



## Judge Alito's Nomination Threatens Congressional Authority to Protect the Environment

Nearly every major federal environmental law relies on Congress' constitutional authority over interstate commerce. Judge Alito has an extreme record and narrow views on the scope of this authority that threaten to undermine the Clean Water Act and other environmental and public health safeguards. Polluters and developers have filed a flood of challenges based on the Commerce Clause, to environmental laws such as the Clean Water Act, Safe Drinking Water Act and the Endangered Species Act.

Judge Alito's nomination to replace Justice Sandra Day O'Connor could dangerously tip the balance on the Supreme Court. The Court's 5-4 opinion in *SWANCC v. Army Corps of Engineers*,<sup>1</sup> in 2001 interpreted the Clean Water Act to deny protection to several Illinois ponds used by migratory birds, but avoided deciding what the majority termed "significant constitutional questions" about Congress' Commerce Clause authority. As soon as Chief Justice John Roberts was confirmed in September 2005, the Court granted industry requests to decide sweeping claims that Congress lacks the Commerce Clause authority to prevent pollution and destruction of the vast majority of streams, wetlands, ponds and other waters now covered by the Clean Water Act.

### **Judge Alito's Commerce Clause record is outside the mainstream of American law**

In the *U.S. v. Rybar*<sup>2</sup> case, a federally licensed firearms dealer sold two illegal machine guns at a Pennsylvania gun show. Judge Alito's dissenting opinion concluded, contrary to numerous U.S. courts of appeal, that a Reagan-era law banning possession of machine guns was unconstitutional.

Judge Alito's opinion has been widely criticized; Sen. Tom Coburn (R-OK) said that Judge Alito was "wrong" and was "legislating" from the bench.<sup>3</sup> Commerce Clause decisions can apply to other safeguards established by Congress. Thus, Judge Alito's dissent and extreme Commerce Clause views could threaten the constitutionality of fundamental federal environmental safeguards and wide swaths of other federal laws. For example, the Third Circuit Court of Appeals relied on the majority decision in *Rybar* to reject a claim that Congress lacked Commerce Clause authority to ban possession of child pornography.<sup>4</sup>

Alito's 1985 application for a Justice Department promotion stressed that "I believe very strongly in limited government, federalism."<sup>5</sup> In 1986, then-Deputy Attorney General Alito recommended that President Reagan veto the Truth in Mileage Act, which cracked down on used car dealers' odometer tampering, because "it violates the principles of federalism." The accompanying proposed veto message asserted that: "it is the States, and not the federal government, that are charged with protecting the health, safety and welfare of their citizens."<sup>6</sup> Fortunately, President Reagan ignored Judge Alito's extreme view and signed the Truth in Mileage Act into law.

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<sup>1</sup> 531 U.S. 159 (2001).

<sup>2</sup> 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997).

<sup>3</sup> [http://blogs.washingtonpost.com/campaignforthecourt/2005/11/coburn\\_alito\\_le.html](http://blogs.washingtonpost.com/campaignforthecourt/2005/11/coburn_alito_le.html) See Simon Lazarus and Lauren Saunders, "Gunning For Congress: Samuel Alito's federalist bent makes John Roberts look like a moderate" The American Prospect (Nov. 15, 2005), at <http://www.prospect.org/web/page.wv?section=root&name=ViewWeb&articleId=10623>

<sup>4</sup> *U.S. v. Rodia*, 194 F.3d 465 (3d Cir. 1999).

<sup>5</sup> Available at <http://www.reagan.utexas.edu/alito/8105.pdf> (pages 15-16).

<sup>6</sup> Available at <http://www.reagan.utexas.edu/alito/8097.pdf>