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Hearings will begin soon in the Senate Judiciary Committee on a series of President Bush's federal court nominees who were rejected by the Senate last year. President Bush has renominated seven appeals court nominees who were blocked in the last session. "Renomination on this scope and scale of so many judges who the Senate has refused to confirm has never happened before," says Glenn Sugameli, senior legislative counsel for [Earthjustice](#), a nonprofit public-interest law firm. Noting that Congress has already confirmed 204 of Bush's appointees, Sugameli asserts, "President Bush is trying to convert the Senate into a rubber stamp that will confirm 100 percent of his judicial nominees. That is what is really at stake here."



First up is one of the most anti-environmental of the Bush nominees, William G. Myers III. Mr. Bush aims to seat Myers on one of the most important benches in the nation, the 9th Circuit Court of Appeals. The 9th Circuit has jurisdiction over three-fourths of all federal lands, covering nine western states -- the scene of perennial battles over mining, drilling, grazing and timber.

Democrats aggressively blocked Myers' appointment with a filibuster in 2004. So when his nomination lapsed at the end of this past congressional session, many legal experts assumed it was dead, along with the nominations of nine other judicial candidates that were blocked by Senate Democrats for their extremist ideology, industry ties and/or ethical problems. But on Dec. 23, while Americans were distracted by the holidays, the president gave his corporate backers (especially those in the energy and mining industries) a Christmas present and gave the citizens of the United States a kick in the pants: He announced his intent to renominate seven of the filibustered candidates, including Myers. (The other three were given the option of being renominated, but withdrew themselves from consideration.)

Unlike most judicial nominees, Myers has never been a judge. Instead, his [qualifications](#) include decades as a paid lobbyist and lawyer to the coal and cattle industries. In his recent position as the Bush Interior Department's chief attorney, Myers tried to give away valuable federal lands to a mining company and imperiled Native American sacred sites. "His nomination is the epitome of the anti-environmental tilt of so many of President Bush's nominees," says Sen. Patrick Leahy (D-Vt.).

Until he resigned in October, 2003, Myers helped shape the weakening of the Endangered Species Act. He also helped curb federal protections designed to prevent destructive mining and overgrazing of public lands. During Myers' tenure at Interior, the department's inspector general ruled that despite meeting 37 times with representatives of the grazing and mining industries, including former clients, Myers--a former lobbyist for mining and grazing interests--did not violate an ethics agreement. In one legal opinion he wrote at Interior, "Myers overturned the opinion of his predecessor so that Interior Secretary Gale Norton could approve a 1,650-acre cyanide heap-leach gold mine in California."

During his previous nomination for the 9th Circuit last January, not a single member of the American Bar Association's committee that rates federal judicial nominees found Myers "well qualified." More than a third rated him "unqualified." His nomination was also opposed by the National Congress of American Indians, representing more than 250 tribal governments, and by 23 public interest organizations.

While the Supreme Court takes on less than 100 cases per year, the circuit (or appellate) courts hear more than 40,000 appeals annually and set most legal precedents that become the law of the land.

There are currently 37 federal judicial openings, with 15 of those on the circuit courts of appeal. For the environment, some of the key open judgeships include three vacancies on the District of Columbia Circuit (the court that hears



most environmental cases involving executive-branch regulatory agencies such as the Interior Department, the U.S. EPA, and the Army Corps of Engineers), as well as seven vacancies on the West's 9th Circuit.

"In many ways, the courts are more important than either Congress or the executive-branch agencies," says Patrick Parenteau, professor of environmental law and director of the Environmental and Natural Resources Law Clinic at the Vermont Law School. "Congress may enact the laws, but it does so in very broad, sweeping terms. It is the courts that interpret, apply, and enforce the statutes." Without the courts, such landmark legislation as the Clean Air and Water Acts could have been stillborn, he says. "If you don't have courts and judges willing to take a strong stand, those laws never take effect on the ground. They don't change how things are done. The courts give teeth to environmental laws."

President Bush, however, seems intent on extracting those teeth. And one of his key strategies for doing so is to pack the federal courts with right-wing extremists. The likely result could be one of the most heated Senate battles over judicial nominations ever, with some experts predicting the struggle will be a defining moment of Bush's second term.

Taking Care of Business

Perhaps the most disturbing trend in Bush's judicial appointees is their increasingly common links to industry. More than a third of Bush appointments to appellate courts and the U.S. Court of Federal Claims during his first term – 21 of 59 nominations since 2001 – have worked as lawyers or lobbyists for the oil, gas, and energy industries, according to a [new investigation](#) by the Center for Investigative Reporting. Three of these energy industry-linked Bush nominations have been made to the critically important 9th Circuit (with one confirmed so far), another nominated but not confirmed to the D.C. Circuit Court, and four confirmed to the little-known Court of Federal Claims, which deals with "takings" property claims made by developers and industry against the government. "The placement of the nominees suggests an administration strategy of nominating corporate-friendly judges in circuits where they will make the greatest impact," notes CIR. "In many cases, these same corporations and industries are also major campaign contributors to the Bush administration and the Republican Party."

Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst and expert on the history of the nominating process, notes that reliance on special-interest lobbyists to fill prime posts on the federal bench has been rare under past presidents, and he raises questions about the Bush justices' ability to be "fair-minded and objective." Goldman reveals in a 2003 *Judicature* journal article that 9.6 percent of Bush district-court appointments had come from large law firms with 100 or more lawyers, of the type that represent large corporations.

But Roger Pilon, vice president for legal affairs and director of the ultra-right Cato Institute's [Center for Constitutional Studies](#), denies and downplays such industry ties. "Twenty-one out of 59 judicial nominees had close ties to mining and other extraction industries? It is factually nonsense," he says. "And even if it were true, so what?" Pilon contends that just because judicial nominees lobbied or lawyered for big business and big polluters, that's no reason to think that, once appointed, they will show bias toward their old clients and against the environment. He calls such thinking "Marxist class-analysis claptrap."

But obviously the National Association of Manufacturers thinks otherwise. This powerful business lobby is about to launch a multimillion-dollar campaign to aid the White House in its bid to win approval for its judicial nominations, [reports the Los Angeles Times](#). The head of the association, former Michigan Gov. John Engler (R), a longtime friend of the president, implied in his *Times* interview that the appointment of federal justices is important to business, partly because of judges' roles in civil liability cases. (Such cases might include corporations being held liable for oil spills, damaged fisheries, toxic waste-causing cancers or birth defects, etc.) It's expected that pressure from the association's powerful members, such as General Motors, might force the reversal of some Democratic senators who fought Bush's most egregious corporate-connected nominees in his first term.

All of this strife over judicial nominations seems to challenge the old stereotype of an impartial U.S. judiciary. And indeed, [a new study](#) shows that political party affiliation does make a difference when it comes to the environment and judges. The study, by the nonpartisan Environmental Law Institute, looked at 325 federal trial and appellate court rulings between 2001 and 2004 concerning the National Environmental Policy Act, a foundation of U.S. environmental law that requires all federal agencies to take into account the impact of their actions on the environment.

It found that a plaintiff with pro-environmental goals had less than half the chance of success before a Republican-appointed judge (a 28 percent success rate) than before a Democratic appointee (59 percent success rate). Conversely, plaintiffs with pro-development or industry goals were successful only 14 percent of the time before Democratic appointees, but 58 percent of the time before Republican appointees.

The GOP judges' anti-environmental stance has grown more pronounced under Bush. **Of the 23 NEPA cases heard by the president's appointees, only four were decided in favor of the environment – that's 83 percent of cases decided in favor of industry, a marked decline from the already poor environmental success rate scored with nominees of past Republican presidents.** (The report does note, however, that the Bush judges have served for such a short time that more data will be needed to fully affirm this trend.)

The NEPA study "may or may not show bias on one or both sides," notes Sugameli. "But what it does clearly show is that who sits on the courts matters. It makes a difference, and affects people's ability to breathe clean air, drink clean water, and to enjoy special places."

Law and Disorder

Bush appointees, though relatively new to the federal bench, are already attempting to reinterpret landmark environmental decisions and change the way the statutes apply. In defiance of precedents and the public interest, the 9th Circuit's Richard R. Clifton in a dissenting opinion would have allowed a national-forest timber sale to go forward despite an environmental group's injunction to stop the sale. Meanwhile, the 5th Circuit's Edith Brown Clement and Charles Pickering (both Bush appointments) have joined in a dissenting opinion that would have allowed a commercial and residential development in Texas, despite the risk to listed endangered species living on the site.

Barring access to courts is antithetical to democracy, says Sugameli. It biases the system against nonprofit citizen's groups and in favor of businesses. It is also prejudicial. "There is no question that corporations will continue to be able to go to court whenever they don't like an environmental protection," he says. "But there is a serious question as to how much citizens will continue to be able to go to court when they feel that environmental laws are protecting corporations and not people."

Bush conservatives have hit upon still another strategy for attacking the environment: property rights. If Scalia and Thomas were to be joined on the Supreme Court by like-minded Bush-appointed justices, they would have the majority needed to set precedents giving industry privileged private-property rights. "For at least 25 years, since President Reagan, the property-rights movement has asserted that property ownership is absolute and enshrined in the Constitution," says Jay Feinman, a professor at Rutgers University School of Law and author of [Un-Making Law](#). That movement sees property rights as a core value of democracy, trumping the authority of Congress to make laws reducing pollution or preserving natural resources. When the government wants to protect air quality, wildlife, or wetlands, the movement contends, it must pay for all profits lost in the forsaking of economic activity, which industry leaders have cleverly – if erroneously – labeled "takings."

This very broad definition of property rights, based loosely on the 5th Amendment of the Constitution, has been repeatedly asserted by conservative Republican judges on the federal bench, and especially by Bush appointees. Myers has taken the extreme view that property rights should receive the same level of constitutional scrutiny as free speech. "What we've seen in the Bush administration is appointees who come out of this property-rights movement and have ties to industry, and who we can expect to advance the cause to undermine government regulation," says Feinman.

Going Nuclear

As for the extremism of Bush's second-term nominees, his *renomination* of the seven candidates already blocked by the Senate doesn't bode well for the environment. Among them are such property-rights extremists as Myers and Janice Rogers Brown, who was nominated to the D.C. Circuit and opposed by 35 national and state environmental groups. Brown has declared that the Supreme Court's 1937 decision upholding the New Deal as constitutional "marks the triumph of our own socialist revolution." And her extreme views on property rights caused her to claim that private property is now "entirely extinct in San Francisco" and that the city is implementing a "neo-feudal regime."

As for the Supreme Court, "All the indications are that the people being looked at to fill those vacancies would include many with very extreme positions," says Sugameli. Bush could also try to elevate either Scalia or Thomas, his two favorites and the two most anti-environmental justices, to the chief justice position.

Bush's lifetime appointments to the federal courts – most of whom seem to be intentionally selected because of their youth – will shape and dominate environmental jurisprudence for many decades to come.

Right Young Things

Parenteau believes that the right-wing judicial strategies being pressed by the Bush administration amount to a corporate coup d'etat in which private special interests trump the public good and democracy. *"It is probably not hysterical to characterize our situation as a constitutional crisis, because I feel that the majority values of this country are still strongly in support of strong laws protecting the environment. But what is happening is that those laws are being picked apart, dismantled, and deceptively, stealthily, slyly undermined. I think that our government's checks and balances are breaking down," as corporations gain a death grip on all three branches of government.*

Sitting Supreme Court Justice David Souter has long warned against the judicial use of constitutional arguments to invalidate Congress's authority to regulate commerce – a tactic that could negate environmental, public-health, labor, minority, and women's civil-rights protections in one massive strike. New Federalism is not new, he contends, but will march America back to the Lochner era of the courts, which lasted from the post-Civil War period until Roosevelt's New Deal.



Some River! Chocolate Brown, oily, bubbling with sub-surface gases, it oozes rather than flows. "Anyone who falls into the Cuyahoga does not drown," Cleveland's citizens joke grimly. "He decays." The Federal Water Pollution Control Administration dryly notes: "The lower Cuyahoga has no visible life, not even low forms such as leeches and sludge worms that usually thrive on wastes." It is also – quite literally – a fire hazard. A few weeks ago, the oil-slicked river burst into flames and burned with such intensity that two railroad bridges spanning it were nearly destroyed. "What a terrible reflection on our city," said Cleveland Mayor Carl Stokes sadly.

Joseph Lochner was a New York baker whose corporate right to force employees to work 60-hour weeks was upheld by the Supreme Court. For seven decades, the courts maintained a laissez-faire attitude about business practices, ruling that the economic sphere was off-limits to congressional regulation, and that private property, especially corporate private property, was sacrosanct. That era's policies spurred political and corporate corruption, spawning the Robber Baron industrialists, a yawning gap between rich and poor, civil unrest, labor strikes and riots, bomb-throwing anarchists, two presidential assassinations, fierce government repression, genocide against the American Indians, and the near extinction of the American buffalo. It was an era whose gross human injustices were only reversed by New Deal reforms.

In the face of a kind of Lochner-era redux, environmental groups have little recourse, Feinman fears. "Other than opposing judicial nominations, we have a real problem here. We can't just wait for the next election, or defeat a bill in Congress. With the judiciary, we are dealing with a matter of constitutional law. Once high courts rule in an area, there is nothing that can be done by executive action, or by legislation, to change things. That's the end of the story. We could see a rollback of environmental law as part of a much broader rollback of government protection of the public interest. Once again, what is good for General Motors is good for the U.S.A."

"Maybe the Cuyahoga River has to burst into flame again," concludes Parenteau, referring to a pivotal outrage in 1969 that helped launch the environmental movement in the following years. The United States may need to see drastic climate shocks, or Bhopal-scale tragedies, before the public becomes determined enough to reverse the Bush administration's judicial excesses. The political and social shape that such a rebellion might take – and how long it might take to emerge – is anyone's guess.

This report was contributed to by GreenWatch and Glenn Scherer, author and freelance journalist whose stories have recently appeared on Salon.com, TomPaine.com, and other publications. He is former editor of Blue Ridge Press, a syndicated environmental commentary service in the Southeast.