



Judge Alito's Nomination Threatens Access to Justice

The public's legal right to go to court to stop or penalize violators of environmental safeguards is a central element in most federal environmental laws because government officials often don't have the resources or will to adequately police large corporate polluters. Unfortunately, Judge Samuel A. Alito Jr. has imposed severe restrictions on Americans' ability to enforce environmental laws. As a Supreme Court justice, Judge Alito could essentially rewrite the Constitution to establish new barriers to justice for people who want to ensure that environmental laws are upheld and enforced.

Judge Alito provided the deciding vote for a ruling that slashed citizens' access to courts under the Clean Water Act. In 1997, Judge Alito joined a 2-1 majority opinion in *PIRG (Public Interest Research Group) of New Jersey, Inc. v. Magnesium Elektron, Inc. (MEI)*¹, ruling that PIRG lacked "constitutional standing" to file suit in the court. The decision also reversed the trial court's \$2.6 million fine on MEI for its 150 Clean Water Act discharge violations into the Wickecheoke Creek, which flows into the Delaware River and Raritan Canal. The bulk of the alleged discharge violations concerned excess emissions of salt and total organic carbon (TOC), which ordinarily depletes the amount of oxygen in water and thereby harms aquatic life dependent on oxygen. Despite recognizing that PIRG's members used the polluted creek for fishing and other recreation, Judge Alito ruled that PIRG had not demonstrated MEI's pollution resulted in serious harm to the environment. PIRG's right to sue had been previously upheld at both the trial level and on appeal in the same case. The "lack of environmental harm" issue was never raised until the penalty phase of the case. Judge Timothy Lewis' dissent stressed that "PIRG was not on notice during the penalty phase of this litigation that standing remained a live issue" and "did not have an opportunity to prove additional facts" on standing.

Judge Alito's nomination to replace Justice Sandra Day O'Connor could dangerously tip the balance on the Supreme Court. In *Friends of the Earth v. Laidlaw*, the Supreme Court (including Justice O'Connor) rejected a challenge to citizens' constitutional standing to sue to enforce the Clean Water Act, rejecting Judge Alito's analysis in the *PIRG* case. By a 7-2 majority, the Court ruled that "the relevant showing... is not injury to the environment, but injury to the plaintiff." Recognizing the value of "citizen suits," the Court added that: "Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance . . . they also deter future violations."² Unfortunately, a concurring opinion by Justice Kennedy³ and a dissent by Justices Scalia and Thomas,⁴ expressed a willingness to consider a separate constitutional barrier to such suits. Considering the serious concerns raised by new Chief Justice Roberts' record on access to courts, Judge Alito could become the swing vote that closes the courthouse doors to all Americans who want to enforce environmental safeguards violated by big polluters.

Judge Alito's Senate Judiciary Committee questionnaire⁵ contains a one-sided discussion of standing to sue that stresses his desire to restrict access to justice. For example, in stating that he has applied Supreme Court precedents, Judge Alito only refers to decisions that restrict standing to sue, and omits any indirect or direct reference to the Supreme Court's more recent *Friends of the Earth v. Laidlaw* decision that upheld and took a broad view of the legal right to sue: "In recent decades, Supreme Court decisions have stressed the importance of these constitutional restrictions on the power of the federal courts, and as a judge of the court of appeals I have applied these precedents."

Judge Alito's extreme views pose a serious threat to Americans' ability to protect themselves from pollution. Senators should reject the nomination of Judge Alito to replace Justice Sandra Day O'Connor based on his record, including indications that he would close the courthouse doors to all Americans acting to protect the environment and public health. The future of our environmental safeguards hangs in the balance.

¹ 123 F.3d 111 (3d Cir. 1997).

² *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

³ "Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution." 528 U.S. at 197.

⁴ *Id.* at 209-11.

⁵ http://www.judiciary.senate.gov/pdf/Alito_Questionnaire.pdf on page 60-61.