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Federal Judicial Nominations Threaten Basic Environmental Safeguards: It's More Than Just Pickering and Owen

Lifetime federal judges decide how to interpret and enforce, and whether to uphold or strike down, fundamental environmental laws that protect our nation's clean air and water, homes, communities, and special natural places. Factions within and outside of the Bush administration are promoting prospective young judges whose views on the Constitution are outside the mainstream of accepted constitutional thought. Their goal is to advance an extreme political agenda, of which environmental protection is a direct target.

Clint Bolick, a former Justice Department official in the Reagan administration, was quoted in the Jan. 8 Washington Post as stating: "Everyone on the right agreed in 2000 that judicial nominations were the single most important reason to be for Bush."

Libertarians, like the Cato Institute's Roger Pilon, seem to believe that we need "active judges" who will roll back the Constitution to the days when courts struck down state Progressive Era initiatives and initially invalidated federal New Deal measures. This, however, would undermine basic environmental and civil rights laws in favor of repudiated constitutional interpretations.

Under the Constitution, two branches of government select members of the third; the president nominates lifetime federal judges with the advice and consent of the Senate. The Bush administration, however, repeatedly has refused to consult meaningfully with Senate Democrats. This culminated in a controversial decision to renominate the only two nominees the

Senate rejected in the last Congress: Charles Pickering Sr. and Priscilla Owen. As reported Jan. 12 by Knight-Ridder, an anonymous Republican Senator termed the Pickering renomination "totally unnecessary" and "in-your-face."

The stakes are extraordinarily high. Based on their unwarranted view of the Constitution, judges can repeal existing laws and prevent enactment of effective safeguards. For example, the Rehnquist Court has acted "without justification of any kind" in doing "intolerable injury to the enforcement of federal standards," according to conservative 9th Circuit Judge John Noonan's 2002 book, "Narrowing the Nation's Power."

Recently, some Supreme Court and appellate judges unjustifiably have attempted to limit the application of the Commerce Clause, which could affect severely civil rights and labor statutes, the Clean Water Act and the Endangered Species Act. These judges ignore the original meaning of the Fifth Amendment's Takings Clause and the definition of property to require taxpayers to pay corporations to comply with environmental and land use safeguards.

They have rewritten the 11th Amendment to eliminate the plain text limitation to suits brought against a state by a citizen of another state and have twisted it to prohibit citizens from suing states or state agencies to comply with federal laws. And they have tried to interpret the Constitution to deny citizens the standing to go to court to ensure that laws are enforced.

The Bush administration's judicial nominee agenda could make things much worse. Litigators know that the identity of judges who decide industry challenges to environmental safeguards can affect heavily the chances of success and whether a decision is narrow or sweeping.

Judicial vacancies in the next two years mean that the current administration could shape the judiciary for decades to come by tipping the balance in the Supreme Court, virtually every federal court of appeals and other key courts. For example, Victor Wolski, who has been nominated to the Court of Federal Claims, which decides whether federal environmental and other laws result in constitutional takings, has spent most of his legal career promoting the Pacific Legal Foundation's extreme Takings challenges to environmental protections.

He told the National Journal in 1999 that "every single job I've taken since college has been ideologically orientated, trying to further my principles - limited government, individual liberty and property rights."

6th Circuit nominee Jeffrey Sutton vigorously has advocated that courts should restrict federal constitutional power, promoting limits that go beyond already-disturbing 5-4 Supreme Court rulings. For example, he argued that the federal government lacks constitutional authority to prevent destruction of waters and wetlands that serve as critical habitat for migratory birds.

"The courts may be the last best hope for stopping the administration's assault on the environment," according to a Jan. 4 New York Times editorial. Right-wing activists and their Bush administration allies understand this and are pursuing a concerted campaign to nominate extremist, anti-environment, lifetime federal court judges and then to put pressure on the Senate to confirm them.

This is coupled with a Trojan Horse strategy whereby the administration quickly has capitulated to industry lawsuits, refused to appeal rulings striking down environmental protections and unjustifiably interpreted new rulings to limit environmental laws. Anyone who cares about the Constitution and environmental safeguards should be concerned.