of the Bush administration's nominees to the federal appellate court have records that reflect controversial views of the federal government's authority to enforce environmental regulations. Environmental groups, as well as public health, labor and women's rights organizations, fear that these nominees will act to advance their ideological agendas, rather than interpret the legality of government policies.

Forests like this one in Connecticut are affected by the decisions of federal appellate judges. (Photo courtesy University of Connecticut)

The consequences, environmentalists say, could be devastating for U.S. environmental protection efforts.

"If you can't go to court and get an honest, fair and unbiased hearing before a judge who is going to decide on the law and constitution, not on distrust of environmental groups or hostilities to governmental actions, then we are really in trouble," said Glenn Sugameli, senior legal counsel for Earthjustice. "This is critical now because [these courts] are the last line of defense against the attack on the environment."

President Bush has nominated 100 people to serve as federal judges. Of primary concern are nominees to serve on the 13 federal appeals courts, which take cases from courts within their jurisdictions. This level of the judiciary is only superceded by the U.S. Supreme Court, which chooses to hear less than some 100 cases a year.

These 13 courts very often provide the final decision on legal challenges to environmental rules and regulations, and their judges are appointed for life.

"This is where the law actually goes into effect, and that is why we are very, very concerned about the slate of nominees," said Sierra Club spokesman David Bookbinder. "We'd like to believe that the President is going to put people on who are within the mainstream."

"We understand the President deciding to have conservative judges, but we are concerned with the President going out of his way to find people who are espousing what can only be called extremist views."

Attorney Jeffrey Sutton is a partner in the firm of Jones, Day, Reavis & Pogue of Columbus, Ohio (Photos courtesy Committee for Justice)

Among those with extremist views, according to Sierra Club, is Jeffrey Sutton, a nominee to the 6th U.S. Circuit Court of Appeals. Sutton has argued that the federal government does not have the authority to enforce the Clean Water Act. In another brief, Sutton argued against the federal

government's authority over state officials charged with enforcing federal law. Sutton, a lawyer from Ohio, has never been a judge.

Former Houston lawyer Priscilla Owen is now a Justice on the Supreme Court of Texas. Fifth Circuit nominee Priscilla Owen, currently a Texas Supreme Court Justice, has authored court opinions that favor polluters over the public and restrict public access to public information. Her nomination was defeated last year, but her name has been resubmitted. Another nominee rejected last year by the Senate is District Court Judge Charles Pickering, Sr. His decisions dismissing claims by victims in toxic tort cases were overruled by the 5th Circuit, the court that the President has again nominated him to serve on.

Ninth Circuit nominee Carolyn Kuhl, a former Justice Department lawyer under President Ronald Reagan and a current Los Angeles County judge, challenged the Supreme Court's precedent on associational standing, a longstanding legal interpretation that enables organizations to protect the rights of their members in court.

John Roberts heads the Appellate Practice Group with Hogan & Hartson's, an international law firm headquartered in Washington, DC.

John Roberts, a nominee to the U.S. Circuit Court for the District of Columbia, defended a coal company's right to blast off the tops of mountains in order to mine coal without concern for degradation to mountain streams and rivers.

Rising concerns about nominees to federal courts has coincided with increased documentation of the key role these courts play in the protection of the nation's environment. Seldom does an environmental rule or regulation move forward without a lawsuit by environmental groups or by affected industries.

A report issued in 2001 by the Natural Resources Defense Council, Community Rights Counsel and Alliance for Justice found that the increasing activism of federal judges has harmed environmental protection efforts.

"Environmental statutes are suffering a death from a thousand cuts in non-constitutional cases as anti-environmental judges ignoring the intent of Congress expressed in statutory text and legislative history," according to the report, titled "Hostile Environment: How Activist Judges Threaten Our Air, Water and Land."

"This trend is particularly evident on the U.S. Court of Appeals for the D.C. Circuit, a critical court empowered to hear most challenges to environmental decisions made by federal agencies," the report found, saying, "Extensive empirical research indicates that judges on the D.C. Circuit and around the country are letting their ideology influence their decision making in environmental cases."

Fishermen at sunset near Washington's Mount Rainier (Photo courtesy NOAA)

In recent months, environmental groups have scored several court large victories, including the protection of some 60 million acres of national forests from logging and road construction,

enforcement of EPA rules to protect waterways from storm water pollution and the prevention of the Bush administration's efforts to allow drilling of oil in waters off shore of California. But there is a growing slate of new lawsuits and legal petitions, including formal challenges to revisions and enforcement of the Clean Air Act, the Clean Water Act, the off-road vehicles emissions law, the National Forest Management Plan as well as to several marine species protection, fisheries and pollution issues.

"We are fighting a defensive battle here," Bookbinder said. "And just because it is bad policy, doesn't mean it is illegal. We are only attacking the things we believe are illegal. Judges only throw out bad policy if it is illegal."

"That is why we've been having a very good success rate with Bush policies. We are afraid that with some of these judges that we are going to lose that ability."

With some 25 of the 179 federal appellate court judge positions at the 13 appeals courts currently vacant, the Bush administration has an unprecedented opportunity to reshape the character of the court. Republicans currently hold majority in seven of 13 courts, Democrats with the majority on two and the remaining four roughly balanced.

"We are concerned some of these courts are really getting out of balance, and moving to the extreme," Sugameli said. "This could have the potential to undermine almost any environmental protection."

Some Democrats in Congress share these concerns, although they are fighting allegations by the Bush administration and other Republicans that they want to apply a political litmus test to judicial nominees.

Not true, counters Senator Patrick Leahy, ranking Democrat on the Senate Judiciary Committee. On January 24, 2003, Leahy warned that the Democrats have been unfairly criticized for the number of judicial vacancies and argued that the Bush administration has tainted the process of judicial nominees by not actively reaching out to Democrats for their input on the nominees. The President is constitutionally bound to seek the Senate's advice and consent in the appointments to the federal court.

"Sending the Senate divisive judicial nominations is something I have urged the President to avoid, but that is exactly what he has chosen to do," Leahy said.

The Senate Judiciary Committee will begin hearings on selected nominees tomorrow.