

COURTS: Bush picks John Roberts for Supreme Court

President Bush nominated federal appeals court Judge John G. Roberts Jr. last night to replace Supreme Court Justice Sandra Day O'Connor. Roberts has strong ties to the mining industry and co-authored an amicus brief on behalf of the National Mining Association's challenge to the government ban on mountaintop removal mining.

Roberts has served on the U.S. Circuit Court of Appeals for the District of Columbia for the past two years and won Senate confirmation by unanimous consent in May 2003, after being reported out of the Judiciary Committee by a 16-3 vote. His two-year stint on that court marks the first time he has served as judge.

Roberts' first ruling was on Endangered Species Act

His first ruling was a dissenting opinion from a decision by the D.C. Circuit to uphold a lower-court ruling to protect the southwestern arroyo toad under the Endangered Species Act. The *Rancho Viejo LLC v. Norton* decision settled a legal dispute between the Fish and Wildlife Service and Rancho Viejo development that began in May 2000 over the toad's habitat, which overlaps with the developer's planned residential development in San Diego County (Smith/Becker, [Washington Post](#)).

Roberts sided with the development company, which had argued that the Endangered Species Act was unconstitutional under the commerce clause of the U.S. Constitution because the toad never crossed state lines. But in the April 2003 decision, Roberts dissented in a 7-2 decision by the full D.C. Circuit not to reconsider the lower-court ruling that Rancho Viejo must adapt its plans to protect the toad. In his dissent, Roberts questioned the application of the Endangered Species Act, and some liberal groups have pointed to the dissent as an indicator that Roberts may rule in favor of striking down ESA.

Earthjustice -- a member of a liberal coalition that may oppose the nominee -- indicated last night that it was "concerned" about Roberts' decisions on environmental issues, specifically citing the *Viejo* case.

"Roberts's arguments advanced a distorted view of congressional power that could threaten to undermine a wide swath of environmental protections, including the Clean Air Act and the Clean Water Act," said Earthjustice executive director Buck Parker in a statement.

Alliance for Justice, a leading liberal group on judicial issues, yesterday also cited the *Viejo* case as one of the top reasons why it could not support Roberts's nomination, saying that case and several others have "led to serious concerns about whether he will be fair, independent and will protect the rights and freedoms of all Americans."

Roberts sided against enviros in smelter case

Last year, Roberts ruled against environmentalists who had asked the U.S. EPA to strengthen its air pollution regulations for copper smelters. In [that case](#), Roberts was part of a three-judge panel that denied the Sierra Club's petition against the 2002 "Maximum Achievable Control Technology" (MACT) rule and

ruled that EPA had properly followed the intent of Congress under the Clean Air Act, as well as court precedent.

Environmentalists had said EPA acted in an arbitrary and capricious manner by stamping final a rule that focuses only on particulate matter emissions and does not set up additional thresholds for other hazardous air pollutants emitted from the industry, including lead and arsenic. EPA attorneys had responded that anything further would mean the nation's four remaining smelters, located in Arizona, New Mexico, Texas and Utah, would have to shut down ([Greenwire](#), Jan. 20, 2004).

Prior to his appointment to the federal court, Roberts served as White House legal counsel during the Reagan administration and as deputy solicitor general for President George H.W. Bush. Roberts successfully argued on behalf of the federal government in a 1990 Supreme Court case that private citizens do not have the right to sue over environmental violations unless they have been directly affected by the violation.

Even though Roberts appears to have a history that is relatively short on court rulings and legal writings, his brief stint on the bench may generate enough fodder for some environmental organizations.

In 2003, Roberts dissented from a majority decision by the full court not to hear a Bush administration's appeal to a ruling that called on the White House to disclose documents related to Vice President Dick Cheney's energy task force.

While working in the White House of George H.W. Bush, Roberts also argued before the Supreme Court that an environmental group did not have standing to sue the federal government to stop mining which may have violated environmental regulations. In private practice from 1993 to 2003, Roberts served as a partner at Hogan & Hartson, where he practiced energy and business law.

Roberts has long been perceived as a potential nominee that was one of the favorites of the business community and the U.S. Chamber of Commerce endorsed his nomination last night.

"[Roberts] has a strong legal background, an appropriate judicial demeanor and relations and experience with people and issues along the political spectrum," said Chamber President Thomas Donohue. "He is highly regarded and well respected by the legal and business communities."

Senate expected to move quickly on nomination

Bush called on the Senate last night to confirm his nominee to the bench by the time the Supreme Court begins its new term in early October. That means the Senate will have to cram committee hearings and a floor vote into just a few weeks after it returns from the August recess.

Senate Republicans declined yesterday afternoon to lay out a specific schedule for the confirmation, saying they will meet to discuss a timeframe after Bush makes his pick. "In the next few days it will become clear when the hearings are," said Senate Majority Whip Mitch McConnell (R-Ky.).

McConnell added that hearings will be held in either late August or early September and that the nominee would be confirmed by October. The Senate has in the past held hearings on a Supreme Court nominee during the August recess.

Senate Minority Leader Harry Reid (D-Nev.) said it is possible to put a nominee on the bench by that date but added that Justice Sandra Day O'Connors decision to stay on the court until her pick is confirmed gave the Senate some leeway.

"We don't lose anything if it slips a little bit," Reid said ([E&E Daily](#), July 20). -- **DIL**

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