

COURTS: Roberts ducks questions on Commerce Clause but addresses ESA

By Alex Kaplun

Supreme Court Chief Justice nominee John Roberts yesterday declined to fully state his position on congressional authority under the Constitution's Commerce Clause in questioning before the Senate Judiciary Committee, even as he sought to clarify a controversial statement he once made about the Endangered Species Act.

On the Commerce Clause, his evasiveness left lingering questions from Senate Democrats and environmentalists about his position on a legal principle that is the basis of many federal environmental laws.

Roberts told the committee that he had "no agenda" to overturn the established legal precedent on the issue, but he also refused to articulate his position on the grounds that interpretation of Commerce Clause applications would likely come before the Supreme Court during the next few years.

Under questioning from Sen. Chuck Schumer (D-N.Y.), Roberts went on to say that he did not believe the 1942 Supreme Court decision *Wicker v. Filburn*, which is often cited as legal precedent for congressional authority under the Commerce Clause, falls into the same category as other "bedrock" legal decisions.

"It's a precedent of the court," Roberts said. "But I do think it's a bit much to say that it's on the same plane as a precedent as *Marbury v. Madison* and *Brown v. Board of Education*."

Roberts' position on the clause has emerged as the top environmental issue of his nomination and most major environmental groups have been looking for a clear articulation of his position before deciding whether to support the nominee. The Constitution's Commerce Clause, which gives Congress the authority to regulate interstate commerce, has been used as the legal foundation for several landmark environmental laws -- including the Endangered Species Act, the Clean Air Act and the Clean Water Act.

But in responding to questions from Schumer, Roberts repeatedly refused to delve too deeply into the issue, citing a Commerce Clause case dealing with medicinal marijuana that came before the court last year. "I have no agenda to overturn it or revisit it, but beyond that I think it's inappropriate to comment," Roberts said.

It has become relatively standard practice for Supreme Court nominees to refuse to answer questions on cases that have either been recently decided by the court or are likely to come before the court in the foreseeable future.

Roberts refusal to lay out a position on the clause drew some criticism from Schumer, who indicated that Roberts' statements fueled concerns that he supported the views of some conservative judges and advocacy groups that Congress had overstepped its authority under the Commerce Clause.

"You know people wonder what's all the fuss about? And the answer is very simple," said Schumer at the end of his questioning on this issue. "And that is that we could see, if certain viewpoints become majority viewpoints on the Supreme Court, the dismantling of the entire apparatus to protect our rights through the narrowing of the Commerce Clause."

Sen. John Cornyn (R-Texas), who immediately followed Schumer in the hearing, argued that there are legitimate questions about whether Congress has gone too far in some of its applications of the clause. "Congress, frankly, has pushed the envelope and tried to argue that Congress has virtually unlimited power to legislate and can crowd out state governments completely out of any field it wants to," he said.

Roberts defends dissent on ESA

Questions about Roberts' position on the Commerce Clause have largely been raised in light of his dissent in a 7-2 decision by the U.S. Circuit Court of Appeals for the District of Columbia not to reconsider a ruling in *Rancho Viejo LLC v. Norton*, which upheld a Fish and Wildlife Service decision to prevent a construction project that biologists said would jeopardize the endangered arroyo southwestern toad. Roberts wrote that the Endangered Species Act -- which is based on the federal government's power to regulate interstate commerce under the Commerce Clause -- may not be used to protect "a hapless toad that, for reasons of its own, lives its entire life in California" ([E&E Daily](#), Sept. 13).

Earlier in the hearing, Roberts defended his dissent in that case, arguing that he was not implying the Endangered Species Act should be overturned but simply that the panel should find other reasoning to uphold the case under the Commerce Clause.

"Another circuit court had suggested pointedly that the approach in the panel opinion was inconsistent with the Supreme Court," Roberts said. "And I thought, if there's another basis for sustaining the Endangered Species Act that was not inconsistent in the view of another circuit court, that we ought to look at that and try to do it."

Sen. Dianne Feinstein (D-Calif.), who first raised the *Viejo* case, proceeded to ask Roberts whether that statement indicates his beliefs when it comes to Congress overstepping its authority in using the Commerce Clause.

"There's a great deal of concern as to what this means for the implication for all environmental law, the Clean Water, the Clean Air Act. But if I understand you correctly, what you are saying is that you do not believe that the Commerce Clause should prohibit legislation in this area, is that correct?" Feinstein asked.

Roberts responded simply that he has not "had occasion to decide that."

Sierra Club attorney David Bookbinder said after Feinstein's questions that Roberts response did little to clarify his position on the issue. "I don't think we got the

answers out of John Roberts that we were hoping to get," he said. "What we heard from John Roberts today of Congress' authority under the Commerce Clause was pretty much pro-forma without a lot of detail."

Enviro policies surface sporadically

While much of yesterday hearings -- the first day of questioning of the nominee -- revolved around issues such as abortion and civil rights, environmental issues were peppered throughout the topics raised by committee Democrats.

Early in the hearing, committee member Patrick Leahy (D-Vt.) questioned Roberts about a law journal article in which he wrote -- referring to an endangered species case -- that Congress may not ask the courts to "exercise oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue."

Leahy said that Roberts' writing on the case indicated he may embrace a legal philosophy that would limit the ability of citizens to bring lawsuits against polluters.

"In the area of environmental protection, I feel that you've narrowly construed laws in the Constitution in a way to close the courthouse doors to millions of parents who want to protect their children from dangerous air pollution or unsafe drinking water, fish contaminated with mercury, foods covered with pesticides," Leahy said.

Roberts responded that the law journal article simply addressed the issue of whether citizens needed to have standing -- a legal term used to identify whether plaintiffs have cause to sue someone -- on environmental cases to bring it before the courts.

"One point [the article] makes is that environmental interests ... are all protected under the law," he said. "And that's one reason courts should insist that those who bring suit have standing -- that's the issue, that they are actually injured -- because standing can encompass, certainly, environmental harms."

Earthjustice attorney Glenn Sugameli said Roberts dodged the key issue of what kind of harm a plaintiff needs to show in order to be allowed to bring a lawsuit before a polluter.

"There's a lot of damage that could be done to people's ability to go to court that's totally consistent with Roberts' answer," Sugameli said. "The fact that he won't entirely wipe out the right to go to court on environmental cases doesn't assure us that he won't severely limit that right."

Environmentalists have argued that too narrow a definition of standing as it applies to environmental law would hinder the ability of both interest groups and individuals to force polluters to comply with regulations in cases where there is no easily identifiable effect on health or personal property.

Democrat reaction mixed after first day of questioning

Much like on the Commerce Clause issue, Democrats criticized Roberts throughout the day for failing to fully answer some of their questions on other topics. The

evasiveness issue became the major point of contention during the first day of hearings.

Sen. Joseph Biden (D-Del.) at one point accused Roberts of "filibustering" on his answers and then jokingly told the nominee to "go ahead and continue not to answer" his questions.

Committee Democrats have repeatedly stated that because of Roberts' relatively short tenure on the bench, they need him to reveal a significant amount of information on his legal philosophy before they decide whether to support his nomination.

But while no Democrat said during yesterday's hearing that he was inclined to support Roberts' nomination, there were some indication that there may not be outright opposition from the caucus.

Schumer -- a Democratic leader on judicial issues -- said during the hearing that he was "pleasantly surprised" with some of Roberts answers during the hearing.

Sen. Dick Durbin (D-Ill.), the only Democrat left in the hearing room at the conclusion of the 12-hour long hearing, said that while no Democrat has taken a firm position on the nomination, Roberts' performance probably helped him gain at least some support with the minority party.

"I think it probably was a split decision," Durbin said. "I was impressed, I thought he handled himself extremely well."

Committee Republicans, meanwhile, strongly praised Roberts performance during the hearings and continued to make the case that he should sail through the Senate by a wide margin. "I don't know how you can find a better nominee," said Sen. Orrin Hatch (R-Utah). "I just don't see why the Democrats don't fold up their tents and let him go."

The hearings are scheduled to resume today at 9 a.m. with 30 minutes of questioning from two of the committee's most junior Republicans -- Sens. Sam Brownback (R-Kan.) and Tom Coburn (R-Okla.). The committee will then move to the second round of questioning, where each senator will get 20 minutes to question the nominee.

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