

Environmentalists Uncertain on Roberts

Review of Record Sends Mixed Signals

For One of Left's Most Vocal Constituencies

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WASHINGTON -- The environmental community looks at Judge John G. Roberts Jr. as something of a chameleon. As a result, it is having a hard time deciding how green he is and whether to join other liberal groups in opposing his nomination to the Supreme Court.

As a private lawyer, he won a big case for environmentalists that slowed development in Lake Tahoe. As a judge, he later issued an opinion on the Endangered Species Act considered troubling to supporters of that measure.

Doug Kendall of Community Rights Council, an environmental-law organization that helps to rate judicial nominees' green credentials, worked on the Lake Tahoe case that blocked development for years while a preservation plan was completed. He says Judge Roberts "wrote the best brief I've ever read." Yet he's "pretty skeptical" about whether Judge Roberts would be an ally on the court.

Uncertainty about the leanings of Judge Roberts, who is President Bush's pick to fill the seat of retiring Supreme Court Justice Sandra Day O'Connor, has silenced for now one of the left's most vibrant constituencies. Women's rights groups were quick to mobilize against him with rallies and petition drives. Indeed, NARAL Pro-Choice America was widely accused last week of battling the nomination too aggressively with television ads linking Judge Roberts to abortion bombers; the group pulled the spots.

Most environmental groups, in contrast, have posted material on their Web sites and urged members to lobby senators to ask Judge Roberts pointed questions on their issues.

Judge Roberts poses the first big test for the environmental community's new activism on judicial nominations. Such groups never weighed in heavily on these matters before. But just as a series of adverse rulings on school prayer and other issues energized the religious right on judge selection, environmentalists decided to get involved in 2001 after a string of disappointing Supreme Court rulings, including one that exempted some ponds and lakes used by migratory birds from clean-water regulations.

Their new activism reached a peak in 2004, when they launched telephone banks and petition drives to block the Ninth Circuit Court of Appeals nomination of William Myers, a former Interior Department attorney who once advocated as a lawyer and lobbyist for cattlemen and miners in clashes with environmentalists over land use and other issues. Mr. Myers' nomination continues to be blocked by a Democratic filibuster in the Senate.

Environmental leaders say they could still rally to oppose Judge Roberts in September, after the Senate Judiciary Committee hearings shed more light on his legal philosophy. The hearings open when Congress returns Sept. 6. In advance of that, Democrats are sparring with the White House

over access to Judge Roberts' records. They want to review them to try to figure out whether there is some reason to block the nomination, or to allow the process to move smoothly so he can take his seat in time for the new court session opening in October.

For environmental groups, a key issue in the Roberts hearings will be his view on the breadth of the Constitution's Commerce Clause, which gives Congress authority to regulate interstate commerce. Virtually all important environmental laws are rooted in that clause -- as are civil-rights laws -- and conservatives for years have been pressing the federal courts to adopt a narrower reading of it.

For instance, they have argued that species found in only a single state -- such as red wolves of North Carolina, cave insects in Texas and the Delhi Sands Flower-Loving Fly in California -- shouldn't be protected by a federal law regulating "interstate" commerce. Thus far, they have lost every time and the Supreme Court has refused to take up the matter.

But a number of conservative judges have endorsed the challenge, including several who were on Mr. Bush's short list of Supreme Court candidates.

The case that puts Judge Roberts in the heart of this fight involves a small population of endangered arroyo southwestern toads that live in the sandy banks of Keys Creek in San Diego County, Calif.

In 2000, the U.S. Army Corps of Engineers concluded that a 280-home development planned by real-estate developer Rancho Viejo LLC near the creek could threaten the toad population. A fence could block access to their breeding area, and a plan to dredge fill dirt from the creek would further disrupt their habitat, government officials said.

U.S. Fish and Wildlife Service officials proposed a compromise that involved removing the fence and bringing fill dirt in from another location. But Rancho Viejo rejected the offer and filed a lawsuit against the Interior Department at the U.S. District Court in the District of Columbia. The complaint challenged the government's authority under the Commerce Clause to designate the toad an endangered species.

Rancho Viejo was assisted in its case by such conservative legal organizations as the Claremont Institute Center for Constitutional Jurisprudence, headed by John C. Eastman, a former law clerk of Justice Clarence Thomas, and the Pacific Legal Foundation. Both aim to roll back more than a half century of high-court jurisprudence deferring to acts of Congress centered on the Commerce Clause.

Two Supreme Court cases touching on the Commerce Clause fueled their argument. In 2000, the court struck down the Violence Against Women Act, in part because it didn't affect interstate commerce. In 1995, the justices overturned a federal law creating gun-free zones around public schools on similar grounds.

The district court in 2001 ruled against Rancho Viejo, and its decision was upheld by a three-judge panel at the D.C. Circuit Court of Appeals. In 2003, Rancho Viejo petitioned for a

rehearing before the full appellate court. On a 7-2 vote, its request was denied. Judge Roberts, who had been on the court for only a few months, was one of the dissenting judges.

In a five-paragraph opinion, he said the court's approach in Rancho Viejo "seems inconsistent" with the Supreme Court holdings in the gun-free zone and violence-against-women cases.

And in a passage that has, since Judge Roberts' nomination to the Supreme Court, become one of the most famous phrases of his short judicial career, he wrote: "The panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes 'Commerce ... among the several states.' "

Judge Roberts didn't take his argument further and reveal how he might rule on the case if the full panel had taken it up. The last sentence of his dissent only deepened the mystery around him, by suggesting that he might still have sided with the "hapless toad" and its backers. A review by the full court, he said, would "afford the opportunity to consider alternative grounds for sustaining application of the [Endangered Species] Act that may be more consistent with Supreme Court precedent."

But Glenn Sugameli of Earth Justice, a partner in the environmental community's judicial-vetting project, says: "No federal court has ever ruled that any federal wildlife protection is beyond Congress's Commerce Clause power. It is a position that, although he doesn't give his ultimate view, is troubling."

Judge Roberts' other rulings on the court, which typically handles appeals of government-agency actions, are equally opaque. He tends to defer to government regulators, whether they are disappointing business or the greens. In one instance, he wouldn't intervene for a firm objecting to its listing as a Superfund site. In another, he rebuffed the Sierra Club in a pollution case.

"His record on the D.C. court is even-handed," says David Bookbinder, the Sierra Club's lead counsel. "There is certainly no pro- or anti-environmental bias we can see. We're glad, but these are not the sort of cases that go to the Supreme Court."

So they await the hearings in hopes of clarity. Meanwhile, in San Diego County, an agreement was reached between the Rancho Viejo developers and government regulators. "The toad is still alive, and the development is in," reports Jane Hendron, spokeswoman for the Carlsbad Fish and Wildlife Office.