Endangered Species & Wetlands Report

July 2005

Roberts and the toad: A Supreme Court story

High court nominee's Commerce views dissected

By Steve Davies

The arroyo toad — and with it, the issue of the ESA's constitutionality— hopped onto the nation's front pages in July with the nomination of Judge John G. Roberts Jr. to the Supreme Court.

The toad was the central species (along with man) in an opinion issued by the D.C. Circuit Court of Appeals two years ago upholding the ESA's Section 9 "take" prohibition under the Commerce Clause (*Rancho Viejo v. Norton*, 323 F.3d 1062, 2003).

Following the 3-0 ruling, the D.C. Circuit rejected a rehearing request, but two judges dissented. David Sentelle was one.

The other was Roberts, for whom the dissent marked his first piece of writing on the court. Said the new judge: "The panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'commerce … among the several states.' "

Roberts, however, did not conclude that the ESA's take prohibition was invalid. He said *en banc* review was appropriate because the approach of the panel in *Rancho Viejo* and the decision it relied upon, *Nat'l Ass'n of Home Builders v. Norton*, 130 F.3d 1041 (D.C. Cir. 1997), conflicted with the Fifth Circuit's decision in *GDF Realty v. Norton*, 326 F.3d 622 (5th Cir. 2003).

In that case, the court aggregated the taking of "cave bugs" with the taking of all other endangered species to find a Commerce Clause connection. In *NAHB* and *Rancho Viejo*, the D.C. Circuit looked to the commercial nature of the projects at issue — a hospital and housing development, respectively.

Review of the decision by the full court "would … afford the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent," Roberts wrote.

The judge's views on the Commerce Clause are certain to be a subject of questions from the Senate Judiciary Committee at his conformation hearings, which are likely to be held in September.

In the meantime, the "hapless toad" remarks — and the rest of Roberts' environmental record — were grist for the debate over his nomination.

Roberts "flippant" toward species protection, EJ says

Earthjustice, in a brief paper called "Beyond the Toad," said Roberts' opinion "raises serious questions about his views on the scope of the Commerce Clause." The group

called Roberts' opinion "troubling" in a couple of respects. First, he was one of only two judges who dissented from denial of rehearing. Seven other judges on the D.C. Circuit, including three appointed by Republicans, declined to rehear the case.
One of those judges was Chief Judge Douglas Ginsburg, who wrote a concurring opinion in *Rancho Viejo*. Circuit Judge Merrick Garland wrote the opinion, and Judge Harry Edwards was the third jurist on the panel.
The other bothersome aspect of the opinion, Earthjustice said, was Roberts' "hapless toad" remark. The group said this passage "displays a flippant attitude towards preventing the extinction of a species. Judge Roberts' language contrasts with the recognition of the value of species that is reflected in the consistent rulings by every majority opinion to consider the issue, including decisions by conservative Republican-appointed judges that rejected similar claims."
Jay Austin, a senior attorney with the Environmental Law Institute, said that if confirmed (as seems almost certain), Roberts will be interesting to watch as the court considers cases dealing with the scope of federal authority. Austin said Roberts "could become a fourth vote for the Court to take *cert* on the ESA issue for the first time — if nothing else, his opinion in the toad case is some indication that he thinks the legal rationale needs to be reviewed."
Experienced Supreme Court attorney Tim Bishop of Mayer Brown, Rowe & Maw, who represented GDF Realty (with Paul Terrill of Hazen & Terrill) in petitioning the Supreme Court unsuccessfully, said he was "delighted with the Roberts nomination. He is a very smart, thoughtful lawyer with a great temperament and an appreciation, from his practice, of the practical problems faced by business people. He is not at all doctrinaire, and I don't think his votes in environmental cases would be predictably pro-business, but they'd be fair and reasoned."
"*Rancho Viejo* is a case in point," Bishop said. "His dissent points out what I think is obvious — that the majority's reasoning is not compatible with recent Supreme Court precedent."
But Bishop noted that Roberts "did not shut the door on there being other ways to uphold the regulation, and the opinion sounds overall as if he'd like to find a way to uphold it. Of course, we'd like to get the issue up before a court with Roberts on it — though I'm not sure how ultimately he would vote."
And Tim Dowling, an attorney with Community Rights Counsel, which defends local governments against takings claims, said in an op-ed in the L.A. *Daily Journal* in May that Roberts' dissent "should be viewed in context. He did not express a position on the constitutionality of single-state species protections, but instead insisted that additional review would 'afford the opportunity to consider alternative grounds for sustaining' them. And it is indisputable that federal appellate courts have adopted different rationales in upholding these protections, a relevant consideration in deciding whether to grant a full-court rehearing."

On the other side of the coin, Tahoe case

Dowling and CRC Executive Director Doug Kendall also spoke favorably of Roberts because of his representation of the Tahoe Regional Planning Agency in one of the biggest land-use wins for local government in recent years — *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). In that case, the Supreme Court said two building moratoria lasting 32 months did not effect a taking on Lake Tahoe landowners.
Said Dowling: "His brilliant and enthusiastic advocacy helped to generate an opinion that was not only terrific on the specific issue before the court but that has become very, very useful to environmentalists and state and local officials in protecting the

environment on a broad range of regulatory taking issues. It really generated an opinion that has far-reaching effects, and that's very widely recognized."

Roberts said during oral argument in that case that "there is no dramatic effect on the economic value of the affected lots, because we're talking about temporary regulation for a limited time."

In his *Daily Journal* op-ed, Dowling also said of the nominee: "Former colleagues across the political spectrum have showered bouquets upon Roberts, characterizing him as 'possibly the foremost appellate lawyer of his generation' and 'one of the two or three best lawyers I have see in more than 30 years.' They extol not only his intellect, but also his balanced approach to the law. And his opinions are blessedly free of ideological blather."

But not all are so upbeat about Roberts. In its paper, Earthjustice also took note of Roberts' representation of the federal government in *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990) in which the Supreme Court ruled 5-4 that NWF could not challenge BLM's decision "to reverse thousands of actions that had withdrawn (protected) millions of acres of federal land from mining and other development."

Roberts was Deputy Solicitor General from 1989-93, during the first Bush Administration. In that period, the Supreme Court also decided *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992), wherein the court ruled that environmentalists did not have standing to challenge federal actions abroad that might jeopardize endangered species.

"Defenders submitted affidavits of individuals who had visited the habitats of the endangered Nile Crocodile—a species threatened by American oversight of the Aswan High Dam project—and the Asian elephant and leopard, whose habitats are threatened by the Mahaweli project, which was funded by the federal Agency for International Development," Earthjustice said.

Justice Sandra Day O'Connor dissented in the 5-4 decision for the government, saying that she could not "join the Court in what amounts to a slash-and-burn expedition through the law of environmental standing."

But Roberts, in the April 1993 edition of the *Duke Law Journal*, said the ruling was "hardly a surprising result under the Court's standing precedents, given the vague and amorphous nature of the plaintiff's claims of injury."

Earthjustice said Roberts also "described Congress' attempt to extend the right of individuals to sue to enforce ESA safeguards with a note of sarcasm." "Congress is perfectly free to cut off funding for the Aswan Dam or Mahaweli River projects if it concludes those projects threaten endangered species," Roberts said. "It also can exercise its oversight power if it believes agencies are not consulting adequately about such effects. The one thing it may not do is ask the courts in effect to exercise such oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue."

Roberts' views on standing "may become an even bigger concern than the Commerce Clause," ELI's Austin said, summarizing a panel discussion that took place at ELI.

"A broad view of citizen standing is incredibly important for protecting the long-term ecological and intergenerational interests that tend to arise in environmental cases, specially ESA cases like the *Lujan* decisions he's describing," Austin said. "If Roberts shares Justice Scalia's cramped view of standing and what constitutes 'remediable harm,' it could make things very difficult for ESA plaintiffs in the future — not so much because of any single big ruling, but case-by-case-by-case."

Web: More on Roberts at www.eswr.com/705