

COURTS: Enviros dust off campaign playbook for Supreme Court nomination battle

Joining interest groups from across the political spectrum in an expensive scrum over the Supreme Court vacancy, environmentalists will use their old presidential campaign strategies in a nomination battle that many say could determine the fate of laws that protect natural resources and public health.

Environmentalists are forming coalitions with other left-leaning groups to reach out to donors, mobilize members and set up media operations to get out messages in rapid-fire fashion.

The Sierra Club and Earthjustice, for example, have joined civil rights, religious groups, women's rights groups and others in the Coalition for a Fair and Independent Judiciary. The coalition plans to use television advertising and mobilization efforts that are typically found in major elections.

And while League of Conservation Voters President Deb Callahan said her group has not decided about the scope of its involvement in the looming Supreme Court fight, LCV sent e-mails seeking donations to "educate senators and their constituents about the environmental record of any nominee" a few hours after Justice Sandra Day O'Connor's announced her retirement last Friday.

"Please make a gift to help ensure that Justice O'Connor's replacement does not become the swing vote that undermines our environmental laws," LCV said, echoing its message from last year's election.

Most environmentalists are unwilling to describe their campaign plans until President Bush announces his choice of a nominee. But they do say they are preparing for a tough fight.

Resource protection laws at stake, enviros say

Environmentalists say the nominee could determine the fate of several long-standing environmental protection laws.

Prior to O'Connor's resignation, several environmentalists suggested they might accept a nominee in the mold of Chief Justice William Rehnquist -- a conservative who tends to uphold states' rights to set policies on issues such as the environment. But they fear Bush's nominee will be closer philosophically to Justices Clarence Thomas or Antonin Scalia and could question basic principles that underlie environmental policies.

"There would be a large number of conservative Republican judges that would be acceptable, they are not people that we would actively support but people whom the president could nominate and we would not actively oppose," said David Bookbinder, a senior attorney with the Sierra Club. "Our chief concern is that he's not going to seek out a mainstream Republican conservative but cast around for the best ideologue he can find and nominate that person."

The nomination is critical, environmentalists say, because a few unfavorable rulings could unravel several environmental protections.

"There's a series of constitutional issues that have been fairly prominent in environmental law-making in the last decade," said Richard Lazarus, an environmental law expert at Georgetown University.

Lazarus specifically pointed to the recent eminent domain debate -- which gained nationwide attention last month because of the Supreme Court's controversial 5-4 decision in *Kelo v. City of New London* -- that said local governments have the right to seize property for private development under eminent domain as long as they compensate the property owners. Environmentalists have generally sided with government officials in such eminent domain cases because they provide government leverage to carry out policies for limiting sprawl and cleaning up and redeveloping degraded "brownfield" industrial sites.

"This is a topic in which the court has been closely divided and in recent years government regulators have fared fairly well," Lazarus said.

But the high court's *Kelo* ruling -- along with a couple of others in recent years -- has drawn strong opposition from conservatives, who say they intend to challenge the court's stance on the "takings" issue through either continued legal action or the legislative process.

Another constitutional issue crucial for environmental regulations is the court's interpretation of the so-called Commerce Clause, which gives the government authority to regulate interstate commerce. Congress has used the clause to establish laws such as the Endangered Species Act, which some property-rights advocates see as federal over-reaching with little constitutional basis.

Lazarus said O'Connor has been generally viewed as a supporter of the government's right to use the Commerce Clause to establish certain regulations and had shown little opposition to ESA.

But some of Bush's judicial nominees to lower court posts that have questioned the government's right to establish ESA, the Clean Water Act and the Clean Air Act. Indeed, environmentalists say they opposed appellate court nominees William Myers, William Pryor and Janice Rogers Brown out of concern their hostility to regulations would eventually undermine environmental laws.

Two appellate judges who experts point to as being at the top of the list of likely Bush nominees for the Supreme Court -- Michael McConnell of the 10th U.S. Circuit Court of Appeals and Michael Luttig of the 4th Circuit -- have likewise questioned key regulations and are likely to be vigorously opposed by environmentalists.

"A lot of judges that Bush could nominate will say Congress has no authority over land protection, clean air, wetlands protection," Bookbinder said. "The issue is not going to be narrow case law, it's going to be whether laws like these are constitutional."

O'Connor resignation raises stakes for enviros

That it was O'Connor who stepped down from the bench and not Rehnquist, who is ill and whose resignation had been widely anticipated, further raises environmentalists' stake in the nomination fight.

O'Connor has been the famous "swing" vote on a split court and legal experts repeatedly pointed to her as the key tie-breaker on many of the court's most scrutinized decisions. Indeed, environmentalists say that several recent Supreme Court cases show that O'Connor did not necessarily side with them on many issues but was also not consistently hostile to federal regulations.

Last year, for example, O'Connor sided with the majority in a 5-4 decision that said the U.S. EPA has the final say over the quality of a state's Clean Air Act emissions permit -- a ruling that was viewed as a significant victory in the environmental community. But two weeks ago, she wrote the dissenting opinion in the 5-4 *Kelo* decision.

Environmentalists conceded that there is little possibility that O'Connor's replacement will be someone who can be considered "environmentally friendly," but they say they hope to see another moderate justice who can be convinced to side with government regulators.

"I don't think there's a perception that any particular justice on the Supreme Court is an environmental champion," said Earthjustice Legislative Counsel Jim Cox. "We don't need an activist to interpret laws in a fashion that protects clean air and clean water, we just need someone who strictly follow the statutes that grant environmental protections."

While environmentalists are hesitant to say that the fight for O'Connor's seat is more important than one for Rehnquist, they say that replacing the moderate O'Connor with a more conservative justice could swing the court in an anti-regulatory direction.

"The replacement can tip the balance one way or another," LCV's Callahan said. "That's why it's an important seat on the bench."

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