

## Judge Roberts' Environmental Record Under Scrutiny

While environmentalists have not yet taken a position on President Bush's Supreme Court nomination of John G. Roberts, Jr., they are calling for careful scrutiny of his environmental record. Attorneys at several leading environmental groups are combing the environmental positions taken by Roberts in private practice and as a government attorney, as well as on the bench.

In his first opinion as a DC federal appeals court judge, Roberts unsuccessfully urged the entire court to reconsider a decision that rejected a constitutional challenge by a developer to Endangered Species Act safeguards for an endangered southwestern toad. Because the toad's habitat is confined to only one state, Roberts suggested that the Commerce Clause, which governs interstate commerce, did not enable the federal government to protect the species. Environmental groups contend that such an interpretation of the Commerce Clause implies that Roberts may hold an extremely narrow view of Congress' authority to enact federal environmental, civil rights and other protections.

Glenn Sugameli, head of Earthjustice's judicial nomination project, says "Roberts' opinion advanced a view of Congressional power that could threaten to undermine a wide swath of environmental protections, including the Clean Air Act and Clean Water Act."

Last year Roberts ruled against the Sierra Club's effort to require the Environmental Protection Agency to enforce statutory limits on air pollution from copper smelters. Roberts upheld EPA's refusal to adopt stronger standards than those required by EPA's rule, despite evidence that limits more than twice as protective were already being achieved.

Roberts also wrote a dissenting opinion, largely glossed over in national media coverage, that supported a Bush Administration petition to rehear a case regarding the release of Vice President Cheney's secret energy task force records.

In the lawsuit, Judicial Watch and Sierra Club demanded that the White House provide the names of all private industry executives who participated in crafting its closed-door national energy policy in 2002. The plaintiffs charged that the vice president's task force violated federal law by withholding its records from the public.

Before gaining a seat on the DC Circuit Court of Appeals, Roberts worked as acting solicitor general under the first President Bush, where he represented the government in a Supreme Court case brought against then-Interior Secretary Manuel Lujan Jr. by the National Wildlife Federation (NWF). The suit challenged the Interior Department's Land Withdrawal Review Program, which reversed thousands of actions that had "withdrawn" (protected) millions of acres of federal land from mining and other development.

Roberts argued that the NWF members did not adequately prove they had been injured by the specific government actions. He added that no one could bring an overall challenge to the Land Withdrawal Review Program, even though, as the dissent explained, the Department had "attempted to develop and implement a comprehensive scheme for the termination of classifications and withdrawals." The Supreme Court sided with Roberts in a 5-4 ruling, making it more difficult for citizens to file claims against the government for environmental damage.

Again arguing in favor of suppressing citizens' rights to pursue environmental litigation, but this time outside of the courtroom, Roberts wrote a *Duke Law Journal* article supporting a 1992 majority opinion by Justice Antonin Scalia that further narrowed citizens' ability to bring challenges to government actions that damaged the environment.

This case, *Lujan v. Defenders of Wildlife*, involved a challenge to a national rule that consultation with federal wildlife agencies under the ESA would no longer be required for U.S. agency actions in foreign nations that may threaten endangered species. Roberts wrote that, "If a court errs in its standing dismissal and should have reached the merits, that court is wrong--not activist." Earthjustice's Sugameli stated that "Roberts' analysis ignores that a judge may be an 'activist' if he or she applies the law of standing unfairly, as by unreasonably restricting court access as to one class of plaintiff-- for example, private citizens-- while not restricting access for another type of plaintiff-- for example, industry."

As a corporate attorney, Roberts also wrote an amicus brief in 2001 supporting the National Mining Association's challenge to a government ban on mountaintop removal mining.