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The Environmental Opinions of Judge Samuel Alito

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Summary

The nomination of Judge Samuel A. Alito, Jr., to serve on the Supreme Court has prompted close scrutiny of his judicial opinions during 15 years as an appellate judge. A review of the 34 opinions in environmental cases in which Judge Alito participated generally reveals careful reasoning based on straightforward readings of statutes or regulations, without broad philosophical assertions. At the same time, a small number of his opinions arguably suggest endorsement of larger jurisprudential principles that may present hurdles to environmental plaintiffs (through narrow interpretation of a constitutional standing requirement), government enforcement (through stringent evidentiary requirements), and congressional legislating (through a narrow reading of the Commerce Clause).

The recent nomination of Judge Samuel A. Alito, Jr., to serve as an Associate Justice on the U.S. Supreme Court has generated considerable interest in his judicial opinions during his 15 years as an appellate judge. Judge Alito has served on the United States Court of Appeals for the Third Circuit since April 30, 1990.

This report is based on a review of all the reported environmental decisions of the Third Circuit in which Judge Alito was on the three-judge panel that initially decided the case, or in the en banc group of judges that heard the case on review of the panel decision.¹ It does not confine itself, as did the recently reported Washington Post study, to Third Circuit opinions in which there was a dissent.² We construe “environmental” broadly to include insurance coverage, Fourth Amendment, and other issues arising in an environmental context — and included 34 decisions in our review. Not surprisingly given the heavy concentration of industrial activity in some of the states within the Third

¹ As identified by the Federal Environmental Cases database in Westlaw.

² Amy Goldstein and Sarah Cohen, *Alito, In and Out of the Mainstream*, Wash. Post, Jan. 1, 2006, at A1. Divided opinions, reflecting as they do close questions of law, are generally assumed to be more representative of the type of issues of interest to the Supreme Court.

Circuit,³ fully a dozen of these decisions involve liability for cleanup of contaminated sites under federal or state “superfund” laws.

Judge Alito’s environmental decisions generally

Generally, Judge Alito’s environmental decisions are based on straightforward readings of statutes and regulations, with little disposition to infer rights or duties not clearly stated. They contain little in the way of broad philosophical statements. His opinions reveal no obvious bias either for or against environmental causes per se. In the 20 opinions out of 34 in which it seemed there was a clear “environmental” side to the arguments in the case, Judge Alito took the environmental side in ten, and took the contrary position in the other ten.⁴ This 50-50 split could be better interpreted, however, if we possessed information on whether it is typical of appellate judges generally.⁵

Suggestive of Judge Alito’s lack of any agenda in the environmental area is that with the exception of the insurance-coverage decisions, the cases reviewed showed no environmental decisions in which he dissented. That is, he was never “out on a limb” by himself. Similarly, of all the decisions reviewed, Judge Alito himself authored a majority or dissenting opinion in 11, but four of these arose in the four insurance-coverage decisions. Subtracting these out, Judge Alito wrote in only seven out of 30 environmental rulings in which he participated.

Judge Alito’s environmental cases found him favoring the prosecution side in criminal cases, as commentators have observed is typically his wont. For example, in two Fourth Amendment cases, Judge Alito joined unanimous panels upholding warrantless Coast Guard searches of vessels seeking evidence of unlawful oil discharges.⁶

³ The Third Circuit encompasses Pennsylvania, New Jersey, Delaware, and the U.S. Virgin Islands. See 28 U.S.C. § 41.

⁴ Decisions in which Judge Alito sided with the “environmental” argument include *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106 (3d Cir. 1997) (joining unanimous opinion upholding EPA denial of state’s request to redesignate area from nonattainment to attainment for ozone under Clean Air Act) and *ALM Corp. v. U.S. EPA*, 974 F.2d 380 (3d Cir. 1992) (joining unanimous opinion upholding EPA’s interpretation of Toxic Substances Control Act to authorize EPA to penalize failure to certify shipments).

Decisions in which Judge Alito sided with the “non-environmental” argument include *Clean Ocean Action v. York*, 57 F.3d 328 (3d Cir. 1995) (joining unanimous opinion upholding district court’s denial of preliminary injunction against ocean dumping, notwithstanding “serious error” by district court), and *W.R. Grace & Co. v. U.S. EPA*, 261 F.3d 330 (3d Cir. 2001) (joining two-judge majority opinion vacating as arbitrary and capricious an EPA emergency cleanup order under the Safe Drinking Water Act).

⁵ The Washington Post study, which does report data on appellate judges generally (1990-1996), aggregates environmental decisions with those on government regulation of land use, labor, and securities, and thus is not useful here.

⁶ *United States v. Varlack Ventures, Inc.*, 149 F.3d 212 (3d Cir. 1998); *United States v. Boynes*, 149 F.3d 208 (3d Cir. 1998). To similar effect is *United States v. Kalb*, 234 F.3d 827 (3d Cir. 2000), in which Judge Alito joined a unanimous panel upholding misdemeanor convictions for having held a 20,000-person gathering in a national forest without a permit.

Judge Alito’s decisions on larger jurisprudential issues likely to affect environmental cases

While Judge Alito’s decisions (authored or joined) reveal no obvious sentiment as to environmental suits per se, they arguably suggest his endorsement of larger jurisprudential principles that may present hurdles to environmental suits, agency enforcement, and congressional legislating.

1. Standing

Probably the most prominent of potential hurdles is Judge Alito’s view on standing, to the extent it can be inferred from his joining the two-judge majority opinion in *Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc.*,⁷ a Clean Water Act citizen suit. The majority opinion found that plaintiffs PIRG and Friends of the Earth could not establish “organizational standing” to challenge a manufacturer’s multiple violations of its NPDES permit⁸ through discharges into a creek that flowed into a canal and river. To establish organizational standing, black-letter law has it that these groups have to show that some of their members have standing to sue on their own — which, in the majority’s view, they could not do. It was not enough, said the majority, that four of the groups’ members fished and recreated less in the canal and river based on their concerns about the multiple upstream permit violations. Those members had not demonstrated *actual injury to the waterways*. (The court below had accepted the testimony of Magnesium Elektron’s expert limnologists, who found that the company’s discharges had not actually harmed the creek.) Recreating less without actual injury to the affected waterways, the majority said, does not satisfy the “injury in fact” element of the Supreme Court’s constitutional standing test.⁹

The view of “injury in fact” endorsed by the majority opinion joined by Judge Alito was a stringent one. It required a considerable evidentiary showing by plaintiffs in the threshold portion of their case — as to matters (harm to the environment) that were not part of the case on the merits (discharge in exceedance of permit limits, regardless of harm to the environment). Three years later, the Supreme Court came to the opposite view, coincidentally also in a Clean Water Act citizen-suit case. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,¹⁰ the Court held 7-2 that the relevant showing for Article III standing is not injury to the *environment* but injury to the *plaintiff*. “To insist on the former rather than the latter ... is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with

⁷ 123 F.3d 111 (3d Cir. 1997).

⁸ “NPDES” stands for National Pollutant Discharge Elimination System. The Clean Water Act requires a NPDES permit for any point-source discharge into navigable waters. See Clean Water Act § 402; 33 U.S.C. § 1342.

⁹ Along similar lines is the holding in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107 (4th Cir. 1999), reversed on rehearing en banc, 204 F.3d 149 (4th Cir. 2000). The en banc reversal came one month after the Supreme Court’s decision in *Laidlaw*, discussed in following text, and relies in part on that decision.

¹⁰ 528 U.S. 167 (2000).

an NPDES permit.”¹¹ The Court said that reasonable concern on the part of a plaintiff diminishing his/her recreational or aesthetic enjoyment of a resource is sufficient in and of itself to show injury in fact. Dissenting, Justice Scalia, joined by Justice Thomas, articulated a general demand for environmental injury as part of standing similar to that of the majority view joined by Judge Alito in *Magnesium Elektron*.

2. Agency evidentiary burden

As in *Magnesium Elektron* in connection with standing, Judge Alito appears to favor high evidentiary hurdles for agencies defending Administrative Procedure Act challenges — at least based on the key decision on point. In *W.R. Grace & Co. v. U.S. EPA*,¹² Judge Alito joined a two-judge majority opinion vacating as arbitrary and capricious an EPA emergency order under the Safe Drinking Water Act. The EPA order had sought to protect a city’s drinking water wells from an ammonia groundwater plume emanating from the company’s nearby fertilizer plant. In support of its ruling, the majority opinion contended that no technical study had been done to determine the appropriate ammonia standard, hence EPA’s adoption in the order of a 1.2 mg/l standard was unjustified. Moreover, the majority said, EPA provided no rational basis for selecting the remedy it chose (cleanup of the aquifer to 1.2 mg/l) when a consultant had concluded that another approach would also be effective. The dissenting judge argued that given the emergency public health context, a high degree of deference to EPA’s decision was called for, and given such deference the agency’s action was adequately justified.

In contrast with the foregoing evidence-intensive case, Judge Alito shows himself as more deferential to EPA when it comes to the agency’s interpretation of its statutory authority.¹³

3. Federalism: Commerce Clause

Many federal environmental statutes are based on Congress’ power under the Commerce Clause.¹⁴ That being so, the Supreme Court’s renewed interest in the Clause, as part of its renewed interest in the constitutional relationship between the federal government and the states generally, has been of special interest in the environmental area. Since the Court’s seminal Commerce Clause decisions in *Lopez*¹⁵ and *Morrison*,¹⁶ a flurry of litigation has challenged as beyond Congress’ power certain intrastate applications of the Clean Water Act, Endangered Species Act, Superfund Act, and Safe

¹¹ *Id.* at 181.

¹² 261 F.3d 330 (3d Cir. 2001).

¹³ See first two opinions, *Southwestern Pennsylvania Growth Alliance* and *ALM Corp.*, cited in footnote 5 *supra*. In the former case, the majority opinion stresses the importance of *Chevron* deference to the agency several times.

¹⁴ U.S. Const. art. I, § 8, cl. 3.

¹⁵ *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁶ *United States v. Morrison*, 529 U.S. 598 (2000).

Drinking Water Act.¹⁷ Indeed, two consolidated Clean Water Act cases explicitly raising Commerce Clause issues are now before the Court¹⁸; with oral argument scheduled for February 21, 2006, Judge Alito could conceivably be on the Court in time to participate in deciding these cases.

The importance of the Court's Commerce Clause jurisprudence has drawn much attention to Judge Alito's one judicial writing on the Clause. In *United States v. Rybar*,¹⁹ Judge Alito dissented from a two-judge majority opinion upholding as within Congress' commerce power a general federal ban on the possession or transfer of machine guns. His dissent concludes that the congressional ban fails each of the three established bases for Congress' invocation of its commerce power, and thus should be invalidated as currently written. Previously, several federal circuits had determined, under various rationales, that the ban was not a violation of the Commerce Clause. As noted in a separate CRS report, *Federalism: Selected Opinions of Judge Samuel Alito*, Judge Alito's dissent appears to be "an argument for a more limited interpretation of the Commerce Clause than is consistent with current case law."²⁰ The reader is referred to that report for extended analysis.

4. *Federalism: Eleventh Amendment and state sovereign immunity*

A second federalism-type constraint on Congress' power derives from the Eleventh Amendment. The arcane terms of this amendment have been read expansively by the Supreme Court to embody, but not to exhaust, broad principles of state sovereign immunity. The Amendment bars Congress from authorizing private lawsuits against the states, unless one of several exceptions applies.²¹ Of importance here is the exception allowing Congress to abrogate state sovereign immunity through its authority under section 5 of the Fourteenth Amendment to enforce the guarantees of that Amendment.

The Eleventh Amendment constraints on federal environmental statutes are limited in scope, and arguably much less important than those under the Commerce Clause should it be narrowed by the Supreme Court. The Amendment bars actions against only states, not their political subdivisions or nongovernmental actors, and only by private entities, not other states or the United States. Environmentally related private actions against states — those not covered by the Amendment's exceptions — arise principally in connection with non-sovereign state activity (e.g., state ownership of solid waste landfills). The Amendment has also insulated states from whistle blower actions brought under federal environmental statutes by state employees alleging retaliatory treatment by their state employers.

¹⁷ See generally CRS Report RL30670, *Constitutional Bounds on Congress' Ability to Protect the Environment*, by Robert Meltz, at 3-11.

¹⁸ *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *cert. granted*, 74 U.S.L.W. 3228 (Oct. 11, 2005) (No. 04-1034); *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 74 U.S.L.W. 3228 (Oct. 11, 2005) (No. 04-1384).

¹⁹ 103 F.3d 273 (3d Cir. 1996).

²⁰ CRS Report RL33214, *Federalism: Selected Opinions of Judge Samuel Alito*, by Kenneth R. Thomas and Todd B. Tatelman, at 15.

²¹ See generally Meltz report, *supra* note 17, at 28-38.

In *Chittister v. Dep't of Community and Economic Devpmt.*,²² Judge Alito wrote for a unanimous court holding that Congress, in enacting a provision of the Family and Medical Leave Act, had not validly invoked section 5 of the Fourteenth Amendment to abrogate state sovereign immunity. In contrast with his *Rybar* dissent on the reach of the Commerce Clause, this holding appears to be “consistent with Supreme Court precedent at the time.”²³ The reader is referred to the aforementioned CRS federalism report for extended analysis of the *Chittister* case.

²² 226 F.3d 223 (3d Cir. 2000).

²³ CRS Report RL33214, *supra* note 20, at 15.