

Inside EPA

September 9, 2005

ENVIRONMENTALISTS STOP SHORT OF OPPOSING CHIEF JUSTICE NOMINEE

By Manu Raju

Environmentalists are withholding their opposition to Judge John Roberts as the next chief justice of the Supreme Court, but are questioning how his personally held views would influence major issues pertaining to the federal judiciary.

While the environmentalists say they are not yet taking a formal position on the nominee because his environmental record is "unclear," they are concerned about some of his writings that suggest he supports limiting the federal role in favor of states' and citizens' right to sue the government and industry.

The environmentalists' decision not to take a position comes as liberal groups are seeking to build opposition to the chief justice nominee prior to Senate Judiciary Committee hearings, which are scheduled to begin Sept. 12. Groups like the People for the American Way and Alliance for Justice are "vigorously" opposing the nomination, citing environmental concerns along with women's and privacy rights issues, and are hoping to defeat the nomination on the Senate floor. But Senate Majority Leader Bill Frist (R-TN) said this week that he expects Roberts to be confirmed before the Supreme Court's session begins in October.

If confirmed as chief justice, Roberts would also serve as the chief executive officer for the federal judiciary and

have the opportunity to push Congress to act on issues that could impact the jurisdiction of the courts. For instance, he could weigh in on pending bills to limit the impact of consent decrees and split up the U.S. Court of Appeals for the 9th Circuit, which hears many environmental cases.

As chief justice, observers say, he could have the opportunity to advance these views through annual reports submitted to Congress as the chairman of the Judicial Conference of the United States, the official policymaking arm of the federal judiciary.

Environmentalists last week sent letters to Senate Judiciary Committee Chairman Arlen Specter (R-PA) and ranking Democrat Patrick Leahy (VT) to raise concerns over Roberts' environmental record during his two years on the U.S. Court of Appeals for the District of Columbia Circuit, as a corporate attorney and as counsel in the Reagan and George H.W. Bush administrations.

"Judge Roberts has impressive credentials, but his record on environmental issues raises some troubling concerns," says the Sept. 2 letter, which was signed by the Community Rights Counsel, Defenders of Wildlife, Earthjustice, Endangered Species Coalition, Friends of the Earth, National Environmental Trust, Sierra Club and Wilderness Society. The Natural Resources Defense Council

sent a similar letter that same day. *Relevant documents are available on InsideEPA.com.*

Although the groups sent the letter before President Bush elevated Roberts' nomination to chief justice following the death of William Rehnquist, the environmentalists say their positions have not changed.

The activists highlight their concerns over his questioning of the application of the Constitution's Commerce Clause in a 2003 Endangered Species Act case, *Rancho Viejo v. Norton*, where he dissented from a decision by the DC Circuit to deny full-panel review of a case restricting development in areas inhabited by a southwestern toad.

"It is not clear how Judge Roberts would rule on environmental Commerce Clause challenges if confirmed to the Supreme Court, but his one opinion on the issue as a D.C. Circuit judge -- indeed the first opinion he wrote as a member of the bench -- warrants close examination by the Committee and gives us serious concern," says the letter by the coalition of environmentalists.

Roberts' interpretation of the Commerce Clause is critical because Congress relies on it to provide EPA with authority to address contamination and other issues. Specter has already indicated that he would question the nominee on his views of the Commerce Clause, according to a letter he sent to Roberts last month.

In addition, environmentalists are concerned over Roberts' previous support for a 1990 decision in *Lujan v. Defenders of Wildlife*, which he argued on behalf of the government in favor of limiting citizens' standing to sue in environmental cases. Before the case was overturned in a later Supreme Court ruling, he wrote a 1993 article in a Duke University law journal that

supported the *Lujan* decision, which was authored by Justice Antonin Scalia.

But Roberts has also sided with environmentalists in other cases. Roberts argued a successful 2002 case before the Supreme Court over the Constitution's Takings Clause in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* that ruled in favor of the planning agency, which Roberts represented. The ruling said the planning agency's ban on development to preserve Lake Tahoe did not constitute a taking of property.

Observers say Roberts could advance his perspective of the law through the complementary powers granted by being chief justice, much like Rehnquist did by seeking to limit the role of federal powers. For example, Rehnquist, as chairman of the Judicial Conference, sought to limit the federal cause of action under the Violence Against Women Act in the early 1990s. Congress later adopted the conference's position.

The chief justice also has the responsibility for setting ethics rules for the justices, which critics say had been relaxed in the Rehnquist court.

"The chief has a tremendous platform for advancing his particular view of the federal judiciary," a source with the Community Rights Counsel says. "Our concerns about Roberts are even more pertinent because the chief justice could respond to Congress on legislation and other pertinent issues."

This material originally appeared in INSIDE EPA [September, 9, 2005] It is reprinted here with permission of the publisher, Inside Washington Publishers. Copyright 2001. All rights reserved.