

Living on Earth

High Court Opening= High Stakes for the Environment

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Washington Correspondent Jeff Young reports on how retiring Supreme Court Justice Sandra Day O'Connor shaped environmental law--and how important her replacement could be to conservation efforts.

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TRANSCRIPT

CURWOOD: Since the first of July, Washington lawmakers, lobbyists and activists have been focusing on the vacancy on the US Supreme Court created by the retirement of Justice Sandra Day O'Connor. The Supreme Court rules on a wide variety of issues of course, and Justice O'Connor has a record of being a key swing vote on such hot button matters as abortion, school vouchers, and the death penalty, as well as tipping the balance, often as not, in environmental decisions. Living on Earth's Jeff Young looks back at the legacy of Justice O'Connor and how her successor may affect rulings on environmental law in the future.

YOUNG: When the US Environmental Protection Agency told Alaska's environmental officials to use tougher air pollution standards the state resisted and the case made its way to the U.S. Supreme Court. Glenn Sugameli of the environmental law group Earthjustice watched, hoping the court would uphold federal power under the Clean Air Act. As was often the case, the decision came down to Sandra Day O'Connor.

SUGAMELI: She wrote for the majority holding that the federal EPA could step in and take action to reduce air pollution under the federal clean air act. It was a 5-4 decision; she was the key vote on that one on clean air protections.

YOUNG: Just one example of O'Connor's opinions shaping environmental law. And an indicator of how important her replacement could be. Georgetown law professor Richard Lazarus has studied the high court's conservation cases and even argued a few before the justices. Lazarus says the Alaska decision on state versus federal power represents one of three crucial environmental areas where O'Connor was key. The second was the tricky balance of private property rights and environmental protection.

LAZARUS: Justice O'Connor no doubt sort of starts from the premise of someone who's worried

about private property rights and she's wary of government and she is ready sometimes to see government overreaching including in environmental protection area. But with that said, she parted ways in some significant respects from Justice Scalia who is sort of the champion on the court of private property rights.

YOUNG: Lazarus says O'Connor saw more benefits in environmental regulation than did her conservative colleague, Antonin Scalia. Their conflict reached its conclusion with a case from California's Lake Tahoe, with Scalia in the minority and O'Connor's view winning the day.

LAZARUS: A very sweeping opinion, quite, one that was widely hailed by environmentalists in behalf of, sort of, protection of sensitive ecosystems. And although Justice Stevens' opinion for the court, if you read it, he's quoting again and again and again Justice O'Connor.

YOUNG: Lazarus says O'Connor also made the difference on whether ordinary citizens can sue the government to make it enforce environmental laws. He says the outcome of all these could be quite different if the person replacing O'Connor leans more toward the court's conservative voting block.

LAZARUS: And there are a whole host of issues like this. I actually think the Endangered Species Act could be quite close, the constitutionality. That might well be hanging in the balance.

YOUNG: Even though the scales could easily tip on environmental law, legal affairs analyst and author Benjamin Wittes says it's received little attention so far in the debate about O'Connor's replacement.

WITTES: Environmental law seems to me to be peculiarly under-discussed in the nominations process.

YOUNG: Wittes argued in his May column in the Atlantic Monthly that the threat to basic environmental protections is "broad-based and severe." But the cases in question are highly technical, difficult to follow and don't lend themselves to snappy slogans to rouse public interest.

WITTES: They're not simple questions like, 'should abortion be regarded as a constitutional right or not.' They're fairly dense questions that aren't fundamentally even about the environment. For example, how far is Congress' reach under the power to regulate interstate commerce? I would be very impressed with anybody who could come up with a bumper sticker about the commerce clause.

YOUNG: That's the challenge for Glenn Sugameli at Earthjustice as he tries to make the environment an issue for the next Supreme Court nominee. So what sort of nominee would Sugameli like to see? One very much like the woman who is leaving.

SUGAMELI: Earthjustice is urging that President Bush follow the example of President Reagan when he selected Justice O'Connor. Somebody who will be a moderate, will not always rule in the way we would like but will always at least have an open mind. Won't have a bias in favor of industry and against the environmental protection, against conservation laws. That's what we're looking for, that's what the American people have a right to expect.

YOUNG: Sugameli's well aware that his counterparts in the industry and property rights lobbies will be pushing their agenda too. Which means the environment will likely become one more point of contention in a difficult confirmation process. The Senate confirmed O'Connor on a 99 to nothing vote. But that was nearly a quarter century ago. For Living on Earth I'm Jeff Young

in Washington.

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