

## **COURTS: Roberts hearing does little to alleviate enviros' concerns**

**By Alex Kaplun**

Environmentalists yesterday indicated that Supreme Court Chief Justice nominee John Roberts' testimony before the Senate Judiciary Committee this week did little to alleviate their concerns about his legal philosophy on issues such as the Endangered Species Act and the Commerce Clause.

But unlike other liberal interest groups, environmental groups had little immediate reaction to his testimony yesterday, and officials from several organizations said they will closely study Roberts' testimony before deciding whether to oppose his nomination.

"I don't think that John Roberts harmed himself in this hearing, but I think the concerns about John Roberts before this hearing remain serious concerns," said Jason Rylander, staff attorney at Defenders of Wildlife. "He said very little to alleviate them, he said very little to exacerbate them."

Most major environmental groups had decided not to take any position on Roberts in the weeks after his nomination was first announced and said they would wait until after the hearings to determine whether to oppose or support the nominee.

Roberts unwillingness throughout the three days of testimony to fully lay out his views on the Constitution's Commerce Clause and the lack of questions about access to courts for environmental lawsuits appears to have left officials with lingering questions about where he stands on those issues.

Democrats repeatedly tried to nail down Roberts' views on congressional authority under the Commerce Clause -- perhaps the biggest single issue for the environmental community -- but he mostly declined to discuss views on the topic on grounds that it will likely come before the courts in the next few years.

"He was asked questions about the issues that we've raised, and he didn't fully answer those questions," said Earthjustice attorney Glenn Sugameli.

One of the main areas of concern for environmentalists entering the hearings was a dissent Roberts wrote while serving on the U.S. Circuit Court of Appeals for the District of Columbia in which he indicated Congress may lack the congressional authority under the Constitution's Commerce Clause -- which gives Congress the authority to regulate interstate commerce -- to protect an endangered toad that "lives its entire life in California." Legal experts said the dissent may indicate Roberts may be willing to overturn the Endangered Species Act as well as laws such as the Clean Air Act on similar Commerce Clause grounds.

Roberts defended his dissent several times, saying that it should not be interpreted as a desire to overthrow ESA but that he was simply looking for other legal justifications to protect the toad. Environmentalists remain concerned that Roberts questioned the legitimacy of ESA on grounds that have rarely been raised by most federal judges in the country.

"What remains troubling is that his toad opinion, in that he's at least strongly criticizing one of the strongest basis for constitutional authority to protect species," said Community Rights Counsel executive director Doug Kendall. "I don't view his testimony as meaningfully addressing this concern."

Sen. Chuck Schumer (D-N.Y.) asked yesterday whether he believed Congress had authority to regulate commercial activities that are "purely local" but "exert a substantial economic effect on interstate commerce" -- a definition that would presumably apply to most instances of federally mandated species protection.

Roberts responded that it would appear to depend on whether the activity can be defined as commercial. "Where the dispute and issue has come in is whether the activities are commercial," he said. "That's where the disagreement -- or the point I was trying to make in the infamous or famous toad case."

Roberts also agreed with Schumer that Congress should have a "great deal of deference" to Congress in determining if an activity is commercial.

But earlier in the week Roberts said he did not believe the 1942 Supreme Court decision *Wickard v. Filburn*, which is often cited as legal precedent for congressional authority under the Commerce Clause, falls into the category as other "bedrock" legal decisions. Still, Roberts did not at any point during the hearing express a belief sometimes stated by conservative judges that Congress has dramatically overstepped its constitutional authority in this area.

"He seemed to rule out the most extreme cutbacks on Congress' power under the Commerce Clause, but I didn't really anticipate he would join Justice [Clarence] Thomas as the vanguard of the revolution on those issues anyway." Kendall said. "I would describe my concerns about the same as where they were before the hearing."

### **Roberts says he's not an 'ideologue'**

Roberts' testimony wrapped up yesterday with Democrats continuing to complain that he has not revealed enough about his legal philosophy to the committee, but several leading Democrats said they still had not decided how they would vote on the nomination.

Schumer -- one of Roberts' most vocal critics throughout the confirmation process -- said in his closing remarks that he has been "wrestling with how to vote" on Roberts, in part because he did not receive enough information of Roberts' view on many issues.

"Will you be a very conservative judge who will impede congressional prerogatives but does not use the bench to remake society, like Justice Rehnquist?" Schumer said. "Or will you use your enormous talents to use the court to turn back a near-

century of progress and create the majority that justices [Antonin] Scalia and Thomas could not achieve?"

Sen. Dianne Feinstein (D-Calif.) told Roberts several minutes later that "many of us are struggling with exactly that: What kind of a justice would you be?"

In responding to those comments, Roberts said that his 50 opinions of the D.C. Circuit demonstrated he would not be the kind of "ideologue" that some lawmakers seemed to fear.

"I think if you've looked at what I've done since I took the judicial oath, that should convince you that I'm not an ideologue," Roberts said. "And you and I agree that that's not the sort of person we want on the Supreme Court."

Shortly after those comments, Sen. Lindsey Graham (R-S.C.) criticized Democrats for choosing to focus on Roberts' "heart" rather than his legal qualifications. "There are all kind of hearts. There are bleeding hearts and there are hard hearts," Graham said. "And I want this committee to understand that if we go down this road of putting people's hearts in play, and the only way you can have a good heart is, adopt my value system, we're doing a great disservice to the judiciary."

Shortly after those comments, the committee ended more than 20 hours of questioning late yesterday morning and then moved into closed session to discuss Roberts' FBI files. Both Committee Chairman Arlen Specter (R-Pa.) and ranking member Patrick Leahy (D-Vt.) said there was nothing in his file that will be an issue in his confirmation.

The committee then moved through testimony by about 30 witnesses, which included individuals who have worked with Roberts as well as officials from independent organizations who either touted or questioned his credentials to sit on the bench.

Committee members can now also submit written questions to Roberts, which he must respond to by the time the panel votes on his nomination on Sept. 22. Senate Majority Leader Bill Frist (R-Tenn.) said he would move Roberts' nomination to the floor shortly after the committee vote and will confirm him by Oct. 3.

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