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COURT NOMINEE PRESSED ON VIEWS ON 'STANDING' UNDER ENVIRONMENTAL LAWS

Supreme Court nominee John Roberts' previous writings on when citizens have the right to sue under environmental laws suggest that he might side with some of the more conservative members of the court who have argued for strict limits on plaintiffs' standing to sue, conservatives and environmentalists agree.

Critics and supporters say that Roberts' previous writings in a law journal, an opinion when sitting on the DC Circuit Court of Appeals and his arguments as the government's solicitor general in a key Supreme Court case indicate that he might have a judicial philosophy on the issue similar to Antonin Scalia and Clarence Thomas.

If confirmed, environmentalists worry that Roberts could grant conservatives another vote on the bench supporting limits on citizen suits. Most recently, the court in 2000 ruled 7-2 in favor of a broad interpretation of standing in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* Retiring Justice Sandra Day O'Connor sided with the majority in the 2000 *Laidlaw* case.

The issue is critical to environmentalists who view access to courts as one of their top priorities, as the court could weigh in on the issue if global warming cases are presented to the court *(see related story).* As a result, environmentalists are urging senators to probe his philosophy over standing once confirmation hearings begin after Labor Day.

Roberts, as a deputy solicitor general under President George H.W. Bush, represented the government in a landmark case, *Lujan v. Defenders of Wildlife* in 1992, which ruled against environmentalists. The court limited plaintiffs' ability to sue unless they could prove the environment has been harmed -- a high standard to meet. Following *Lujan,* the 2000 Supreme Court decision in *Laidlaw* swung the pendulum in the other direction, saying plaintiffs could sue under environmental laws if they prove that they have been harmed.

Roberts wrote a 1993 article in the *Duke Law Journal,* supporting Scalia's opinion in the *Lujan* decision, saying it was consistent with existing court precedent, said the plaintiffs' claims in the case were of a "vague and amorphous nature."

"A dismissal on the basis of standing prevents the court from reaching and deciding the merits of the case, whether for the plaintiff or the defendant," Roberts wrote in the article, *Article III Limits on Statutory Standing.* Standing under Article III of the Constitution requires plaintiffs to show they have suffered harm, the injury was caused by the defendant, and there is a remedy available. To prove an injury has

occurred, plaintiffs have to show that the injury is actual or imminent and "concrete and particularized."

"Standing is thus properly regarded as a doctrine of judicial self-restraint," Roberts wrote. "If a court errs in its standing dismissal and should have reached the merits, that court is wrong -- not activist."

The group Earthjustice is highlighting this article and other concerns in a memo it is circulating about Roberts. The group says Roberts' language "suggests that he has an extraordinarily narrow view of the constitutional doctrine of 'standing.'" *The memo is available on InsideEPA.com.*

"John Roberts' sweeping characterization of decisions denying citizens access to the courts on the basis of standing as exercises of 'judicial self-restraint,' and his suggestion that it is impossible for an 'activist' court to summarily throw deserving litigants out of court, is wrong," the group says. "A judge with an agenda to unreasonably restrict access to the courts across the board ... can be just as 'activist' as one who unreasonably expands such access."

The group's memo also highlights Roberts' dissenting opinion in a case challenging the constitutionality of the Endangered Species Act where the court denied a petition for rehearing. His dissent has prompted concern over how he views the breadth of federal powers under the Constitution's Commerce Clause (*Inside EPA*, July 22, p18).

The group and others are raising concerns over a 2004 opinion Roberts authored on the DC Circuit in *Sierra Club v. EPA*, where the court ruled in favor of EPA's decision not to impose stricter standards on toxic emissions from copper smelters. Roberts, who currently sits on the DC Circuit, noted that the Sierra Club had not commented to EPA about the rule, but brought forward a court case instead. The group says that the statement was a "cheap shot" since a party in a court can highlight any concern that was raised during the administrative process.