



## THIS WEEK'S SHOW

# Alito: "An Agnostic" on the Environment

Air Date: Week of November 4, 2005



(White House photo by Paul Morse)

The nomination of Samuel Alito to the U.S. Supreme Court has environmental activists digging through the judge's fifteen years of appeals court opinions to find out what his record and ideology might be. Georgetown University Environmental Law Professor Richard Lazarus talks with host Bruce Gellerman about what we know, and don't know, about Judge Alito and what effect his confirmation might have on environmental laws.

## TRANSCRIPT

**GELLERMAN:** From the Jennifer and Ted Stanley Studios in Somerville, Massachusetts, this is Living on Earth. I'm Bruce Gellerman, sitting in for Steve Curwood.

When George Bush nominated federal judge Samuel Alito to the U.S. Supreme Court, the president specifically noted Alito's environmental record, saying that as a federal prosecutor Alito moved aggressively against environmental crimes. To assess Judge Alito's rulings and environmental record, we turn to Richard Lazarus who teaches environmental law at Georgetown University Law School.

Thank you very much for joining us, Professor.

**LAZARUS:** Thank you.

**GELLERMAN:** I did a Google search of Mr. Alito and he has only about three cases in which he sat that have relevance for environmental law, as I could find. Maybe four.

**LAZARUS:** Yeah, there are very few given the number of years he was on the bench, and given the fact that he was on the United



[RealAudio for this Story](#)  
(Requires [RealPlayer](#))



[Download this Story](#)  
([mp3](#) format)



[Links Related to this Story](#)

## THIS WEEK'S SHOW

[ABOUT LIVING ON EARTH](#)

[WHERE TO TUNE IN](#)

[LOE EDUCATION PROGRAM](#)

[TAPES & OTHER PRODUCTS](#)

[ARCHIVES](#)

[BOOKS AND MUSIC](#)

[FOR STATIONS](#)

[SPECIAL FEATURES](#)

[STORY IDEAS?](#)

[NEWSLETTER SIGN-UP](#)

[SEARCH](#)

[STUDIO RENTALS](#)

Living on Earth is an independent media program and relies entirely on contributions from listeners and institutions supporting public service. Please [donate now](#) to preserve an independent environmental voice.

For information on how to listen to audio on our website, [click here](#).

States Court of Appeals for the Third Circuit which involves several significant eastern states. I think the luck of the draw, or the bad luck of the draw, led him not to have very many cases.

GELLERMAN: The one that I found very curious had to do with machine guns, of all things.

LAZARUS: Right, that's the Rybar case. It was decided in 1996. That's a classic case which, on its own terms, obviously isn't about environmental law at all. But it's of potential significance to environmental law because in that case Judge Alito dissented from that ruling on the ground that Congress had exceeded its authority under the Commerce Clause.

Now, the reason that's so significant is that there are challenges being brought right now. In fact, there are two cases before the United States Supreme Court, a case called Rapanos v. United States and Carabell v. the United States. And in both those cases, individuals are claiming that the Clean Water Act may well be unconstitutional, for a rationale similar to that endorsed by Judge Alito in the Rybar case.

GELLERMAN: And that is that the Commerce Clause suggests that Congress has a role to play in interstate commerce, but not intrastate commerce?

LAZARUS: That's right. Now, we can't tell from the Rybar decision by itself what Judge Alito would do as Justice Alito in the Carabell case and the Rapanos case because, among other things, there's been some intervening Supreme Court precedent since then.

GELLERMAN: The intervening cases that have occurred since his ruling, have they overturned or sustained his rulings?

LAZARUS: Actually, the rulings since then have gone the other way. When Judge Alito wrote his opinion in 1996, the Supreme Court had just announced a very significant case called United States v. Lopez in which they had struck down a federal statute making a crime to possess a firearm within a certain number of feet from a public high school. And the Supreme Court had said that basically exceeded Congress' authority under the Commerce Clause.

Since then, and actually just last term, the Supreme Court announced a new ruling which I think everyone agrees cuts back on the Lopez ruling. What Judge Alito would do in light of that new Supreme Court ruling I think is an open question.

GELLERMAN: There's this case PIRG – Public Interest Research Group – versus a company, Magnesium Electron, that environmental groups seem to be concerned about.

LAZARUS: Yeah, that's a case that the Third Circuit decided in 1997. Judge Alito didn't write the opinion for the court, but he joined the majority opinion which dismissed the environmental citizens for lack of standing. "Standing" refers to a requirement that the courts say exists under Article Three of the Constitution which provides, as construed by the Supreme Court, that to bring a claim in federal court you have to prove an injury in fact.

And what the Third Circuit held, with Judge Alito joining, was that the environmentalists in that case had failed to prove an injury in fact. But it was the standard the Third Circuit applied, it was a very exacting standard, a very exacting injury standard, a kind of standard which, actually, environmentalists feared after the Magnesium Electronic case would make it very hard, if not impossible, in lots of cases for environmental citizen suits to be brought at all.

GELLERMAN: Professor Lazarus, if Mr. Alito is approved by the Senate, does that change the balance, do you think, in terms of the Supreme Court and its perspective on environmental law?

LAZARUS: I think it does change the balance in some ways. Justice O'Connor was a really interesting vote on the environment. She was generally a conservative individual in many ways, but there were certain areas in which she tended to sort of go to the other side. I'll give you a couple quick examples.

On questions of standing, for instance, the standing of citizens' suits. In a case called *Defenders of Wildlife v. Lujan* – actually, it was *Lujan v. Defenders of Wildlife* – in the early 1990s, in that case, in an opinion written by Justice Scalia, the court said *Defenders of Wildlife* lacked standing to bring a claim under the Endangered Species Act. Justice Blackman wrote a very passionate dissent in that case accusing the majority of engaging in a, quote, "slash and burn expedition" through the environmental law of standing. Justice O'Connor joined that opinion in that case. She joined the dissent.

Similarly, in the 1990s, in a case called *Babbitt v. Sweet Home*, the Supreme Court, in an opinion written by Justice Stevens, endorsed the idea that modification of the habitat of a species could constitute a take, an unlawful take, of a species. Justice Stevens wrote the opinion, but Justice O'Connor joined that opinion there as well, with Justice Scalia and Justice Thomas, among others, in dissent.

So, in a variety of areas Justice O'Connor really did move over. I think she had sensitivity to some kinds of environmental protection concerns. She was a real westerner. She grew up on a ranch in the west. She harbored sort of a natural suspicion, I think, of the federal government. She also had a real sensitivity and appreciation for the environment; a real love of the outdoors and of the beauty of the natural environment.

GELLERMAN: How is it possible, Professor, in this day and age, that someone does not have a personal opinion about environmental issues? How could they not influence a person's ruling on the bench?

LAZARUS: Well, I think that this Judge Alito, he may well love the environment, or not love the environment – although I don't know anything yet about his personal life and his habits and his passions in that respect. But I don't think there's any sense of him, as a professional, having some kind of ideological agenda one way or the other with respect to the environment.

But there is some truth in what you say. I actually do strongly believe that the kind of way you live your life, and if you spend a lot of your free time, basically, enjoying and loving the natural environment, I do tend to think that affects how you approach cases which involve

environmental issues. I think that's true. I think it was true for Justice O'Conner. I don't think we yet know enough about a Justice Alito to know, though, how that might influence him.

GELLERMAN: Professor Lazarus, thank you very much. I appreciate your time.

LAZARUS: Thanks a lot.

GELLERMAN: Richard Lazarus is a professor of law at Georgetown University School of Law in Washington, DC.

[LINKS TO RELATED STORIES](#)

[\\*\\*LOE EXTRA\\*\\* - In this web-only exclusive, Professor Cass Sunstein of the University of Chicago Law School talks about Supreme Court pick Samuel Alito's rulings on the environment \(audio only\)](#)

 [BACK TO TOP](#)

[COMMENTS SUBSCRIPTIONS](#)

Living on Earth wants to hear from you! Email us at [comments@loe.org](mailto:comments@loe.org), or call our listener line (1-800-218-9988). Our mailing address is:

Living on Earth  
20 Holland Street Suite 408  
Somerville, MA 02144-2749

 [BACK TO TOP](#)

Audio streaming [wbur.org](http://wbur.org)  
provided by Boston's NPR news source

 [HOME](#)

 [EMAIL](#)

 [SITEMAP](#)

 [SEARCH](#)

[This Week's Show](#)  
[About Living on Earth](#)  
[Where to Tune In](#)  
[Education](#)

[Archives](#)  
[Tapes & Other Products](#)  
[Books & Music](#)  
[For Stations](#)

[Story Ideas?](#)  
[Newsletter](#)  
[Donate](#)

Copyright © 2006 Living on Earth and World Media Foundation. All rights reserved. No portion of this transcript may be copied, sold, or transmitted without the written authority of World Media Foundation.