

# Justice Alito's Green Day

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*Legal Times*

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Tony Mauro

The first time he takes the bench later this month, new Supreme Court Justice Samuel Alito Jr. will face a baptism -- not by fire but by water.

Three cases challenging the scope of the Clean Water Act will be argued Feb. 21, testing themes of federalism and commerce clause power that were much at issue during Alito's confirmation hearings. The cases have environmentalists worried about how Alito and Chief Justice John Roberts Jr. will ultimately come down.

"These are probably the most important environmental cases in a decade and will be an enormous test of the two new justices," says Douglas Kendall of the Community Rights Counsel, which filed a brief in two of the cases.

Alito has plenty of reading to do; more than 50 briefs on the cases have flowed into the Court. After being sworn in officially at the Court, on Jan. 31 at a private ceremony, Alito settled into the chambers his predecessor, Justice Sandra Day O'Connor, vacated last month in anticipation of retirement. His staff is still in flux, but he has already picked up two O'Connor law clerks, Benjamin Horwich and Alexander Volokh. Late Friday, Alito announced he would adopt the Court's 1993 policy on recusals in cases involving close relatives who are lawyers -- in Alito's case, sister Rosemary, a partner at Kirkpatrick & Lockhart Nicholson Graham in Newark, N.J.

The environmental cases, more than any other coming soon, will spotlight issues that got Democrats upset during Alito's contentious hearings last month. In two of the cases, *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*, the issue is whether, under the commerce clause, the Clean Water Act protects certain wetlands that are adjacent to tributaries of navigable waters covered by the law. In the third case, *S.D. Warren Co. v. Maine Board of Environmental Protection*, the justices will decide whether the mere fact that a river flows through a dam produces a "discharge" that triggers federal jurisdiction under the act.

In all three cases, the Bush administration is arguing for a broad view that would preserve a "landmark" law that is "a permissible exercise of Congress' power," in the words of Solicitor General Paul Clement, who will argue the cases himself.

In *Rapanos* and *Carabell*, the cases that have gotten the most attention on both sides, environmental groups say a loss would strip federal jurisdiction from between 50 percent and 99 percent of the waterways currently covered by the law -- a level not seen "since the McKinley administration," says Howard Fox of Earthjustice.

On the other side, conservative and business groups cast the dispute as a property rights battle against overriding federal regulation. "Agency bureaucrats are exploiting an ambiguity in the law to run roughshod over property owners," says Reed Hopper, the Pacific Legal Foundation lawyer who represents Michigan developer John Rapanos in his case. "The Clean Water Act authorizes federal regulation of navigable waters, not every wet spot in the nation."

## **DIGGING UP BONES**

A sure sign of the importance of Alito and Roberts is that one anti-regulation brief, by the conservative Washington Legal Foundation, pointedly cites appeals court writings by both justices that support a narrow view of the commerce clause.

The brief reminds Alito and the rest of the Court of his 1996 dissent as a 3rd Circuit judge in *United States v. Rybar*, the so-called machine gun case, that Alito was repeatedly quizzed about at his hearing. Alito argued that Congress did not have authority to ban possession of machine guns, and the foundation hopes he will rule the same way on Clean Water Act coverage.

The WLF also cites *Rancho Viejo v. Norton*, the "hapless toad" case in which Roberts, as a D.C. Circuit judge, said congressional commerce power did not extend to protecting California's arroyo toad under the Endangered Species Act.

Mark Perry, a D.C. partner at Gibson, Dunn & Crutcher who wrote the foundation brief, declines to discuss specific justices but says the cases before the Court pose "starkly different visions of federal power."

Perry's brief may also be the first -- and only -- to invoke the animated movie "Finding Nemo." He cites a scene in which Nemo the fish is swirling down a dentist's drain. "Don't worry. All drains lead to the ocean," the character Gill says to reassure everyone that Nemo is safe. Perry accuses the government of adopting the same principle to justify regulating every conceivable body of water. "I was watching the movie with my two kids and I thought, that actually describes what's going on here," says Perry.

Rapanos has been trying for nearly 20 years to build a shopping center near Midland, Mich. His sites were deemed to be wetlands, but Rapanos -- arguing that the nearest navigable water is 20 miles away -- began construction without permits. The Environmental Protection Agency ordered him to halt the work and eventually brought criminal charges against him. After years of litigation, the 6th U.S. Circuit Court of Appeals ruled that any "hydrological connection" between his property and navigable waters was sufficient to establish Clean Water Act jurisdiction.

Similarly, June Carabell sought to build condominiums on forested wetlands in Macomb County, Mich. She applied for a fill permit, but the Army Corps of Engineers turned her down.

Rapanos claims the government's broad definition of the act's reach unconstitutionally disturbs

the traditional "division of labor" that allows states to regulate "upstream" sources of pollution while the federal government takes care of larger navigable waters downstream.

## **STATE ACTIONS**

But two-thirds of the states have joined briefs advising the Court that they want federal protection. Eliminating federal jurisdiction over the wetlands at issue would "pull the rug out from under state officials and leave a regulatory void that the states could not easily fill," says Kendall's brief on behalf of an association of state pollution-control administrators nationwide.

A similar plea from states did not persuade the Court in the 2000 case *United States v. Morrison* to uphold federal powers granted by the Violence Against Women Act, but Kendall thinks the federal role in helping prevent water pollution is more deeply rooted. Utah and Alaska joined a brief arguing against the federal role in *Rapanos*.

In the third Clean Water Act case, the S.D. Warren Co., owner of five hydroelectric dams on the Presumpscot River in Maine, challenges the need to obtain state licenses for the dams -- a process that is triggered if they produce a "discharge" under the Clean Water Act. The dams are already licensed by the Federal Energy Regulatory Commission.

The company, joined by business and power-industry groups, claims that the dams add nothing new to the water; thus they do not produce a discharge. In a brief for the Edison Electric Institute, Jeffrey Fisher of Davis Wright Tremaine says state regulation triggered by the federal law is "unnecessary and duplicative."

Environmental groups counter that hydroelectric dams do alter the water and have strong environmental effects.

"Dammed from stem to stern, the river has witnessed a profound decline in water quality and the consequent extirpation of its once prodigious sea-run fishery," states a brief filed by the American Rivers organization and a group called Friends of the Presumpscot River.

The brief's author, Georgetown University Law Center professor Richard Lazarus, added a historical note that may catch the justices' eye. Samuel Warren, who founded the company that built the dams, was the father of Samuel Warren Jr., the law partner of Louis Brandeis before Brandeis became a justice. Warren and Brandeis co-wrote the famous 1890 Harvard Law Review article that articulated a right to privacy.

How will Alito view the cases? His track record on environmental law was not mentioned prominently during his confirmation hearings, and a study by the Congressional Research Service concluded that his rulings were "based on straightforward readings of statutes and regulations, with little disposition to infer rights or duties not clearly stated." The CRS study found that Alito took the pro-environment side in half of the 20 cases he ruled on in which

there was a clear environmental side.

But the study did point to other cases, including *Rybar*, in which Alito's positions indicated a narrow view of standing and commerce power -- touchstones for most environmental litigation.

Alito's biggest Clean Water Act ruling was *Public Interest Research Group of New Jersey v. Magnesium Elektron Inc.*, a 1997 case in which Alito joined a 2-1 majority that found that neither the PIRG nor Friends of the Earth had standing to challenge the company's illegal discharges into a creek that leads to a river.

His rulings on the bench led major environmental groups to oppose Alito. "Judge Alito's record is more troubling than either Judge Roberts' or Harriet Miers'," Earthjustice concluded.

Just how the rest of the Court will react to Alito's commerce clause views is uncertain. While in the *Rybar* case, Alito said he was following the then recent Supreme Court precedent *United States v. Lopez* in rejecting congressional regulation of machine gun possession, the Court since then has sometimes taken a broader view of congressional power. In *Gonzales v. Raich* last June, the Court upheld federal regulation of medical marijuana against a commerce clause challenge. Soon after that ruling, the Court vacated and remanded back to the 9th Circuit the case of *United States v. Stewart* -- the only appeals court decision that agreed with the view of the machine gun law that Alito expressed in *Rybar*.

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# Green Groups Mobilize Against Alito

## Some of Supreme Court Nominee's Judicial Rulings Trouble Environmentalists

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*The Wall Street Journal*

*Jeanne Cummings*

*December 14, 2005; Page A4*

WASHINGTON -- Environmentalists declined to join women's groups, civil-rights organizations and gay-rights activists in opposing the nomination of Chief Justice John Roberts. But the green community is mobilizing against the Supreme Court bid of Judge Samuel Alito, citing rulings during his 15 years on the bench that suggest to them a constitutional view that could limit laws on clean air, clean water and similar issues.

"These laws are designed to fix large-scale, national environmental problems," says David Bookbinder, senior attorney for the Sierra Club. "It's disingenuous for courts to say, 'I'll read it this way and Congress can fix it.' No one wants to reopen the Clean Air Act. It just doesn't happen."

More than a half-dozen environmental organizations are expected to announce their opposition next week. Lobbyists will work Capitol Hill, and some groups are considering advertisements against Judge Alito. Many will urge members to hold rallies and petition drives in the states of undecided senators.

The environmentalists have a big stake in the fight: In February, the Supreme Court is scheduled to hear two cases on whether Congress has the authority under the Constitution's Commerce Clause to regulate certain wetlands.

The White House wants Judge Alito on the high court by then. The Senate Judiciary Committee will begin hearings on the nomination Jan. 9, and a vote by the full Senate is tentatively slated for later in the month.

Thus far, Democrats aren't considering mounting a filibuster, which could bode well for confirmation early next year. But there is no guarantee that situation will hold, since Judge Alito's adversaries have almost another month to attack before his confirmation hearings, which also could turn up surprises.

Women's groups argue that Judge Alito, who said in 1985 that there is no constitutional right to abortion, could shift the court toward overturning *Roe v. Wade*, the high court's landmark abortion-rights decision. If confirmed, Judge Alito would succeed Justice Sandra Day O'Connor, who voted to affirm *Roe*.

Civil-rights groups, organizations for the disabled, and gay-rights advocates say their opposition

is based, like the environmentalists, on Judge Alito's narrow view of congressional authority, which could influence his rulings on civil-rights laws and the Americans with Disabilities Act. They also object to his judicial opinions that set exacting standards for proving discrimination.

The Alliance for Justice, a civil-rights group, on Monday sent a caravan of cars, trucks and a boat to several states to spread the anti-Alito message. Also on Monday, Human Rights Campaign, a gay-rights group, announced its opposition to the nomination. Today, a coalition of groups representing the disabled also will weigh in against him.

Now, the environment issue could put more pressure on Republican moderates, already uneasy with his stance on abortion, to oppose Judge Alito. Progress for America, a Republican group aligned with the White House, already is running ads to counter attacks. Yesterday, the National Association of Manufacturers, which often spars with environmentalists, announced its support for the nominee.

"It is clear to us that he will be a justice committed to interpreting the law as written, not an activist who will try to legislate from the bench. Business depends on a legal system that is fair and predictable," NAM President John Engler said.

Most groups opposing Judge Alito also campaigned against Chief Justice Roberts's nomination to succeed the late William Rehnquist. Environmentalists raised concerns about Chief Justice Roberts but didn't lobby for his defeat because his record on their issues was thin and mixed. In his two years on the appellate bench, Chief Justice Roberts had few relevant rulings, and as a private attorney he helped score an important victory for environmentalists in a land-development case near Lake Tahoe.

Judge Alito's lengthy record on the Third Circuit Court of Appeals provides a more detailed window into his legal thinking. Environmentalists have examined his rulings on nearly 40 cases, and while those decisions break both ways, several aspects of Judge Alito's record have set off alarms among advocates.

In a 2001 case, *W. R. Grace & Co. v. United States Environmental Protection Agency*, Judge Alito joined a 2-1 ruling that threw out an EPA order under the Safe Drinking Water Act for an ammonia-spill cleanup near Lansing, Mich., and concluded that the government cleanup standard was "arbitrary and capricious." In a dissent, Judge Carol Los Mansmann asserted that the law requires courts to take a more deferential view toward EPA findings because "that is a cornerstone to the EPA's power, enshrined in" the Safe Drinking Water Act.

In a 1996 case, *Public Interest Research Group of New Jersey v. Magnesium Elektron Inc.*, the manufacturer admitted to repeatedly violating a clean-water permit by dumping excessive pollutants into a Delaware River tributary. A district judge imposed a \$2.6 million fine for the violations. On appeal, Judge Alito joined a 2-1 opinion that overturned the district court, finding that the PIRG members had brought the lawsuit improperly because they couldn't prove they

or the river and its tributaries were injured by the pollution.

The Supreme Court, in a later case, rejected that reasoning and reaffirmed on a 7-2 vote the ability of citizens to bring such lawsuits to court.

However, Judge Alito was on the side of environmentalists in a 1994 case that was a major toxic-waste-cleanup victory. That case, *FMC Corp. v. U.S. Department of Commerce*, forced the federal government to spend millions to help remove pollution from a World War II factory site in Front Royal, Va., that polluted groundwater.

When government lawyers complained about the costs to taxpayers -- the estimate at that time was as much as \$78 million -- the judges didn't flinch, saying "that circumstance cannot influence our result and we cannot amend (the cleanup law) by judicial fiat."

Judge Alito also wrote a 1997 opinion in *Southwestern Pennsylvania Growth Alliance v. Browner*, an ozone-pollution dispute that was a victory for the EPA and the Clean Air Act. "Although we are sympathetic to the view expressed by many within the area that this rule threatens serious economic harm, we recognize that our role as a reviewing court is strictly limited," he wrote.

The case in Judge Alito's record that may concern environmentalists most wasn't actually about pollution but gun control. In a 1996 opinion on a machine-gun case, Judge Alito questioned Congress's authority under the Commerce Clause to regulate gun sales. Environmentalists worry that if Judge Alito joins the Supreme Court he would push to shrink congressional authority, including over the nation's environmental laws.

Doug Kendall, founder of Community Rights Counsel, an environmental-law group that hasn't taken a position on the Alito nomination, said the nominee's court record isn't all bad for the environmental community.

"But it's not the little things that we have to worry about with Alito. It's the big things," he said.

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# Court nominee deals with ethics criticism

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*Associated Press*

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*Gina Holland*

WASHINGTON — Judge Samuel Alito has said he did not break a federal ethics law when he ruled in a case involving the company that handles his mutual fund investments.

Legal experts are divided over whether Alito did anything wrong in the case three years ago. Of more immediate concern is his explanation of his role in that case — along with questions about what his recusal practices will be if confirmed to the high court.

Judges, including Supreme Court justices, are required by law to stay out of cases in which they have a financial stake. Members of the high court, however, decide for themselves when to recuse with no oversight.

Alito serves on the 3rd U.S. Circuit Court of Appeals in Philadelphia and has most of his money in mutual funds. When he joined the court in 1990 he told senators he would avoid cases in which Vanguard Group was a party.

Senators questioned him about the 2002 Vanguard case, which was the subject of a conflict of interest complaint filed by the woman who lost her lawsuit. Alito withdrew after first ruling against her and the decision was reaffirmed without his participation.

Alito and the White House have offered several explanations: that a computer glitch allowed the disqualification issue to slip through undetected, that Alito's 1990 pledge to stay out of Vanguard appeals only applied to his initial service, and that the promise was "unduly restrictive."

"The explanation causes greater concern than the problem," said Stephen Gillers, a professor specializing in legal ethics at New York University's School of Law. "It would have all gone away if Judge Alito had said, 'This was an oversight.' People can forgive oversights. We all have them."

Doug Kendall, executive director of the Community Rights Counsel, a public interest law firm, said the response was "inconsistent and somewhat incoherent."

"His explanation has made it an issue that will continue through the (Senate) hearings," said Kendall.

Judges who have even one share of stock in a company are not allowed to rule in cases involving that company. Because of that, recusals are common at the high court.

Steven Lubet, an ethics expert at Northwestern University, said the rules for judges and their mutual funds is not clear. If the mutual fund company is compared to a bank, which just holds deposits, then recusals are not required.

Lubet said that Alito should be praised for keeping the bulk of his money in mutual funds instead of in individual stocks.

Alito reported holdings of about \$80,000 in Vanguard funds when he was confirmed in 1990. Last year he reported shares in 14 Vanguard Group mutual funds, worth \$455,000 to \$1 million.

Nominated late last month by President Bush, Alito would replace retiring Justice Sandra Day O'Connor, who has extensive stock holdings.

O'Connor has had about 730 recusals during her 24 years on the court, according to Goldstein & Howe, a Washington law firm that tracks Supreme Court statistics.

New Chief Justice John Roberts has already had several major recusals, including one that followed an acknowledgment that he wrongly participated in a case. He took himself out of a patent infringement case the same week that he and the other justices picked the case for review. The conflict apparently was related to his former law firm, Hogan & Hartson.

Like Roberts, who also had served as an appeals court judge, Alito as a justice would be sidelined in a few cases he previously ruled on.

Justices recently agreed to hear a prison lawsuit in which Alito argued that states should be allowed to restrict inmates' reading material. The appeals court found that the rules were an unconstitutional restriction on free speech.

Roberts and Alito also have family legal ties, which could prompt them to step aside in some cases. Roberts' wife is a partner with a prominent Washington law firm. Alito's sister is a lawyer in New Jersey.

Members of the Senate Judiciary Committee should question Alito sharply during his confirmation hearings in January about what his recusal policies will be, said Kendall, because "once confirmed, a justice has unreviewable discretion in this area."

Gillers said the criticism about the mutual fund case might have a long-term impact.

"This experience may have had a personally bruising effect on Judge Alito. If he gets onto the court he might err on the side of recusal to clear his name," Gillers said.

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# Many of Alito's rulings have been at odds with Supreme Court

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*Knight Ridder Newspapers*

*October 31, 2005*

*Stephen Henderson*

WASHINGTON - Samuel Alito once wrote that employees who allege sex discrimination ought to have a tougher time proving their claims. The Supreme Court disagreed.

Alito once argued that Congress hadn't granted state workers the family-leave benefits that are mandated for other employees. The high court rejected his thinking again.

And Alito, now President Bush's choice to replace Justice Sandra Day O'Connor, once embraced a standard that would make it harder to punish water polluters. But the Supreme Court didn't go along.

In Alito's 15 years of rulings on the Third Circuit Court of Appeals in Philadelphia, many of his interpretations of federal law and the Constitution are at odds with established thinking and practice, and ultimately they've been rejected by large majorities on the high court he hopes to join.

Alito's most aggressive opinions - on everything from abortion and civil rights to gun control and federal authority - are already drawing fire from the critics lining up to oppose his confirmation. And they'll likely be a focus of the debate on the Senate floor.

Nearly everyone expected Bush to pick someone with superior conservative bona fides after White House counsel Harriet Miers' catastrophic nomination was withdrawn.

But some court watchers say Alito's conservatism often takes shape in opinions that attempt to push the law closer to his ideals, rather than simply reflect it. It's an approach that could be difficult to define as restrained - the philosophy preferred by many conservatives. And that could leave Alito open to charges that he's an activist.

"It's clear he'll write opinions in cases just to voice what are clearly unpopular opinions," said University of Pennsylvania law professor Nathaniel Persily. "And he has 15 years of opinions for people to go through, so there's potentially a lot of material for people to find."

Douglas Kmiec, who worked with Alito in the Department of Justice during the Reagan administration, described the judge as "careful in his reasoning" and said any notion of him as an activist is "not the Sam Alito I know."

Kmiec said Alito does have a knack for pointing out "weaknesses" in court precedent and the

conflicts and inconsistencies that he believes should be remedied. "But he generally does not reach out to decide those issues if they aren't squarely before him in a case," Kmiec said. "In that sense, Sam is more scholar than activist. And most of the disagreements with the high court are explainable in similar terms."

To be sure, much of Alito's work suggests a traditional conservative approach, one that resists broad, sweeping opinions and is marked by meticulous examination of the facts in each case, and the language used in laws and in the Constitution.

Alito has also written several opinions whose results should please liberal interests: cases asserting disability rights, preserving due process for criminal defendants and securing free-speech rights.

When he was introduced at the White House Monday, Alito also spoke of the limited role that judges play and its importance.

"Federal judges have the duty to interpret the Constitution and the laws faithfully and fairly, to protect the constitutional rights of all Americans and to do these things with care and with restraint," Alito said.

Not all of his work may square with that notion, though.

In a 1996 employment discrimination case, *Sheridan v. Dupont*, Alito concluded in his dissent that victims of sex discrimination in the workplace should meet a higher standard of proof than was required.

Alito said proving discrimination and that the employer was responsible weren't always enough to ensure that the claim wouldn't be dismissed by a court. He based his interpretation on the rulings of another, more conservative appellate court decision, urging his colleagues on the 3rd Circuit to adopt that standard.

They didn't, and the Supreme Court later unanimously rejected that same rationale in another discrimination case, *Reeves v. Sanderson Plumbing Products*, in 2000.

Kmiec said the *Sheridan* opinion is an example of restraint on Alito's part, because he acknowledged that he was bound by his own circuit's rules; he was simply pointing out his preference for another approach.

"That's one of the things he does, and I think it's from a scholarly point of view," Kmiec said.

But Alito's interpretation would have led to a fundamental change in the way sex discrimination claims are handled and would have conflicted with what Congress intended when it enacted anti-discrimination laws.

In another knotty case, *Chittister v. Department of Community and Economic Development*, Alito questioned Congress' power to require state governments to grant family and medical leave to men and women equally.

Alito's opinion, which was echoed in opinions from other lower courts, would have denied protection to millions of workers whom Congress clearly intended to protect with the Family and Medical Leave Act of 1993.

The Supreme Court contradicted Alito's thinking in a 2003 ruling in *Hibbs v. Nevada Department of Human Resources*. The late Chief Justice William H. Rehnquist wrote the opinion.

Alito also joined another judge in 1997 in a ruling that attempted to make it more difficult to hold polluters accountable when they fouled water supplies.

Rather than applying the standards that punished companies based on how much they polluted a body of water, Alito embraced an approach that would require proof that the pollution damaged the water. The ruling, in *Public Interest Research Group (PIRG) v. Magnesium Elektron*, invalidated an existing \$2 million fine.

Three years later, the Supreme Court rejected Alito's analysis, saying in another case that the new standard raised "the hurdle higher than ... necessary."

"A number of his opinions, like this one, suggest he's pushing the legal envelope," said Doug Kendall, an environmental lawyer and executive director of the Community Rights Counsel, a public-interest law firm in Washington. "What's troubling is that in some of his opinions, Judge

Alito has been aggressive even as an appeals court judge. As a Supreme Court justice, he won't be as bound."

Kendall noted that Alito has written other opinions that question the reach of Congress' regulatory power, and, famously, embraced an abortion restriction in a landmark Pennsylvania case that was later rejected by the high court.

"There's a tremendous amount of research that needs to be done before he's confirmed," Kendall said. "I don't think many people have focused that intently on his record, but it's long and at least initially disturbing."

Kmiec said he's confident Alito will respect court precedent and embrace the restraint that is a hallmark of judicial conservatism.

"This was not someone who gave quick, seat-of-the-pants kind of judgments," Kmiec said. "Even when the Supreme Court has reversed positions he has held, they have often gone out of their way to applaud his particular reasoning. In the end, he comes up with opinions that are quite defensible, and I think he'll do the same on the high court."

# Alito's telling dissent in machine gun case

## He sought to limit reach of Congress

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*San Francisco Chronicle*

*November 2, 2005*

*Bob Egelko*

For John Roberts, it was a "hapless toad" in the path of a California housing development that represented the limits of the federal government's power to regulate activities within a state. For Samuel Alito Jr., it was a machine gun.

In a lone dissenting opinion as a federal appeals court judge in 1996, Alito argued that the federal ban on possessing machine guns was unconstitutional -- a stand described by both admirers and detractors Tuesday as one of the most revealing cases in the lengthy judicial record of President Bush's nominee to the U.S. Supreme Court.

"He understands the original design of the Constitution as being one of limited government," said Roger Pilon, director of the Center for Constitutional Studies at the libertarian Cato Institute. In his opinion, Alito said the federal ban on possessing machine guns exceeded Congress' power to regulate interstate commerce, but a majority of his court disagreed, and the Supreme Court denied review. He took no position on whether the Constitution protects an individual's right to possess firearms.

Pilon said the case showed Alito's recognition that Congress' constitutional power to regulate interstate commerce is not a license "to regulate anything and everything."

But Dennis Henigan, legal director of the Brady Center to Prevent Gun Violence, said the opinion is "perhaps the most powerful evidence that Judge Alito is very much a right-wing judicial activist" willing to disregard congressional judgment. Another critic, Douglas Kendall, executive director of the Community Rights Counsel, said Alito's opinion is disturbing for reasons that have little to do with gun control.

The case "suggests that he will impose rather significant limits on federal authority" over interstate commerce, the basis for a wide range of laws, said Kendall, whose Washington, D.C., organization supports regulation of the environment and public health. He said the issue of federal power is critical to two cases the Supreme Court plans to review this term testing the limits of the government's authority to prohibit pollution of wetlands under the Clean Water Act.

The machine gun case was decided by the Third U.S. Circuit Court of Appeals in Philadelphia a year after the U.S. Supreme Court overturned as unconstitutional a federal law banning gun possession near schools. The Supreme Court said congressional power over interstate commerce does not extend to guns that might have been obtained within the state and were

not being used for any commercial purpose -- the first ruling to overturn a law on interstate commerce grounds since the 1930s.

Pennsylvania gun dealer Raymond Rybar Jr., sentenced to 18 months in prison for possessing and selling two machine guns, argued in his appeal that a 1986 federal law banning the possession or transfer of machine guns was unconstitutional because it applied to weapons that had never crossed state lines or affected interstate commerce. A 2-1 majority of the appeals court disagreed.

Unlike the law on guns near schools, the court majority said, the machine-gun ban was supported by findings in federal gun laws since the 1930s that there was widespread interstate traffic in guns, including surplus military weapons from other countries, and that state regulation was inadequate. Another distinction, the court said, is that the 1986 law applied to all areas of the nation and not just to possession of guns in certain local areas.

Alito began his dissenting opinion by suggesting that the majority was treating the Supreme Court's 1995 ruling as "a constitutional freak" rather than a recognition that the Constitution "still imposes some meaningful limits on congressional power."

Congressional findings about gun trafficking in older laws were irrelevant, he argued, to the question of whether possessing a machine gun has any effect on interstate commerce. Whatever role machine guns play in nationwide crime, Alito said, the mere act of possessing one within a state is no more of an interstate, or economic, activity than possessing a gun near a school.

He said the law might be valid if it was limited to machine guns that crossed state lines, or if Congress had included findings about the impact of those weapons on interstate commerce. That suggestion was derided by the court majority, which said Congress was not required to "play Show and Tell with the federal courts" to validate a law.

The same legal issue arose during Roberts' confirmation as chief justice in September, based on a dissenting opinion he wrote as an appeals court judge in 2003. The opinion questioned federal authority to protect a "hapless toad" that was found only in California and had no obvious connection to interstate commerce. Roberts, at his confirmation hearing, said he had never meant to suggest that the government lacked power to protect endangered species.

The Supreme Court is closely divided on conflicts between federal and state power, in cases ranging from environmental regulation to civil rights. Justice Sandra Day O'Connor, whom Alito has been nominated to succeed, has been a strong supporter of state autonomy.

Critics of Alito's 1996 opinion point out that the machine-gun law has been upheld by every federal court that has considered it. Rybar, the Pennsylvania gun dealer, appealed his case to the Supreme Court, which denied review.

"When conservatives decry liberal judicial activism, they purport to be talking about judges who are unelected and who second-guess the wisdom of elected legislators," said the Brady Center's Henigan. He said the same description applies to Alito's opinion.

A supporter of Alito countered that the judge should not be criticized for going against the grain.

"I think the lower courts after (the 1995 ruling) were resistant to the Supreme Court's direction. Judge Alito was not," said Pepperdine University Law Professor Douglas Kmiec. He said the ruling indicates that Alito, as a high court justice, would "strongly defend the federalist structure of the Constitution."

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# Bracing — Finally — for the Battle Royal

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*Legal Times*

*November 7, 2005*

*T.R. Goldman*

The e-mail carried the breathless tone so often associated with the quest for money:

"This is it," People For the American Way's Ralph Neas wrote last week to hundreds of thousands of potential opponents of Supreme Court nominee Samuel Alito Jr., "the moment the Radical Right has been dreaming about for years."

Then, after rattling off three areas in which Alito would "jeopardize Americans' rights and freedoms for decades," Neas got to the point: "We need to raise \$500,000 NOW to get the message out that confirming Judge Alito to the Supreme Court would not be good for America."

Less than a week after Alito's Oct. 31 nomination, PFAW's first television spot was ready. A spokesman for the group, Peter Montgomery, would not comment on how much the e-mail raised. "Ralph doesn't like to talk about money," he said.

Nothing fills an interest group's coffers like a crisis. The two previous Supreme Court nominees - Chief Justice John Roberts Jr. and former candidate Harriet Miers -- failed to ignite much controversy on the left, and didn't bring in much cash. But Alito's perceived hostility to civil liberties may get the register ringing in a hurry.

But probably not as fast as it has at PFAW's conservative rival, Progress for America. The day after Alito's nomination, the group fired up a \$450,000 national television ad campaign on Fox and CNN. The same ad also ran in local television markets in Nebraska and Arkansas.

"By 3:15 in the afternoon Monday, we had our spot completed, and on the air the next day," says Brian McCabe, Progress for America's president. "Our plan is to spend \$11.5 million, but like [with] Roberts, we could come in much less than that."

Progress for America had claimed it would spend up to \$18 million to support Roberts' nomination to replace the late William Rehnquist as chief justice; it actually spent closer to \$8 million as opposition slowly fizzled. That's still a sizable sum and a harbinger of how much it may spend on Alito, who still has eight more weeks before his Senate Judiciary Committee hearings start, on Jan. 9.

The group's major funder is Robert Perenchio, chairman of Univision, who has given Progress for America \$4 million in the past two years. Ironically, Perenchio, a former Hollywood talent agent, founded a television and movie production company in 1975 with Norman Lear, who years later would start People For the American Way.

PFAW and other liberal groups are trying to leverage their strength. They're part of a coalition that includes the Alliance for Justice, the Leadership Conference on Civil Rights, NARAL Pro-

Choice America, and Planned Parenthood of America. The name: The Coalition for a Fair and Independent Judiciary.

## **BULLET POINTS**

But the Alito nomination isn't just about rallying the base and raising money. After largely sitting out the first two nominations, liberal interest groups are expected to go full bore to derail the appeals court judge.

"The pieces are falling into place for a huge showdown among interest groups that is going to put senators in the crossfire," says Bert Brandenburg, a former Department of Justice spokesman who now runs the Justice at Stake campaign. "Whether these members care or not will be up to them. For a lot of senators, it won't make a difference; for some it might. That's the bet these groups are placing."

Right now, for Senate Democrats and liberal interest groups, it is an uphill battle.

Talk of using a filibuster, which would require the agreement of 41 of the Senate's 44 Democrats, has temporarily died down. That's because the GOP's 55-seat majority gives it the power to eliminate judicial filibusters, using the so-called nuclear option.

So to defeat Alito's nomination, Democrats will likely need a simple majority -- holding on to all 44 of their own votes as well as that of independent Sen. James Jeffords (Vt.), and persuading at least six Republicans to join them. The best bets to cross over so far are pro-choice GOP Sens. Lincoln Chafee (R.I.), Lisa Murkowski (Alaska), and Olympia Snowe and Susan Collins of Maine.

But Democratic senators up for re-election in 2006, particularly those in states that voted overwhelmingly for George W. Bush, are under intense pressure to approve Alito.

Indeed, Sen. Ben Nelson (D-Neb.), whose state voted 2-to-1 for Bush and who stands for re-election next year, was laudatory after a Nov. 2 visit by Alito, although he did not endorse the nominee. Nelson told reporters that he was impressed with what he had heard and that Alito had assured him that he would not be a "judicial activist" or "take an agenda to the bench" if he were confirmed.

Nelson is also a leading member of the Gang of 14, the now famous group of seven moderate Democrats and seven moderate Republicans who last spring brought talk of using the nuclear option to kill the filibuster to a halt. They will once again play a critical role in deciding whether sufficient votes for a filibuster are available.

Last week the conservative Family Research Council announced plans to spend \$100,000 on television spots in five states -- including Nelson's Nebraska and Arkansas, where Democrat Mark Pryor, another member of the Gang of 14, is also a target.

## **FROM MAN TO MONSTER**

The stakes could hardly be higher -- for either side. Unlike Roberts, Alito is replacing a key swing

vote, and his presence could very well shift the Court much further to the right. The question is, how much?

But it is not just Alito's jurisprudence that will be part of the public discourse. Ever since Supreme Court nominees began holding public confirmation hearings, in 1955, it has been impossible to divorce a nominee's personality from his or her legal opinions.

Alito, according to Court watchers, presents a challenge to Democrats because he comes across as humble and amiable.

"Affability -- I think it figures a fair bit," says John Maltese, a political scientist at the University of Georgia who wrote *The Selling of Supreme Court Nominees*. "People might deny it makes a difference, but I'm sure it does."

Adds Stephen Wermiel, who teaches at American University Washington College of Law: "It's very hard to take a mild-mannered, low-key, not particularly scary-looking or -sounding individual and try to turn him into Count Dracula.

"The Democrats beat Bork because [liberal interest groups] were able to convince enough voters -- who in turn influenced enough senators -- that Bork was scary," Wermiel continues, referring to the 1987 defeat of Court nominee Robert Bork.

The challenge for Democrats is to convince voters that while Alito's persona is friendly enough, his opinions are not.

"We'll be using every tool available -- advertising, targeting to opinion leaders, pushing the message directly to the media. And these groups have massive grass-roots networks, as well," says David Smith, a partner at GMMB, which is working with the Coalition for a Fair and Independent Judiciary. "Alito is not like John Roberts," he adds. "This guy's got a record a mile long and a history of taking positions on a whole host of issues."

Neas' fund-raising letter, for example, points to cases in which Alito "supported a restriction on women's reproductive freedom that even the conservative Supreme Court rejected." And, the e-mail notes, Alito "would have allowed police to strip search a mother and her ten-year-old daughter in their home even though the warrant allowing the search did not name either of them."

Of course, the realities of these cases are less black and white than either side would like to admit. But Democrats can also persuasively argue that the president's choice of Alito is a concession to the hard-right wing of the Republican Party, all of whom are ecstatic in their praise of the nominee. And that in itself, Democrats say, should be cause for alarm.

To date, most Democrats have been holding their fire, preferring to wait for the definitive showdown at the confirmation hearings. Republicans, on the other hand, seem uniformly pleased. And that, argues University of Connecticut political scientist David Yaloff, gives the GOP a distinct leg up.

"It's very difficult to defeat these nominees when the marching [from Democrats] doesn't begin right away, and conservatives and Republicans are doing the marching," he says. "There are a lot of Republicans who really want Alito, and a lot of liberal Democrats who aren't sure, and when it's 'the sure' versus 'the unsure,' the sure generally win."

Still, the hearings are a political eternity away, and members will be home over the holiday break before they start, leaving them and their constituents susceptible to state-based campaigns. With nearly 4,000 appellate court decisions to his credit, there's plenty of time to find controversial opinions involving Alito, and spark public outrage.

"This is a very different nomination and will play out very differently than Roberts'," notes Doug Kendall, the executive director of the Community Rights Counsel, which has not taken a position on the nominee.

"Because there was nothing in Roberts' judicial record, there wasn't a lot to grab onto. People were talking about things 20 years old, and I don't think senators bought into that," says Kendall. "But Alito has 15 years of opinions and some genuinely disturbing judicial rulings. So a lot of this depends on whether Judge Alito is John Roberts or Robert Bork."

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# The Sum of Alito Fears

## Supreme Court nominee Samuel Alito has enviros worried

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Enviro advocates in D.C. have spent the last 24 hours digging through **Samuel Alito's** extensive paper trail for clues as to how he might vote on environmental cases were he confirmed as a U.S. Supreme Court justice.

A staunchly conservative judge who's served on the Philadelphia-based 3rd U.S. Circuit Court of Appeals for 15 years, Alito was nominated by **President Bush** yesterday to fill the slot being vacated by **Sandra Day O'Connor**. He's already a hit with Republican senators as well as Bush's right-wing base, which squelched the candidacy of **Harriet Miers**.

Environmentalists, meanwhile, are joining many progressives and Democrats in crying foul over the nomination.

Sen. **Charles Schumer** (D-N.Y.), a member of the Senate Judiciary Committee, stepped right up yesterday to criticize Alito as a "controversial nominee who would make the court less diverse and far more conservative." He's 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, whom he described as having "extraordinary breadth of experience ... more prior judicial experience than any Supreme Court nominee in more than 70 years." The prez even tried to frame Alito as a pro-environment pick who "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," **Glenn Sugameli**, **Earthjustice** senior legislative counsel, 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 D.C.-based public-interest law firm that defends environmental laws against constitutional challenges.

### **Alito Rain Must Fall**

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 particularly concerning 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 versus 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.

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