

Alito's not-so-clean record

Does the Supreme Court nominee's paper trail forecast a sparkling future for big industry polluters?

By Amanda Griscom

Page 1

November 2, 2005 | Since Monday morning, environmental advocates have been digging through Samuel Alito's extensive paper trail for clues as to how he might vote on environmental cases if confirmed as a U.S. Supreme Court justice. They have quickly joined many other progressives and Democrats in crying foul over Bush's nominee.

Alito has been dubbed "Scalito" for having a judicial philosophy closely akin to that of Supreme Court Justice Antonin Scalia, who shares with the nominee a Roman Catholic, Italian-American background. That comparison alone is enough to raise the hackles of enviros, many of whom see Scalia as a right-wing ideologue more staunchly opposed to environmental regulation -- and federal-level authority in general -- than any other justice on the Supreme Court. And at 55 years of age, some 14 years younger than Scalia, Alito would be in a position to influence environmental jurisprudence for decades to come.

Bush, trying desperately to bounce back after a week of crushing blows to his presidency, gushed over his nominee's track record. The president even tried to frame Alito as a pro-environment pick, mentioning that Alito "moved aggressively against white-collar and environmental crimes, and drug trafficking and organized crime and violation of civil rights" as a U.S. attorney for New Jersey in the late '80s.

When examining the whole of Alito's record, however, environmentalists found little that was encouraging. "Here's our initial assessment of his record: some good, but more bad and ugly," Earthjustice senior legislative counsel Glenn Sugameli told Muckraker. "We're extremely concerned that Alito has repeatedly sought to restrict Congress' authority to allow Americans to protect their rights in court, and to enact laws that protect our health and environment. His record in these cases is more hostile to congressional authority than the current Supreme Court majority."

Sugameli cites the example of *Public Interest Research Group v. Magnesium Elektron*, a 1997 case in which Alito cast the deciding vote in a 2-1 ruling that not only blocked certain rights of citizens to sue polluters under the Clean Water Act, but threw out a \$2.6 million fine against Magnesium Elektron for violating the act. The decision was effectively reversed two and a half years later by a Supreme Court ruling in which Scalia was one of two dissenting votes.

Alito's extensive track record on the court isn't entirely devoid of pro-environment decisions. Take, for instance, the 1995 ruling on *Pennsylvania Coal Association v. Bruce Babbitt*, in which Alito rejected an industry challenge to the toughening of an environmental law on coal mining. Or the 1997 ruling on *Southwestern Pennsylvania Growth Alliance v. Carol Browner*, in which he joined a consensus in denying industry's efforts to skirt pollution rules under the Clean Air Act.

Critics, though, say such instances are rare. Alito appears to have favored environmental protections "mainly in the face of unanimous agreement and overwhelming evidence against polluters," said Doug Kendall, executive director of the Community Rights Counsel, a Washington public-interest law firm that defends environmental laws against constitutional challenges.

What concerns enviros most are not the decisions Alito has made on environmental matters directly, but those revealing a broader judicial philosophy that could be invoked in future environmental lawsuits. "What's most important is what a justice believes on constitutional grounds," said Sugameli.

Take, for instance, *Chittister v. Department of Community and Economic Development*, in which Alito argued that the 11th Amendment prohibits state employees from suing a state government in federal court for damages under the federal Family and Medical Leave Act. (The Supreme Court later ruled that employees could sue under a related provision of the act.) "It's more evidence that Alito may not believe the Constitution adequately empowers Congress to allow average Americans to go to court, protect their rights, and ensure that environmental and other laws are enforced," said Sugameli.

The most troubling skeleton in Alito's judicial closet, according to Sierra Club senior attorney David Bookbinder, is the dissent he wrote in *U.S. v. Rybar* in 1996. Alito advocated striking down a federal law banning possession of machine guns on the grounds that, in some instances, it exceeds congressional power under the Constitution's Commerce Clause. He argued that, as in-state machine-gun possession is not interstate economic activity, such authority should be conferred to state governments alone. This kind of reasoning strikes fear in the hearts of enviros, as the Commerce Clause is the basis for nearly every major federal environmental law in the U.S.

"If he is willing to find that Congress doesn't have that sort of authority over possession of machine guns, it makes you very concerned he will apply the same logic to Congress's authority over interstate pollutants," said Bookbinder.

This is of particular concern to enviros given that three weeks ago, the Supreme Court decided to review *Rapanos v. United States* and *Carabell v. Army Corps of Engineers*, two landmark cases that challenge the reach of the Clean Water Act and call into question state-level vs. federal authority to protect the environment. "The stakes are enormous," said Kendall. "If the federal government loses these cases, millions of acres of waters and wetlands could be left unprotected.

And an adverse ruling would also call into question a much broader array of environmental safeguards."

It brings into sharp relief the potentially immediate impact of Alito's nomination, Kendall added: These cases are scheduled to be heard in the spring of 2006, so if confirmed, Alito would be in a position to cast a deciding vote.