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Beyond the Toad:

Judge Roberts Needs To Explain His Views On Congressional Authority To Protect The Environment, And On Citizens' Access To Courts

I. Judge Roberts and the Scope of Congressional Authority

Senators' statements and media coverage and commentary, including editorials in *The Washington Post* and *The New York Times,* on President Bush's Supreme Court nomination of D.C. Circuit Judge John Roberts, Jr. has focused on an opinion he wrote that questioned, but did not decide, the constitutionality of key Endangered Species Act (ESA) safeguards.[1] Judge Roberts' opinion raises serious questions about his views on the scope of the Commerce Clause, which is the basis for a wide range of laws that protect the environment, civil rights, workers, consumers, and public health and safety. These questions must be asked and fully answered during the Senate hearings on whether to confirm Judge Roberts to a lifetime seat on our nation's highest court.

In this case,[2] a three judge D.C. Circuit panel, including a conservative Republican-appointed judge (Douglas Ginsburg, who initiated the right–wing praise for "the Constitution in exile") rejected a claim that Congress lacked the constitutional authority to protect the endangered arroyo southwestern toad from a housing development. Judge Roberts' opinion dissented from the court's denial of a request that all D.C. Circuit judges review the decision, and questioned the panel's approach and the reasons it relied upon.

The Senate hearing on Judge Roberts' Supreme Court nomination is important because his opinion raises serious questions without deciding them—he concluded by stating that review by the full D.C. Circuit court would "afford the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent."

Judge Roberts' opinion in this key environmental case is troubling in several respects:

- Judge Roberts was one of only two judges who dissented from the court's denial of a request that all D.C. Circuit judges review a decision that upheld the constitutionality of Endangered Species Act safeguards. The seven judges who declined to join him include three conservative Republican-appointed judges (Ginsburg, Henderson, and Randolph). Such dissents are very rare; since Roberts joined the D.C. Circuit, judges have dissented in only three cases (including two cases in which Roberts dissented).

- While his dissent did not say how he would decide the issue, Roberts suggested that he might have an unjustifiably narrow view of the Commerce Clause. First, his dissent states that the D.C. Circuit panel "sustains the application of the Act in this case because Rancho Viejo's commercial development constitutes interstate commerce and the regulation impinges on that development, not because the incidental taking of arroyo toads can be said to be interstate commerce," and argues that the panel's approach "seems inconsistent with" the Supreme Court's *Lopez* and *Morrison* decisions. Judge Roberts' analysis has implications beyond the ESA. For example, in the *SWANNC* case,[3] the Supreme Court interpreted the Clean Water Act narrowly but did not decide a constitutional Commerce Clause challenge to protections for waters and wetlands against commercial nature of the activity.

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[1] See http://www.earthjustice.org/policy/judicial/whats_new/index.html#roberts

[2] *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J. dissenting) (denying rehearing en banc), *cert. denied*, 124 S. Ct. 1506 (2004).

[3] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

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- Second, Roberts seemed to question whether the ESA can protect species found in only one state, stating that "The panel's approach . . .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 'Commerce among the several States.'" This latter passage from Roberts' dissent 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.[4] Indeed, the U.S. Fish and Wildlife Service website explains how another endangered toad (the Houston Toad) produces chemicals that "are used as medicines to treat heart and nervous disorders in humans."[5]

- As the Bush Administration's own Solicitor General explained in successfully urging the Supreme Court to deny review of the case, no court "has invalidated any federal wildlife legislation as exceeding the reach of Congress's power under the Commerce Clause. Affirmation of federal authority to act in this sphere is particularly appropriate because systemic obstacles exist to the adoption and enforcement of effective state wildlife-protection measures. See [*Rancho Viejo*, 323 F.3d at 1079]; *Gibbs*, 214 F.3d at 501 (Congress may act to "arrest the 'race to the bottom' in order to prevent interstate competition whose overall effect would damage the quality of the national environment")."[6]

- The Supreme Court has repeatedly rejected, without recorded dissent, petitions to review appeals court decisions that rejected Commerce Clause challenges to ESA safeguards.[7]

- As the *Wall St. Journal*'s July 21st editorial stated:

  > "The hapless toad," he wrote, " for reasons of its own, lives its entire life in California" and thus could not affect interstate commerce. This implies a less expansive view of the Commerce Clause than the current Supreme Court majority, and suggests he would have joined the four dissenters in *Raich,* the Supreme Court's recent decision to let the federal government overrule state laws on regulating medical marijuana.

II. John Roberts and Access to Courts

Congress has enacted numerous environmental, civil rights and other citizen suit provisions that recognize that access to courts is necessary to ensure that laws are upheld against constitutional challenges, and carried out when administrative agencies fail to do so. For example, in upholding the ability of individuals and organizations to sue polluters, the Supreme Court recognized that: "Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance . . . they also deter future violations."[8]

Questions about Roberts's views on access to courts need to be asked and answered in light of his record. This includes his role in, and law review comment about, two major Supreme Court decisions that took a very narrow view, over vigorous dissents, of access to courts, including the constitutional doctrine of 'standing'—which is the basis for giving plaintiffs access to the courts. Roberts has written that he:

> served as Principal Deputy Solicitor General, United States Department of Justice, 1989- 1993. The Office of the Solicitor General represented Secretary of the Interior Manuel Lujan before the U.S. Supreme Court

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[4] *See Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (Wilkinson, J.), *cert. denied*, 531 U.S. 1145 (2001); *National Ass'n of Home Builders (NAHB) v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Henderson, J., concurring), *cert. denied*, 524 U.S. 937 (1998).

[5] http://ifw2es.fws.gov/HoustonToad/

[6] U.S. Brief, *available at* http://www.usdoj.gov/osg/briefs/2003/0responses/2003-0761.resp.html

[7] See footnotes 2, 4 and *GDF Realty, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *rehearing and rehearing en banc denied*, 362 F.3d 286 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2898 (2005).

[8] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

> in *Lujan v. Defenders of Wildlife*, [504 U.S. 555] 112 S. Ct. 2130 (1992), and ... argued *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990), on his behalf.[9]

In the 1990 case, the Court voted 5-4 to reverse a D.C. Circuit ruling and to dismiss a National Wildlife Federation (NWF) challenge to the Interior Department's decision to reverse thousands of actions that had "withdrawn" (protected) millions of acres of federal land from mining and other development. The Court held that NWF had not demonstrated that it had standing to challenge a particular decision. The Court also held 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."

In *Lujan v. Defenders*, the Court ruled that the plaintiffs lacked standing to challenge 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. 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 (AID).

Justice O'Connor joined in a dissenting opinion that concluded: "I cannot join the Court in what amounts to a slash-and-burn expedition through the law of environmental standing."[10] In contrast, in his law review comment, John Roberts argued that the ruling in *Defenders* was "hardly a surprising result under the Court's standing precedents, ***given the vague and amorphous nature of the plaintiff's claims of injury***."[11]

At one point, Roberts 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. 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.***[12]

Other language in Roberts' law review comment suggests that he has an extraordinarily narrow view of the constitutional doctrine of standing. Specifically, according to Roberts:

> A dismissal on the basis of standing prevents the court from reaching and deciding the merits of the case, whether for the plaintiff or the defendant. Standing is thus properly regarded as a doctrine of judicial self-restraint. . . . If a court errs in its standing dismissal and should have reached the merits, that court is wrong—not activist.[13]

Roberts' analysis is very disturbing. He suggests that decisions denying access to court are even-handed because "dismissal on the basis of standing prevents the court from reaching and deciding the merits of the case, whether for the plaintiff or the defendant." This ignores the fact that dismissals favor corporate and government defendants, by avoiding the risk losing on the merits. His unqualified characterization of decisions denying citizens access to court on the basis of standing as exercises of "judicial self-restraint," and his apparent belief that it is impossible for an "activist" court to summarily throw deserving litigants out of court, are wrong. A judge with an agenda to unreasonably restrict access to the courts across the board beyond what the law permits can be just as "activist" and

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[9] John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1219 n. (1993).
[10] 504 U.S. at 606 (Blackmun, J. joined by O'Connor , J. dissenting).
[11] John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1221 (1993) (emphasis added).
[12] *Id.* at 1229 (emphasis added).
[13] *Id.* at 1221 & n.14.

unrestrained as one who unreasonably expands such access. Moreover, 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—e.g., private individuals—while not restricting access for another type of plaintiff—e.g., industry.

In his law review comment, Roberts also specifically agreed with Justice Scalia's argument in *Lujan v. Defenders of Wildlife* that courts should rigorously enforce the Constitution's Article III case or controversy limitations to avoid infringing on the executive branch's constitutional authority under Article II.[14] This view calls into question the constitutionality of private attorneys general laws that authorize citizens to enforce environmental and other safeguards.

As a Reagan Administration Justice Department attorney, Roberts wrote to Attorney General Smith on Nov. 25, 1981, urging Smith to tell reporters that although "certain parts of the Justice Department previously followed a policy of not raising standing challenges in the most vigorous fashion. This was particularly true in the environmental area. It will be our policy to raise standing and other justiciability challenges to the fullest extent possible."

Roberts' new policy statement was sweeping and unqualified—it was not limited to cases where the Justice Department believes there is no standing or to even cases where there is a serious question (it likely would require raising any challenge that would not violate rules against frivolous arguments). Challenging standing "in the most vigorous fashion" and "to the fullest extent possible" needlessly delays decisions that redress injuries from violations of environmental and other laws, and chills access to courts by individuals and non-profit groups that have standing but cannot afford to respond to the Justice Department's aggressive discovery requests and lengthy briefs on this issue.

A few months later, in a March 5, 1982 memorandum to the Attorney General entitled "Areas in Which Various Conservative Groups Have Suggested That the Department Take Action," Roberts and Carolyn B. Kuhl listed one of the few "issues on which the Department already has taken action" as "Reverse Carter Administration position not to regularly contest standing. (action taken)."

Further, Judge Roberts' majority opinion in *Taucher v. Brown-Hruska*,[15] raises additional concerns about how he will rule on access to courts. In *Taucher*, Judge Roberts reversed a district court's award of attorney's fees under the Equal Access to Justice Act (EAJA) to a public-interest law firm that had successfully represented a publisher *pro bono* against the Commodities Futures Trading Commission (CFTC). EAJA provides for the award of attorneys' fees to a party in a lawsuit who prevails against the U.S. government, unless the government's legal position in the case was "substantially justified."[16] Although he rejected CFTC's arguments against paying plaintiff's fees, Judge Roberts' found that CFTC's position in the underlying case was substantially justified on other grounds. In a sharp dissent, Judge Harry Edwards argued that the court had exceeded its proper scope of review and had not given proper deference to the lower court, under an abuse-of-discretion standard.

Senators should question Judge Roberts closely on whether his actions, arguments, and language reflect an understanding and acceptance of, and appreciation for, the importance of access to courts and a proper deference to congressional statutes and findings that grant such access.

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[14] John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993) ("Separation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches. Dean Nichol loses sight of this reality in criticizing Justice Scalia's invocation of the "take Care" clause of Article II. * * * The Article III standing requirement that the judiciary act only at the behest of a plaintiff suffering injury in fact, however, ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive's* responsibility of taking care that the laws be faithfully executed.").

[15] 396 F.3d 1168 (D.C. Cir. 2005).

[16] See 28 U.S.C. § 2412 (d)(1)(A).

III. Judge Roberts' Opinion in *Sierra Club v. EPA*

In the case of *Sierra Club v. EPA*,[17] Judge Roberts authored a decision rejecting a Sierra Club suit that sought stronger limits on arsenic—a known human carcinogen—and other toxic pollutants emitted into the air by copper smelters. EPA had adopted a rule that purported to require adequate controls for these pollutants. Under the Clean Air Act, sources of toxic air pollution must reduce their emissions by the maximum degree that is achievable.[18] Nevertheless, Judge Roberts' opinion in *Sierra Club* 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.

Judge Roberts' toxic air pollution decision ignores settled principles of administrative law. For example:

- The opinion upheld EPA's refusal to set a stronger control standard that had been in place since 1986 based solely on an argument advanced for the first time by EPA's lawyers, and never articulated by the agency itself.

- The opinion acknowledges that, to conclude that particulate matter (PM) was a valid surrogate for all the metals that smelters emit, EPA must find that controlling PM is the "only" means by which smelters control metal emissions.[19] In *Sierra Club*, record evidence showed that PM is not the only means by which smelters achieve metals control. Further, EPA never even claimed that PM was the only means by which smelters achieve metals control, far less provided a rational explanation for such a claim.

- The opinion acknowledges that EPA previously has used lead compounds instead of PM as a surrogate for metals, but holds that the agency did not have to: (1) explain why it failed to do so in the smelters rule; (2) consider comment urging the use of lead compounds as an alternative surrogate; or (3), respond to such comment.

Judge Roberts' opinion also appears to take a 'cheap shot' at Sierra Club's basis for appealing EPA's rule when he states that "Sierra Club did not comment on the proposed emission standards, and none of the entities that did have challenged the Final Rule."[20] He added that Sierra Club "nonetheless" had challenged the rule.[21] The Clean Air Act provides that a party in court can raise any objection that was raised by someone during the administrative process. The issues raised in the case had been addressed extensively in comments submitted by other organizations. Thus, Judge Roberts' observations about Sierra Club's failure to comment were both factually and legally irrelevant. Moreover, Sierra Club submitted declarations showing that its members are affected by toxic emissions from smelters—a point that was never questioned by the court or any party.

Columnist David Broder has concluded that although Roberts has decried any suggestion that he has a doctrinaire approach to the law, "you can search his record in vain for examples of his sensitivity to the impact of the law on people's lives."[22] Judge Roberts' opinion in *Sierra Club* suggests a disturbing lack of sensitivity to the impact of toxic air pollution on the health and safety of ordinary Americans.

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[17] 353 F.3d 976 (D.C. Cir. 2004).
[18] 42 U.S.C. § 7412.
[19] *Sierra Club*, 353 F.3d at 984.
[20] *Sierra Club*, 353 F.3d at 982.
[21] *Id.*
[22] Column, The Nominee's Sheltered World, *The Washington Post* (July 24, 2005) at B7.