



Obama Begins Shaping Federal Judiciary

By Jesse Greenspan

Law360, New York (May 06, 2009) -- Though energy and environmental issues will almost certainly not be used as a litmus test for new federal judges, experts predict that President Obama's appointees will read the Constitution broadly when deciding climate change, standing and other key legal matters likely to come up.

Obama has made only three appointments so far – David Hamilton to the U.S. Court of Appeals for the Seventh Circuit, Gerard Lynch to the U.S. Court of Appeals for the Second Circuit and Andre Davis to the U.S. Court of Appeals for the Fourth Circuit – but he will have ample opportunity to shape the courts.

According to the Administrative Office of the U.S. Courts, there are 70 current vacancies in the 870-member federal judiciary, 15 of which are at the circuit court level and 55 of which are at the district court level.

In fact, the Fourth Circuit alone has four vacancies, and the D.C. Circuit, which is especially important for environmental and energy attorneys because many environmental statutes require cases to be brought in that jurisdiction, has two vacancies.

“It's a situation where you have a court that's somewhat balanced now for the first time in a long time, because it had been a very right-wing court,” Glenn Sugameli, senior legislative counsel at the environmental law firm Earthjustice, said in reference to the Fourth Circuit.

Other attorneys point to what they see as a liberal bias in certain courts.

“The enviros always run to the Ninth Circuit,” said Reed Rubinstein, a shareholder at [Greenberg Traurig](#) LLP. “In my mind, the Ninth Circuit is truly the only ideological court, where it's decision first and rationale after.”

He said most judges were uncomfortable trying to make policy.

“It's not their role,” Rubinstein said. “Particularly where you're going to get cases that could have potentially mammoth consequences, I think there's going to be a tendency to let the political branches of government handle what are fundamentally political questions.”

Of the three appointees so far, none have a focus on environmental or energy law and none have really triggered any controversy, according to Graham Noyes, of counsel with [Stoel Rives LLP](#).

He added, however, that the appointees do share some common characteristics, including previous work experience in either academia or the government.

“You're seeing somewhat less emphasis on private law firm type experience,” Noyes said.

Sugameli said that environmental and energy issues have become first-tier issues in terms of judicial selection. But other experts agreed that at confirmation hearings, they usually take a back seat to such things as abortion, civil rights and constitutional law.

There are exceptions, however, such as a controversial opinion written by failed Supreme Court nominee Robert Bork, who upheld a chemical company's policy barring female employees of childbearing age from holding jobs that exposed them to toxic substances unless they were surgically sterilized.

Chief Justice John G. Roberts also received some criticism for once writing in an Endangered Species Act case that the species in question was a “a hapless toad that, for reasons of its own, lives its entire life in California.”

“A Supreme Court justice is not going to be selected because they have the right reading of the Endangered Species Act,” Noyes said.

But Obama would likely appoint judges who believe in the federal government, according to Noyes.

“I don't think you're going to see a lot of states' rights-type judges,” he said.

“Certainly, judges who have a broad view of the Constitution will be of interest to the Obama administration,” added Gail Suchman, special counsel at [Stroock & Stroock & Lavan LLP](#).

David Bookbinder, chief climate counsel of the Sierra Club, pointed out that while judges appointed by Democratic presidents are generally more sympathetic to environmental groups' points of view, it is not always that way.

“The only thing I want in judges is smart judges who read the papers,” Bookbinder said. “That's all I want.

“I have no problem appearing in front of Republican-appointed federal judges,” he added.

“There are some excellent ones out there. The problem came with the Bush administration appointing utterly unqualified ideologues to the federal bench.”

Environmental and energy issues have become especially contentious at the Supreme Court level, where there have been a number of closely-fought decisions with broad implications.

“The Supreme Court is extremely narrowly balanced on environmental issues,” Sugameli said.

For example, it ruled 5-4 in *Massachusetts v. EPA* that the U.S. Environmental Protection Agency “offered no reasoned explanation” for its refusal to regulate carbon dioxide and other automobile emissions.

That empowered the EPA to issue a proposed endangerment finding last month for six greenhouse gases. It also led environmental groups to file a number of lawsuits seeking to block new coal-fired power plants.

Other close decisions of late include *Rapanos v. United States*, in which the court split 4-1-4 regarding the Clean Water Act's jurisdiction over wetlands, and *Winter v. NRDC*, in which the court ruled 5-4 that the Navy should not be restricted from using sonar during military training exercises in order to protect whales.

As for the future, Rubinstein said standing would be a big issue that comes up in the courts over the next few years.

“Environmental groups are always trying to push the end of the envelope on standing,” Rubinstein said.

He added that it would also be interesting to see how often the courts defer to the authority of federal agencies.

Yet another important area for judges will be on the international jurisdiction side, particularly regarding any climate treaty that comes out of the Copenhagen conference later this year, Noyes said.

Some interesting cases might also revolve around infrastructure for renewable energy projects that possibly affects endangered species, he added.

“You get into a green versus green sort of thing, where you do have to make choices,” Noyes said.

During the Bush administration, it was often environmental groups that initiated lawsuits. But now that Obama is in charge, environmental groups will likely be in more of a defensive mode, according to Sugameli.

“You now have a situation where the right wing groups and the industry groups, for the first time in quite a while, don't have the presidency and they don't have either branch of Congress,” Sugameli said. “If you don't have the political option, then you just keep filing lawsuits and hope for the best.”