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HIGH COURT PICK TO FACE SCRUTINY ON FEDERAL ROLE IN ENVIRONMENT LAW

By Manu Raju

Several appellate judges presumed to be on President Bush's short list to replace retiring Supreme Court Justice Sandra Day O'Connor have authored controversial dissenting opinions calling for a limited federal role in enforcing environmental laws, positions that could prompt Senate scrutiny of these potential nominee's environmental records, legal observers say.

Already, administration critics and supporters say the judges could be portrayed as anti-environment because of dissenting opinions they authored arguing that the Constitution's Commerce Clause should not be interpreted to allow the federal government to regulate certain activities that only have an intrastate impact, such as industrial actions that could harm the environment.

Environmentalists say this is significant because the Senate appears less inclined to back nominees they oppose in light of lawmakers' recent refusal to confirm William Myers -- a former mining industry lobbyist and Interior Department counsel -- to the 9th Circuit Court of Appeals.

Some of the prospective nominees -- appeals court judges Michael Luttig of the 4th Circuit in Virginia, John Roberts, Jr. of the DC Circuit and Edith Jones of the 5th Circuit in Texas -- have authored dissents arguing for a narrow interpretation of the Commerce Clause. "Certainly their views, if adopted by the majority of the Supreme Court, could severely impact environmental statutes," says a source with Community Rights Counsel, a public interest group.

The controversial dissents address whether endangered species protections apply to private property and to species found only within a single state, but observers say such opinions would affect a host of environmental laws that are tied to the Commerce Clause.

But at least one possible candidate, Judge J. Harvie Wilkinson III, who was appointed to the 4th Circuit by President Ronald Reagan in 1984, has authored an opinion supporting broad federal jurisdiction over environmental and other matters. *Relevant documents are available on InsideEPA.com.*

The judges declined to comment for this article.

The White House is declining to say who it is considering, but spokesman Scott McClellan said this week that staff are reviewing at least 12 possible candidates. Bush is expected to announce the nomination by August, and Senate Judiciary Committee hearings would likely begin after Labor Day. The president and Republican leaders are aiming to confirm a nominee before the Supreme Court's next term begins in October.

Bracing for the fight, Senate Democrats and interest groups are researching the background of these judges and others who may be on the administration's short list. Environmentalists, led by Earthjustice and the Community Rights Counsel, are gearing up supporters and writing to newspaper editorial boards to push the president to nominate a moderate justice to the court. And if activists believe a nominee's previous decisions indicate he or she might undermine environmental policy, they are likely to urge their Senate Democratic allies to filibuster the nominee, despite a tenuous deal reached earlier this year by 14 moderate senators who agreed to only employ the delaying tactic in "extraordinary" circumstances.

In addition to the Commerce Clause, the next Supreme Court justice could face scrutiny over his or her views on the breadth of the Fifth and 11th amendments of the Constitution, which address private property takings and states' rights.

Also, the high court could hear ongoing statutory challenges to the Bush administration's Clean Air Act new source review reforms, mercury rules, EPA's authority to regulate carbon dioxide and other EPA regulations.

Environmentalists say any replacement for O'Connor -- who announced July 1 she is retiring after 24 years on the bench -- is critical because she generally supported their views in key cases. For instance, in *Alaska Department of Environmental Conservation v. EPA,* O'Connor joined a 5-4 ruling allowing EPA to regulate a polluting facility under the air law when state agencies do not.

O'Connor's votes siding with environmentalists appear to counter recent trends suggesting that judicial nominees generally back the views of their presidential appointers. Recent studies by the Environmental Law Institute and the University of Chicago show judges appointed by Republican presidents are more likely to side with industry and Republican ideology on environmental issues.

While O'Connor generally sided with environmentalists, she took a narrow view of the federal government's ability to regulate intrastate activities under the Commerce Clause -- the backbone of many environmental laws. Recently, this put her in the court's minority, such as in *Gonzalez v. Raich*, where the court ruled that federal anti-drug laws take precedence over state laws allowing medicinal marijuana use.

Observers said following the *Raich* ruling that the court's affirmation of the aggregation principle, which holds that the Commerce Clause extends to intrastate activities that when aggregated with all similar activities would have a substantial effect on interstate commerce, would likely secure the broad reach of environmental laws that rely on the Commerce Clause (*Inside EPA*, June 17, p18).

Environmentalists say a broad interpretation of the clause is critical in ensuring federal agencies can crack down on intrastate pollution. But many conservative groups say environmental laws are overly expansive and infringe on state and local officials' ability to address the problems themselves.

Despite the court's backing for a broad view of the Commerce Clause, several observers say any nominee to replace O'Connor is crucial because some current justices who supported the broad view of the Commerce Clause in the *Raich* case -- such as Antonin Scalia and Anthony Kennedy -- could switch sides given their past hostility to environmentalists' arguments.

The observers also say any new addition to the court could persuade some of the other justices to limit EPA and other federal agencies' ability to regulate intrastate activities.

"While adding a justice who has a limited view of the Commerce Clause may not change the court's opinion on the issue, it is still a very close decision. And it can certainly change if the court is presented with an environmental issue," says one adviser to Sen. Patrick Leahy (D-VT), the ranking Democrat on the Senate Judiciary Committee.

But some conservatives argue that drawing conclusions about a nominee's record based on one opinion distorts how a judge may rule on a similar case.

The conservatives also say federal environmental laws are the most expansive assertion of federal authority and need to be curtailed to comport with the Commerce Clause. "As lower court judges, their obligation is to follow Supreme Court precedent," says one law professor who supports a narrow view of the Commerce Clause. "It's unfair to just say, a judge is pro- or anti-environment because of one opinion."

In the controversial endangered species cases, Luttig dissented from a June 2000 decision in *Charles Gilbert Gibbs, et al. v. Bruce Babbitt, et al.*, which held that the federal government could impose endangered species protections on red wolves that wander onto private lands. Luttig argued that Supreme Court precedent barred the U.S. Fish & Wildlife Service from issuing a rule to protect the wolves.

But Wilkinson, who wrote the majority opinion, warned that Luttig's dissent "would turn federalism on its head" and could "rework the relationship between the judiciary and its coordinate branches." The dissent if affirmed could "open the door to standardless judicial rejection of democratic initiatives of all sorts," Wilkinson argued.

Roberts and Jones offered similar dissents in 2003 in cases evaluating the Commerce Clause's ability to justify endangered species protections, in the *Rancho Viejo, LLC v. Norton* before the DC Circuit and *GDF Realty Investments, Ltd. v. Norton* before the 5th Circuit, respectively.

Meanwhile, Wilkinson appears likely to face a key environmental test over whether national security concerns will give the military the ability to skirt provisions of the National Environmental Policy Act (NEPA). Wilkinson is expected to hear oral arguments July 20 in *National Audubon Society, et al., v. Department of the Navy*, a case that centers on whether the Navy violated NEPA when it decided to site a practice airstrip next to a wildlife refuge in North Carolina without conducting a full environmental impact statement.

Wilkinson has already voiced sympathy for the federal government's case. "I am wary about using a procedural statute to second-guess a matter of national security," he said. "If people are going to risk their lives, don't we owe them training that will approximate actual wartime conditions?"--