

## ***COURTS: Confirmation shifts 4th Circuit toward Democrats' appointees (11/10/2009)***

*Jennifer Koons, E&E reporter*

The Senate yesterday confirmed a long-stalled judicial nominee to the 4th U.S. Circuit Court of Appeals, swinging the ideological balance of a conservative-leaning bench that has issued a string of decisions unfavorable to environmental interests.

Last spring, the Richmond-based court narrowly upheld the Army Corps of Engineers' issuance of Clean Water Act permits to operators of mountaintop-removal mines.

The 15-member court had four vacancies at the time of the ruling. In that case, four of the remaining 11 judges recused themselves, leaving seven justices who voted 4-3 not to rehear an appeal by a coalition of environmental organizations.

**"Only about half of the court voted in this case," said Glenn Sugameli, a staff attorney with Defenders of Wildlife. "The point of an *en banc* rehearing is to allow the full court to weigh in on a matter, and the fact that you have this many vacancies and this many recusals on such a significant case shows how the process isn't working."**

The Senate's 72-16 vote for Judge Andre Davis gives Democratic nominees a 6-5 edge on court, which covers Maryland, Virginia, West Virginia, North Carolina and South Carolina.

In April, President Obama nominated the Baltimore-based federal trial judge to fill a seat that has been vacant since 2000. The Judiciary Committee approved the nomination in June.

In addition to the mining case, the court in January issued a ruling that addressed Commerce Clause issues, which could have a major impact on environmental law.

The court held that civil commitment provisions of the Sexual Offender Registration and Notification Act were unconstitutional, as they were beyond Congress' Commerce Clause power. The government filed -- and the Supreme Court granted -- a petition for review in the case, which will be decided during the upcoming term.

Observers of environmental cases caution that it is too early to predict how Davis will rule.

As a district judge, Davis once sat on the board of the Foundation for Research on Economics and the Environment, an organization funded by companies such as Texaco, Exxon Mobil Corp. and General Motors Co. that opposes environmental regulation. He resigned in 2005 after a formal ethics opinion by

the judiciary Code of Conduct Committee found a "tension" between his membership on FREE's board and his obligations as a judge.

In the mountaintop case, President Reagan appointee J. Harvie Wilkinson authored the dissent.

"It is often easier in the short run to diminish natural resources, but then environmental degradation is so often the product of short-sightedness," Wilkinson wrote. "West Virginia is witnessing in the Appalachian headwaters the long, sad decline that Virginia and Maryland have seen with the Chesapeake Bay."

**Wilkinson's minority opinion suggests the potential for similar cases to have a different outcome with new additions to the court, Sugameli said.**

**"All you need is to get to seven. Three new judges could make a difference, let alone five," he said.**

### **Other vacancies**

Prior to the Senate vote yesterday, there were 21 appellate vacancies and 76 more for district courts. With the Supreme Court issuing fewer than 100 decisions a year, lower courts have the final say in more than 99 percent of cases.

Environmental cases have suffered in the overburdened system, said Matt Kenna of the Western Environmental Law Center.

"I've heard and read judges say they can't put off the criminal docket because you can't just delay justice for a criminal defendant who is entitled to a speedy trial and resolution, so that often gets priority," Kenna said. "The amount of time left over for civil matters -- like environmental cases -- is so small."

Kenna added, "You see it in the way opinions are written. In the 9th Circuit, which hears many of the environmental appeals in the West, you will sometimes get a short opinion that you can tell judges didn't take much time on. Usually, this benefits the appellee in the case. For instance, if an environmental group is appealing the loss at a district court level, you might get a one-paragraph opinion deferring to the agency, and that's it."

Republican appointees currently have an 87-61 advantage on the 13 circuit courts, and President Obama's impact there could be dramatic. With 19 vacancies and more than two dozen potential openings for judges up for senior status, the president may be able to completely reshape a conservative-dominated judiciary to one largely controlled by Democratic appointees.

Senate Judiciary Chairman Patrick Leahy (D-Vt.) yesterday criticized his Republican colleagues for "obstructing and stalling" action on the president's nominees, noting that 10 judicial nominees are pending on the calendar. Of those, five are for circuit court seats and five are for district court positions.

"The obstruction and delays in considering President Obama's judicial nominations is especially disappointing given the extensive efforts by President Obama to turn away from the divisive approach taken by the previous administration and to reach out to senators from both parties as he selects mainstream, well-qualified nominees," Leahy said in a floor statement.

Davis is the second circuit court nominee to clear the Senate this year and the fifth judge overall. Gerard Lynch, tapped for the 2nd U.S. Circuit Court of Appeals, was approved in September.

Judiciary Committee ranking member Jeff Sessions (R-Ala.) defended his party's actions, noting that Democrats had used similar tactics to delay President George W. Bush's lower-court picks.

"I certainly don't think that we need to have outrage from the other side about vacancies on this court, since they are a direct product of the efforts of my colleagues to [leave] those vacancies open," Sessions said.

Senate Majority Leader Harry Reid (D-Nev.) said in a floor statement yesterday that he planned to file a cloture motion to clear the nomination of David Hamilton, a nominee to the 7th U.S. Circuit Court of Appeals. Hamilton's nomination has been pending since June.

The 7th Circuit hears "some national forest questions and a handful of Endangered Species Act cases, but you're mostly going to see pollution issues -- like CERCLA cleanups," said John Nagle, an environmental law professor at the University of Notre Dame.

Filling judicial vacancies is only part of the solution to a larger problem, Kenna said.

"The federal bench is so overtasked that even if you have all the vacancies filled, there's still going to be a real problem," Kenna said. "For a long-term solution, we need to create more judgeships."

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