

COURTS: Mulling Roberts' record, enviros hold their fire

Environmental groups expressed serious concerns yesterday about the nomination of Judge John G. Roberts to the Supreme Court but stopped short of outright opposing the nominee.

Environmentalists have criticized Roberts, who currently sits on U.S. Circuit Court of Appeals for the District of Columbia, for several decisions, most notably, a Southern California endangered species case. But leaders of the Sierra Club, League of Conservation Voters and Earthjustice said they needed to examine Roberts' record further before deciding whether to formally campaign against his nomination.

"Clearly, there are things about his record that are very troubling," said Earthjustice Attorney Glenn Sugameli. "Whether we will oppose or not, depends on a much more intensive look at his record."

Earthjustice and the Sierra Club have joined civil rights, religious groups, women's rights groups and others in the Coalition for a Fair and Independent Judiciary, which has mobilized against previous Bush judicial nominees and may do likewise against Roberts. Leaders of the League of Conservation Voters also said that the group may become involved in the nomination fight if they have serious concerns about Roberts' record.

Sierra Club attorney David Bookbinder said the lack of immediate opposition to Roberts does not indicate that environmentalists are satisfied with the selection.

"I can't say that he's as good as it would get for a Bush nominee," Bookbinder said. "There were certainly people on the Bush list that were bandied about that we would have been more comfortable with on the initial record."

A reason for the lack of a strong response from environmental groups appears to be Roberts' relatively skimpy judicial record. While he has issued a couple of rulings that trouble environmentalists, he lacks the lengthy judicial record that can be used to immediately pinpoint his position on several key issues.

'A hapless toad'?

The part of Roberts' record that troubles environmentalists most is his dissent in a 7-2 decision by the full D.C. appeals court 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.

In his dissent, Roberts argued that the Endangered Species Act -- which is based on the federal government's power to regulate interstate commerce -- cannot be used

to protect "a hapless toad that, for reasons of its own, lives its entire life in California."

Environmentalists say Roberts' argument and tone in describing the toad may be seen as showing disrespect for endangered species and, more importantly, serve as an indicator that he would overturn key environmental regulations such as ESA and the Clean Water Act.

Other parts of Roberts' legal resume that rile environmentalists are his ruling against environmental groups seeking to strengthen federal regulations for copper smelters and a dissent in the D.C. Circuit's decision not to hear the Bush administration's case to keep secret records from Vice President Dick Cheney's energy task force.

In private practice, Roberts has also represented the National Mining Association, groups challenging federal regulations on nitrogen oxide emissions, and the state of Alaska when it argued that EPA could not enforce the state's Clean Air Act emissions permit.

But Roberts has also won a Supreme Court case in which he argued that Lake Tahoe should be allowed to ban development in some areas without having to compensate the landowners -- a decision that was celebrated by some environmental groups.

No formal opposition yet from Senate Dems

Environmentalists' response to Roberts' nomination appears to largely mirror that of Senate Democrats, who have promised intense scrutiny of his record but have yet to express opposition to the nominee. Indeed, no Democrat has yet to say that he would vote against Roberts and several -- including Sens. Ben Nelson of Nebraska, Joe Lieberman of Connecticut and Dianne Feinstein of California -- said yesterday that Roberts would most likely not face a filibuster.

Most of the vehement opposition to the Roberts nomination has come thus far from pro-choice groups, who fear he would help overturn *Roe v. Wade*. Indeed, abortion -- which has consistently been the top hot-button issue in recent judicial nominations -- is likely to emerge as the one main point of contention during Roberts' confirmation hearing.

But environmentalists say that even if abortion issues take center stage during the confirmation, enough attention has already been brought to Roberts' environmental record where it will be one of the top issues during his confirmation.

"In terms of what goes on at the hearings, I think abortion can be dealt with very quickly. You could get his views on that within four questions," said Bookbinder. "Far more nuanced are his views on congressional authority to protect the environment. ... Those need far more illumination than simply, 'Would you overturn *Roe*?'"

Already, the *Viejo* case has been cited by several liberal coalitions that have prepared to challenge President Bush's nomination and has been repeatedly mentioned by major media outlets during their description of Roberts' background.

"This has been recognized as a major issues in this nomination," Sugameli said. "It does have implications for how he would rule in other areas, including Clean Water cases."

Bid to turn down the rhetoric

Even if the environmentalists do get involved in the nomination process, it remains unclear just how much influence they will have with lawmakers -- especially if Roberts' nomination seems poised to sail through without serious opposition.

Senators from both sides of the aisle have indicated in recent days that they would like outside interest groups to tone down their rhetoric and largely stay out of the Supreme Court debate. "I think the conduct from groups on both the left and the right has been too much," said Sen. Trent Lott (R-Miss.) earlier this week. "I want the groups to just get out of the picture."

Lawmakers from both parties have repeatedly promised that their decision on Roberts will not be swayed by outside organizations.

Sugameli and others said that while outside groups -- including environmental organizations -- are unlikely to force senators to vote a certain way, they can make them and their constituents informed about issues that might not otherwise get their attention.

"Senators make decisions based on facts on evidence from the record which are brought to their attention directly and indirectly by various group," Sugameli said. "I would hope all senators would listen to important information on their nominee regardless of who brought the issue.