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How green is your presidential candidate?

Who they'd appoint as judges may matter most.

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Washington

For environmentalists, it is heartening that the major parties' remaining presidential candidates all offer positive records on environmental issues. But their views on judicial appointments may well matter more.

Last April, the US Supreme Court told the Environmental Protection Agency (EPA) to get serious about global warming. Weighing a lawsuit brought by a dozen states, the justices demolished the EPA's argument that carbon dioxide and other greenhouse gases somehow are not "air pollutants" under the Clean Air Act and ordered the agency to decide whether they endanger public health and welfare. Such a finding would then lead to appropriate federal regulation.

One year later, the EPA has yet to act on the Court's ruling. That delay prompted states and environmental groups to sue again last week in an effort to compel the agency to fulfill its duty. California, meanwhile, is taking the agency to court over administrator Stephen Johnson's December decision to deny the Golden State the authority to limit greenhouse gases from motor vehicles, contrary to the advice of the EPA's own expert staff. It appears the Bush administration prefers inertia to either federal or state action.

EPA's foot-dragging has shown, once again, how important legal interpretation, lawsuits, and fair judging are for any environmental law. Last year's Supreme Court case was decided by a single vote, with four justices – Antonin Scalia, Clarence Thomas, and Bush appointees John Roberts and Samuel Alito – in strident dissent. The narrow margin suggests that any future climate legislation remains on a collision course with the court's conservative bloc.

Suppose Congress and a like-minded White House do successfully collaborate on a comprehensive, bipartisan bill. As happened to the original Clean Air Act, this new law will inevitably face court challenges from industry, as well as from environmentalists and citizen groups who believe it is not being implemented strongly or quickly enough. The law's ultimate reach will depend on how federal judges handle these cases, and whether they consider the public's arguments to be on an equal footing with industry's.

The outlook may turn on the presidential election. Presumptive Republican nominee John McCain promises to appoint judges "in the mold of Roberts and Alito," both of whom he supported for the Supreme Court. The Arizona senator has a solid environmental record and was an early leader in advocating mandatory controls on greenhouse gases.

Most observers see his commitment to nominate judges like Roberts and Alito as intended to reassure the religious right that he will advance their opposition to abortion and gay marriage. He seems unaware of what a conservative judiciary could do to his environmental initiatives.

These same justices are generally skeptical of the strong environmental regulation that Mr. McCain supports. They also clearly doubt whether citizen plaintiffs can ever demonstrate the "concrete and particularized" harm necessary to bring environmental cases – in Chief Justice Roberts' words, "the very concept of global warming seems inconsistent with this particularization requirement."

They argue that, precisely because climate change is a global problem with enormous consequences, federal courts are constitutionally barred from addressing it – even where Congress has expressly authorized legal remedies.

If such tortured judicial logic commanded a majority, it would threaten to undermine whatever global-warming solutions the legislative and executive branches might produce. Judges who abdicate their duty to oversee the new law's implementation could bring it to a halt. And this hands-off view lacks only a fifth vote to hold sway over the Supreme Court. It already has too many adherents on the most important federal appeals court for environmental cases, the District of Columbia Circuit.

Historically, environmental law has followed a two-step pattern: A looming crisis results in legislation and regulation, which in turn get interpreted and refined through litigation. Right now, all eyes are on the EPA as it obstructs Step 1, but that problem can be remedied by congressional action and a change in the White House. The Bush administration's enduring legacy is the judiciary that will preside over Step 2 – litigation. The next president's decision to continue or reverse that legacy could have a real impact on global warming.

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