

Inside EPA

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Democratic-Led Alliance Targets Environmental Views Of Bush Judicial Nominees

Led by the Democratic National Committee (DNC), a coalition of environmental and other policy groups is seeking to make judicial nominees' views on the environment a factor during their Senate confirmation amid widespread speculation that President Bush will have the opportunity to name at least one Supreme Court nominee in the coming months. A separate effort is also in the works by environmental groups.

Democrats and their environmental supporters are seeking to lay the groundwork for a fight over a high court nominee in anticipation of the retirement of at least one member, and possibly more, of the current bench. Observers have speculated that Chief Justice William Rehnquist, along with Justices Sandra Day O'Connor and John Paul Stevens, may retire after the current session ends in June.

Officials in these groups fear Bush will nominate an "extremist," pointing to his campaign statements calling Justices Antonin Scalia and Clarence Thomas, the two most conservative on the bench, his ideal justices. Environmentalists say these two justices are also the most opposed to strict environmental rules.

One Sierra Club attorney says that of those who may retire, O'Connor and Anthony Kennedy -- two critical swing votes -- are the only ones that matter because, in such a closely divided court, convincing either of these two justices will likely ensure a favorable decision. "You write your briefs for

Kennedy and O'Connor and forget the rest," the attorney says.

The new high-profile campaign comes as Senate Democrats are seeking to block as many as five nominees to federal appeals courts, including Miguel Estrada, nominated to the U.S. Court of Appeals for the D.C. Circuit and Priscilla Owen to the 5th Circuit. Those nominees are facing unprecedented filibusters, in part due to their environmental records. Environmentalists and Democratic lawmakers are also opposing Bush nominees Victor Wolski to the Federal Claims Court and Carolyn Kuhn to the 9th Circuit.

A source with Earthjustice, which is closely following Bush judicial nominees, says the Senate has already confirmed four nominees the group opposes, including Judge Jeffrey Sutton to the 6th Circuit. The Senate last month confirmed Sutton, who had successfully argued the so-called *SWANCC* wetlands case before the Supreme Court that limited EPA oversight of some waters.

Environmentalists are also preparing to oppose the nomination of Bill Pryor, Alabama's attorney general, who the administration has nominated to the 11th Circuit. Environmentalists are critical of testimony he gave to Congress questioning the constitutional ability of EPA to enforce the Clean Air Act when pitted against states' rights, several sources say. One activist calls Pryor "dead meat."

Senate Democrats say they will raise the environmental issue, but note that when it comes to considering Supreme Court and other judicial nominees, it is just one of many flashpoints they study. Other, more traditional high-profile issues include nominees' views on abortion, women's rights, labor, access to the courts and civil rights.

"The preservation of our environment is at stake and it will certainly be an issue we look into when evaluating potential Supreme Court justices," says one Senate aide. "This president has already put forth nominees whose environmental records have not been stellar, to say the least."

A source with Sen. Russell Feingold (D-WI) says the senator and other Democrats have already raised environmental issues when considering nominees to the federal circuits, and that several of the nominees now being filibustered are held up due to their poor records on environmental or related constitutional issues. Those include their positions on the Commerce Clause and takings issues that can have a significant impact on environmental laws.

In addition to the Supreme Court, the environmental background of nominees is particularly important in the D.C. Circuit because that is where a majority of environmental statutory challenges are decided. Several sources note that these nominees can have even greater influence than the Supreme Court because most cases do not go to the high court. Moreover, those that do are generally postponed for years, as was the case with a challenge to EPA's 1997 stricter ambient air quality standards that the high court upheld in 2001 but which still have not been implemented.

Environmentalists add that under the current administration, a fair and impartial bench is more important than ever for environmental protection,

pointing to alleged administration rollbacks of key clean air and clean water laws. "It is critical to have fair-minded judges to enforce the law when the administration doesn't do it," one source says, adding that the Republican-controlled Congress is not likely to be effective in reversing adverse court rulings through legislation.

Recognizing these issues, the DNC -- along with People For the American Way, and other groups -- late last month launched a "Supreme Court Countdown" campaign to protest what they view as right-wing nominees.

Last week, former President Jimmy Carter joined the effort, issuing a statement that says, "The United States Senate must be vigilant in preventing the approval of federal judges who are nominated because their extreme right-wing philosophy will, through future rulings, adversely affect American's environment, basic freedoms, and social interrelationships."

A source with the People For the American Way says, "We are attempting to look at environmental protection as one more of a number of key rights and interests at stake. We are working closely with environmental groups . . . and are vitally conscious about environmental issues."

While Earthjustice and several other environmental groups 18 months ago launched a separate campaign to raise the environmental profile of Bush judicial nominees, sources say the DNC effort will further raise the profile of the issue. The Sierra Club is also involved in the effort, tapping field organizers in five states to advocate on the importance of judicial nominees in protecting environmental laws, and is also lobbying on the issue in Washington, D.C., by talking to senators about the importance of the issues in their states, a source says.

When it comes to the Supreme Court, environmentalists note that while they expect the worst from Bush, they could be pleasantly surprised.

Environmentalists do not demand a liberal candidate and would support a conservative justice who was committed to upholding current law. A nominee "may be bad for lots of our fellow progressives but not bad on the environment," a Sierra Club source says. If that were the case, "we would not oppose the nominee."

But the Earthjustice source says when studying nominees, activists will look at crosscutting issues that could play into environmental decisions. For example, Judge Carolyn Kuhl, whose nomination to the 9th Circuit cleared the Judiciary Committee May 8, ruled to limit a trade union's standing to file suit in a high-profile case that Earthjustice says could cross over to environmental and civil rights cases.

The source points to a grassroots effort in California to mount opposition to Kuhl's nomination that convinced Sen. Dianne Feinstein (D) to vote against her in committee. Feinstein raised concerns about Kuhl's positions on issues including the environment, and said in her statement, "My office has received a torrent of calls against Judge Kuhl. . . . Between January 1, 2003 and today, I received 29 calls in favor of Judge Kuhl and 13,400 calls against her nomination."

One activist says the Kuhl experience may foreshadow Supreme Court nominee debates. "If the Senate says an anti-environment record makes a 9th Circuit nominee 'rejectable,' then they should reject for the Supreme Court," the source says.

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