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Environmental groups study Roberts's rulings with concern

By Charlie Savage

The federalist legal philosophy embraced by Supreme Court nominee John G. Roberts Jr. could pose an obstacle to enforcement of environmental laws, limiting the federal government's power to protect endangered species and fragile ecosystems.

Environmental groups yesterday expressed concern about Roberts's dissent in the 2003 case of a rare toad whose habitat in California was threatened by development. As a federal appeals court judge, Roberts contended that the toad was not protected by federal law because it lives only in California, and the federal government can only regulate matters involving more than one state.

Moreover, in 1992, while he was deputy solicitor general in the George H.W. Bush administration, Roberts successfully argued before the Supreme Court that an environmental group, Defenders of Wildlife, had no standing to sue the government when the administration changed a rule in order to narrow the scope of the Endangered Species Act.

As a private-practice appellate lawyer in 2001, Roberts wrote a friend-of-the-court brief on behalf of the mining industry that helped persuade an appeals court to allow "mountaintop removal" in West Virginia. Roberts argued that a lower judge should not have stopped coal companies from dynamiting the tops of mountains and filling valleys and streambeds with the resulting debris.

And as an appeals court judge in 2004, he rejected a lawsuit by the Sierra Club seeking to force the Environmental Protection Agency to adopt a tougher standard for the emission of hazardous air pollutants from copper smelters.

But it is Roberts's decision in the 2003 toad case, in which he cast doubt on the constitutionality of sweeping federal environmental laws, which has given naturalists the most cause for concern -- even as they cautioned yesterday that they wanted to conduct more research into his past before taking a position on his nomination to the Supreme Court.

Roberts wrote that the Endangered Species Act cannot protect "a hapless toad that, for reasons of its own, lives its entire life in California" because the Constitution only allows the regulation of matters involving more than one state.

Most of the nation's environmental laws -- including the Endangered Species Act, the Clean Air Act, and the Clean Water Act -- were passed under the Constitution's grant of power to the federal government to regulate "interstate commerce." Any effort to limit the scope of that power could substantially reduce environmental protection.

Before the 1930s, the Supreme Court strictly limited federal regulation to areas that clearly involved more than one state. But after President Franklin D. Roosevelt won a battle to uphold his New Deal programs on the theory that all state matters had impact on other states, the court for several generations imposed virtually no limits to what the federal government could do.

In recent years, however, some conservatives have called for a "new federalism" that would limit federal power in order to restore more policy-making power to state governments.

"The reason Judge Roberts's dissent in that Endangered Species Act case is troubling is that it indicates that he might take a much more narrow view of Congress's ability to pass that legislation under the commerce clause," said Sara Zdeb, legislative director of Friends of the Earth. "We want to see a justice who is going to uphold that right."

Republicans are already preparing to defend Roberts against an attack from environmentalists. Sean Rushton, executive director of the conservative Committee for Justice, said it was inappropriate to gauge a judge by the political outcome of the case rather than by the legal principle upon which he or she makes a decision.

"It's a results-oriented view and it presumes that there is no actual legal issue at stake, so that it's more of a political judgment -- like 'this guy is anti-environmentalist,' " Rushton said. "We don't like that whole kind of argument."

Conservative groups have also distributed talking points to defend Roberts. One key point: While in private practice, Roberts worked, free of charge, on a case important to environmentalists. He persuaded the Supreme Court to allow Lake Tahoe to impose a ban on further development around its shores without having to compensate landowners.

Indeed, leaders of several environmental groups said yesterday that the Lake Tahoe case, in which Roberts pushed an argument based on their central belief that the needs of the environment can outweigh private property rights, has prevented them from leaping to the judgment that he is their enemy. The Supreme Court's most conservative members -- William Rehnquist, Antonin Scalia, and Clarence Thomas -- all dissented from the opinion.

"He's got, like every other judge, decisions on both sides," said David Bookbinder, legal director of the Sierra Club. "We're eyeing him cautiously, and we are going to thoroughly read everything and listen to his testimony and then make a decision."

Nevertheless, Roberts's roles in the toad case and the mining case have left the movement wary. Earthjustice executive director Buck Parker yesterday issued a statement expressing concern that Roberts "may fail to uphold our key environmental safeguards as a Supreme Court justice" and calling on the Senate to thoroughly question him about the matter. ■