

## ***Disquieting View on Environment***

by Joel A. Mintz

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As they consider President Bush's nomination of Judge John R. Roberts, Jr. to the U.S. Supreme Court, members of the U.S. Senate will face a difficult problem: In many areas of the law, Judge Roberts' two years on the Court of Appeals for the D.C. Circuit is too brief for him to have left a substantial "paper trail" of judicial opinions to illuminate the approach and philosophy he may be expected to apply as a Supreme Court Justice. But in the important area of environmental law, Judge Roberts did hand down one opinion, a dissent that offers troubling insights into his view of environmental protection.

The case in question, *Rancho Viejo LLC v. Norton*, involved construction of a housing development near San Diego, California that was likely to jeopardize the continued existence of the arroyo southwestern toad. The toad now survives only in central and southern California, and had been listed as an endangered species by the Secretary of Interior. After reviewing the developer's plans, the U.S. Fish and Wildlife Service notified the developer that, in their current state, the plans would illegally destroy the toad. The Service proposed that the developer move a fence, so as to accommodate the toad's migratory habits, but otherwise allowed it to complete its entire project. The developer refused, and instead sued the Secretary of Interior, alleging that the application of the Endangered Species Act to its development plans exceeded the federal government's power under the Commerce Clause of the U.S. Constitution.

The Commerce Clause gives the federal government authority to regulate interstate commerce, and since the 1930s, it has been the basis for the application of a slew of federal laws to the states – federal civil rights laws that prohibited motels from discriminating on the basis of race, for example, or, as in this case, federal environmental standards.

The developer lost its case before a federal district court, and appealed to a three-judge panel of the U.S. Circuit Court of Appeals for the District of Columbia, which upheld the lower court. Still not satisfied, the developer then petitioned the D.C. Circuit for a new hearing in the case before all of that court's judges, sitting together. The court denied the petition on a 7-2 vote, with Judge Roberts casting one of the two dissenting votes.

The majority took the view that the Commerce Clause was applicable because the development was to be located close to an interstate highway and that future homes within it would be available for purchase by persons from outside of California. For some time now, that has been a garden-variety interpretation of the Constitution. But in his written opinion, Roberts criticized his fellow judges for focusing on whether the commercial development at issue constituted "interstate commerce." Instead, Roberts took the unorthodox view that the real question was whether the *destruction of the arroyo toad* amounted to interstate commerce activity. He concluded that the panel's approach in *Rancho Viejo* led to the illogical result that

regulating the taking of “a hapless toad that, for reasons of its own, lives its entire life in California” comprises federal regulation of interstate commerce.

If carried to its logical conclusion, Judge Roberts’ approach in *Rancho Viejo* might well undercut nearly all federal environmental laws. The vast majority of federally regulated pollution problems, from the contamination of hazardous waste sites to the environmental discharge of air and water pollutants, take place within the confines of a single state. By the standard Roberts seems to propose, nearly all federal anti-pollution statutes would be on a shaky constitutional foundation. At minimum, Roberts' analysis would negate federal protections for endangered species whose habitat does not extend beyond a state border – Florida’s key deer, for example.

That’s why the United States Senate needs to question Judge Roberts very closely about his views on the Interstate Commerce Clause, particularly as it applies to environmental laws. If it fails to do so, it might well end up confirming a Justice who will in the future vote to dismantle vital protections for the environment – balanced, responsible and popular federal laws whose constitutionality is now, quite appropriately, considered beyond question.

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