

CRC In The News

Bench Marks: The Bush Administration Packs the Courts with Anti-Environmental Judges

**E Magazine
Volume XV, Number 1
January-February 2004
April Reese
"Currents" Section**

For more than 30 years, environmental laws ranging from the Clean Air Act to the Endangered Species Act have provided a formidable weapon for activists and ordinary citizens trying to protect the environment. While the environment does not always prevail in court, litigation has become an essential protection tool.

If the Bush administration has its way, that could all change, some legal analysts say. When George W. Bush took office in early 2001, there were more than 100 vacancies on the federal bench—an unusually high number. Since then, he has nominated scores of candidates to fill those judgeships. But critics say that instead of choosing potential judges with strong records of upholding the law, Bush's nominations are an orchestrated attempt to spread his ideology.

It's not unusual for a president to nominate like-minded judges. But with so many seats vacant, Bush—who has cited conservative Supreme Court justices Antonin Scalia and Clarence Thomas as his models of judicial excellence—has a unique opportunity to stock the courts with political soulmates.

"The federal government's ability to enforce the law and to protect people is at issue here," says Glenn Sugameli, an environmental lawyer with Earthjustice. "There is the ability to change how judges will be ruling on a whole range of issues." And once confirmed, federal judges stay on the bench for life.

A glance at federal court records suggests that the administration has already begun using the courts to weaken environmental protections. Department of Justice attorneys have consistently failed to defend legal challenges to strong environmental policies, such as the Clinton administration's "roadless rule," which would protect over 58 million acres of road-free national forest lands throughout the country. Add a well-placed smattering of anti-environment judges to the federal courts, and far greater damage could be done, Sugameli warns.

According to the Senate Judiciary Committee, after almost three years of nominating and confirming, about 52 vacancies remain, or about six percent of the 877-member federal judiciary. About 50 nominations are waiting to be taken up by either the committee or the full Senate, which must give confirmation. Twenty-seven vacancies have been open for so long that they are considered "judicial emergencies."

Bush may have the opportunity to choose a Supreme Court justice, too: at least one, and possibly two of the high court's justices could soon retire. With many controversial cases decided 5-4, the replacement of even one justice—particularly the decidedly left-leaning Justice Stevens, age 81—could have a big impact on the court's rulings.

Earthjustice and a growing cadre of other green groups, including the Community Rights Council (CRC), the Natural Resources Defense Council (NRDC), Friends of the Earth and the Sierra Club have joined in a multi-pronged fight to keep Bush's most troublesome nominees off the federal judiciary.

Of the courts currently awaiting new judges, the little-known Court of Federal Claims, whose wide-ranging influence is out of proportion to its public profile, is a top concern among greens. According to a joint

report released by CRC, NRDC and the Alliance for Justice called "Hostile Environment," the court already has a reputation for lending a sympathetic ear to so-called "takings" claims filed by property rights advocates. The court has decided in favor of plaintiffs who have argued that the Fifth Amendment, which states that property cannot be taken for public use without "just compensation," requires governments to pay landowners whose property diminishes in value because of environmental regulations.

It's this court that will decide a case filed by Klamath Basin farmers alleging that the federal government's decision to cut off irrigation water to aid fish and other wildlife amounted to a taking of their property that must be compensated.

Over the spring and summer, the Senate confirmed five of Bush's six nominees to the federal claims court, and another was recently nominated and has not yet received a hearing before the Senate Judiciary Committee. One nominee, Victor Wolski, is a significant threat, says Doug Kendall, executive director of the Community Rights Counsel. "Wolski's nomination is clear evidence that this administration is using appointments to the Court of Federal Claims to advance its anti-environmental political agenda," he says.

Wolski has said, "Every single job I've taken since college has been ideologically oriented, trying to further my principles...limited government, individual liberty and property rights."

The D.C. circuit court of appeals, which hears most suits brought against the various federal environmental agencies, is also vulnerable. In a high-profile 1999 case brought by the American Trucking Association against the Environmental Protection Agency (EPA) over new rules for smog and soot, a panel led by Senior Judge Stephen Williams ruled that Congress did not have the constitutional right to grant rule-making authority to the agency in the first place. Then-EPA Administrator Carol Browner called the ruling "bizarre" (E, November/December 1999), and it was unanimously overturned by the Supreme Court.

The newest addition to the D.C. circuit is John Roberts, who was confirmed in May. As a former deputy solicitor under the first President Bush, Roberts successfully argued on behalf of the federal government in a 1990 Supreme Court case that private citizens do not have the right to sue over environmental violations unless they have been directly affected by the violation.

The most recent Bush nominee to come under fire is Alabama District Attorney William Pryor. In July, the Senate Judiciary Committee approved Pryor's nomination to the 11th U.S. Circuit Court of Appeals, which hears cases from Alabama, Florida and Georgia. Environmentalists say his record indicates Pryor would roll back federal environmental protections. In 2001, Pryor asked the Supreme Court to review a decision that upheld the federal government's right to bar the killing of red wolves on private land under the Endangered Species Act and other laws.

Testifying last year before Congress, Pryor took issue with the federal government's "invasion" of state jurisdiction over enforcement of the Clean Air Act. "EPA invaded the province of the states and threw their respective air pollution control programs into upheaval," Pryor said. His professional fate now lies in the hands of the full Senate.

Conservatives say the controversy over Pryor and other Bush nominees amounts to little more than political grandstanding by Democrats. Jim Burling, an attorney with the conservative Pacific Legal Foundation, rejects the idea that Bush is deliberately picking anti-environmental judges. "There aren't any fire-breathing right-wing zealots," he says. "I kind of wish there were, but I don't see it."

Conservative legal scholar Richard Epstein, whose work helped foster the "takings" movement, warns that few nominees can withstand microscopic public scrutiny of their views. "I think in the end, if you make [ideology] a serious issue, then every nominee will be out of commission," he says.

Despite protests from environmental and other progressive groups, many of Bush's nominees have made it to the bench. But Senate Democrats have succeeded in tying up some of Bush's most controversial

nominees. Democrats successfully killed the nomination of Miguel Estrada to the U.S. Court of Appeals, and have held up the ascension of Priscilla Owen, nominated to the 5th U.S. Circuit Court of Appeals.

With Republicans holding only a slim majority in the U.S. Senate on the eve of a presidential election, the political wrangling over Bush's judicial nominees-and the future of the nation's environmental laws-isn't likely to end any time soon.