

## COURTS: 'Very concerned' enviros ponder justice nominee Alito's record

Environmentalists examining Judge Samuel Alito's opinions say they are concerned by President Bush's Supreme Court nominee's views on access to courts and congressional authority under the Commerce Clause.

"Earthjustice is extremely concerned that Judge Alito has repeatedly sought to go even farther than the current Supreme Court majority in restricting Congress' authority to allow Americans to protect their rights in court, and to enact laws that protect our health and environment," Earthjustice attorney Glenn Sugameli said yesterday.

But Earthjustice and the other leading environmental group on judicial nominations, the Sierra Club, have not joined other liberal-leaning advocacy organizations in expressing outright opposition to the judge who sits on the 3rd U.S. Circuit Court of Appeals in Philadelphia. Most liberal groups announced plans to oppose Alito, citing his rulings on abortion cases.

Sierra Club attorney David Bookbinder said the group chose not to take a similar step partially because it wanted to conduct a full review of his record and because -- unlike the abortion issue -- there was no single ruling in Alito's record that instantly raised a red flag among environmentalists.

Bookbinder added that Alito appeared to have an extensive enough public record where the group may be able to clearly decide whether to oppose the nominee down the road. The group had similar concerns about Chief Justice John Roberts, but the group never came out against his nomination.

"[Alito's] been there 15 years, and he'll have enough of a paper trail to determine whether he believes in expansive readings of environmental cases or whether he lets polluters off the hook," Bookbinder said.

Alito has sat on the 3rd U.S. Circuit Court of Appeals for 15 years during which time he has written about 300 opinions.

### **Congress' power at issue**

Bookbinder did say that his group was already "very concerned" about Alito's position on the Commerce Clause, due in large part to a dissent in the 1996 case *U.S. v. Rybar* where he argued that the Commerce Clause did not give the federal government the authority to regulate sales of machine guns that do not cross state lines.

While that case had nothing to do with environmental regulations, environmentalists have pointed to such rulings from other justices as an indicator that they may be willing to throw out other laws that are rooted in the Commerce Clause.

The Constitution's Commerce Clause, which gives Congress the authority to regulate interstate commerce, has been used as the legal foundation for several landmark environmental laws -- including the Endangered Species Act, the Clean Air Act and the Clean Water Act.

"Alito looks to be part of that group of people that believes that Congress has very limited powers," Bookbinder said.

Another area of concern cited by environmentalists is that Alito joined in a 2-1 decision in *PIRG v. MEI*, where the court threw out a \$2.6 million fine against a manufacturing company because it determined that the environmental groups that brought the case did not have standing. The court ruled that the environmentalists could not claim to have standing because there was no demonstration that the pollution resulted in serious environmental damage.

In another constitutional matter, Alito wrote that the 11th amendment prohibited state employees from suing for damages under the federal Family and Medical Leave Act. While that case likewise has little to do directly with environmental law, environmental officials have previously said that such interpretation of the amendment may result in limitation of federal authority.

There are, however, bright spots in Alito's environmental record, stemming largely from his work as the U.S. attorney for the District of New Jersey from 1987 until 1990, where he was lauded for his pursuit of environmental cases.

### **Alito's record as prosecutor**

In a 1987 speech on the Senate floor, Sen. Frank Lautenberg (D-N.J.) specifically cited his work in enforcing environmental laws during his interim appointment to the post as reason why he should be permanently confirmed to that position. "I am pleased ... Mr. Alito has set out to increase the resources in his office dedicated to criminal and civil environmental law," Lautenberg said in his statement.

Alito was confirmed both for the U.S. attorney post and three years later to the federal bench by unanimous consent.

But Sugameli said while environmentalists will consider Alito's work as a U.S. attorney, it will not be as significant of an indicator of how he would rule on the Supreme Court as his tenure on the bench. "It's important. It's significant," he said. "But the most important indication of how he might rule on the court is how he has ruled over the last 15 years."

One other part of Alito's record that may rile some environmentalists but is unlikely to be a factor in his nomination is his financial record. The Associated Press reported yesterday that Alito's 2004 financial disclosure statement showed that he received as a bequest Exxon Mobil Corp. stock that could be worth as much as \$250,000. The disclosure report did not reveal the source of the stock.

Meanwhile, two key business groups -- the National Association of Manufacturers and the U.S. Chamber of Commerce -- also did not take an immediate position on Alito but indicated that they were satisfied with the pick.

"Judge Alito has a reputation for strict interpretation of the Constitution, and that stands him in good stead with us," said NAM President John Engler.

Officials from both NAM and the Chamber of Commerce said the groups will conduct an investigation into his background before deciding whether to formally endorse the nomination.

A lingering question is just how much of a role will the environmental issues play in the Alito nomination, especially if environmental groups decide to oppose the nominee.

Already, abortion has taken center stage in the debate and groups on both the right and the left have begun to mobilize their campaign strategy around this area, perhaps leaving little room for some other legal issues. "We think the abortion issue is going to suck the oxygen out of this debate, and we think this was the president's strategy," Bookbinder said.

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