

COURTS: Alito defends record on environment as Feinstein attacks

For the second day in a row, Supreme Court nominee Samuel Alito vigorously defended a highly scrutinized decision on an environmental matter, further fueling concern among Senate Democrats and environmentalists who fear Alito may try to limit the ability of private citizens and environmental groups to bring lawsuits against polluters.

This time, the issue was Alito's joining of a majority opinion in the 1997 case *PIRG v. MEI*, where the 3rd U.S. Circuit Court of Appeals threw out a \$2.6 million fine against a manufacturing company because it determined environmental groups that brought the case did not have standing. Specifically, Alito wrote that the plaintiff never demonstrated that pollution from the manufacturer caused direct harm to the Delaware River, even though the company had been cited for 150 Clean Water Act violations.

That decision and a Commerce Clause opinion Alito defended earlier in the week have been the main pillars behind environmental groups' opposition to the nomination. The groups argue that similar legal reasoning from a Supreme Court justice could curtail their ability to sue polluters.

When asked about the *MEI* decision by Sen. Dianne Feinstein (D-Calif.), Alito said that even though it was apparent the plaintiffs did indeed use the river, they never demonstrated illegal discharges from the plant caused any harm.

"They alleged that they enjoyed the Delaware River in a variety of ways. As I recall, they walked along the canal path, they ate fish from the river, they drank water from the river," Alito said. "But there was no evidence that the discharges into a creek some distance upstream from the river had had any effect whatsoever on the river and, therefore, there was nothing to support a claim that they were personally injured by the discharges of this plant."

Environmentalists have said Alito's legal reasoning is a significant departure from most environmental case law, where plaintiffs need only to show pollution occurred and not necessarily that they were directly harmed by it.

Feinstein then asked Alito whether he agreed with the Supreme Court's decision in *Friends of the Earth v. Laidlaw* -- a 2000 case in which the Supreme Court upheld that environmental groups have constitutional standing to sue polluters even without the demonstration of "injury to the environment."

Alito responded that the *Laidlaw* decision was now Supreme Court standing, one that he would have to follow in his current position. But he did not endorse the decision or say whether he would follow that precedent if confirmed to the Supreme Court.

"Well, it's a precedent of the court, and I have respect for it," Alito said. "If the issue were to come up again before the 3rd Circuit, for example, and I sat on the issue, then I would follow Supreme Court precedent."

But Earthjustice attorney Glenn Sugameli said Alito's comment showed little recognition that the *Laidlaw* decision essentially overruled his earlier decision on environmental standing. "He's still talking about it as if there's a requirement that a person who uses a stream ... where there's 150 Clean Water violations has to somehow prove that pollution violations are making the water dangerous and not just that he doesn't want to use that stream or swim in that stream," Sugameli said. "He's refusing to back down at all from these opinions that are very disturbing and that he knew were very controversial."

Later, Feinstein again raised the issue of whether Alito would severely restrict congressional authority under the Commerce Clause, citing specifically two cases currently pending before the court that challenge the application of the Clean Water Act to wetlands. "In this march to restrict Congress, you could strike down the Endangered Species Act, you could strike down the Clean Water Act, you could strike down the Clean Air Act, and I think that would be catastrophic for the United States," Feinstein said.

Sen. Jeff Sessions (R-Ala.) later defended Alito's position on environmental issues, arguing that his refusal to grant standing was a legal matter and did not demonstrate any bias against environmental causes. "It does not have to do with whether you were for or against the environmental issue in question but simply whether the person bringing the suit was a legitimate person to bring that suit," Sessions said.

Sessions also pointed out that in the six environmental opinions Alito has authored during his tenure on the 3rd Circuit, he sided with the regulatory agency in five of those six cases.

Still, the two days of testimony by the nominee have done nothing to alleviate the concerns environmentalists had with the nomination prior to the start of the hearings. And yet Sierra Club attorney David Bookbinder said that while Alito's environmental record is clearly a concern for some lawmakers, his statements in the hearings are unlikely to factor in whether he is ultimately confirmed.

"I don't think environmental issues will carry it with the moderate Republicans, I think what they should be concerned with is the expansion of the executive power," Bookbinder said. "If this falls, it will be on the issue -- to some extent -- of choice, and I think it will be more likely on the issue of executive authority."

The committee wrapped up yesterday evening the second full round of questioning. The panel will return at 9 a.m. today and a handful of the committee Democrats are to question the nominee. That round of questioning is expected to conclude around midday, at which point the committee will move into closed session to discuss Alito's FBI file.

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