

COURTS: Alito defends controversial Commerce Clause ruling

Supreme Court nominee Samuel Alito yesterday largely avoided articulating his judicial philosophy on the Constitution's Commerce Clause, saying he merely followed Supreme Court precedent in his most controversial decision on the issue.

At the same time, Alito indicated that many Supreme Court decisions upholding congressional authority under the Commerce Clause were "well-settled precedent." He also appeared to cede Congress significant authority under the provision to set a slew of federal regulations.

"I don't think there's any question at this point that in our history ... Congress' power under the Commerce Clause is quiet broad," Alito said.

Alito's answers did little to placate committee Democrats or officials from left-leaning interest groups, who said that on the Commerce Clause and many other issues, Alito failed to adequately answer questions from the panel.

At issue is one of Alito's most controversial opinions during his 15-year tenure on the 3rd U.S. Circuit Court of Appeals -- a dissent in a 2-1 decision on *U.S. v. Rybar* where Alito argued that the Commerce Clause did not give Congress the authority to regulate sales of machine guns that did not cross state lines. That opinion has repeatedly been cited by environmentalists as an indicator that Alito may be willing to undermine or overturn the constitutional basis for landmark environmental laws such as the Endangered Species Act and the Clean Water Act. The dissent forms in large part the basis for environmental groups' opposition to the nomination.

When asked by Sen. Dianne Feinstein (D-Calif.) yesterday about the 1996 *Rybar* decision, Alito said that his opinion was simply following the precedent set by the Supreme Court a year earlier in *U.S. v. Lopez*. In that case, the Supreme Court in a 5-4 decision struck down a federal law that banned the possession of guns near school grounds on the basis that Congress lacked the authority under the Commerce Clause to implement such a regulation. The ruling was viewed as a major departure for the court, which over the course of several decades had repeatedly upheld congressional authority on a wide range of policies under the Commerce Clause.

When asked by Feinstein about that case, Alito declined to give his specific opinion, arguing that a similar question may come before the Supreme Court. But Alito also said the *Lopez* ruling was a "startling development" for the legal community.

"I think the traditional wisdom was that the commerce power reached everything, that there was no limit to the power, that nothing could exceed that power," Alito said. "And *Lopez* and the *Lopez* line of cases have not made huge inroads on the principle, but it was the first time in a long time that a statute had been held to exceed Congress' commerce power."

Feinstein appeared unmoved by the response. "I would say it has not made that kind of dent yet. And that's why your nomination is so important, because you could be a decisive vote in this area."

Alito did say that he might have decided the case differently if there was some type of congressional finding demonstrating that simple possession of a machine gun "had a substantial effect on interstate commerce." But he stopped short of saying that he would have upheld congressional authority in the matter.

Earthjustice Attorney Glenn Sugameli said Alito's claim that he was following Supreme Court precedent was somewhat misleading, especially given that several other courts had issued rulings that directly contradicted Alito's reasoning. "This was not at all a clear decision, it was not at all obvious, it was not at all straightforward," Sugameli said. "He very much took a view that was going out on a limb. It was misleading to imply that his opinion was an obvious application of *Lopez*."

Sugameli, whose group has opposed the Alito nomination, said there was nothing in Alito's testimony yesterday -- either in the exchange with Feinstein or in other parts of the hearing -- that altered the group's perception that Alito could pose a threat to many environmental laws. "He still doesn't indicate that he thinks his opinions were wrong, he doesn't back away to any extent," he said.

The Alito hearings will resume this morning at 9:30 a.m. with questioning from Sen. Dick Durbin (D-Ill.) -- the only Democrat on the panel who has not yet had a chance to question the nominee. The committee will then move to questions from the two junior Republicans on the panel -- Sens. Sam Brownback of Kansas and Tom Coburn of Oklahoma -- and then immediately move into the second round of questioning.

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