

## **Excerpt of Alito's Hearing Transcript**

FEINSTEIN: OK, I'll let you off the hook on that one.

One of the reasons that some of us are so concerned about the commerce clause is because we see major law being overturned if the Rehnquist court continues its march. Let me give you an example in the environment. And these are cases that will be before you, so I don't expect you to comment on the case but to understand.

The Clean Water Act was passed in 1972, and it included a provision permitting citizens or citizen groups to bring lawsuits for violation of the act. In *Public Interest Research Group of New Jersey v. Magnesium Elektron*, a citizens environmental group sued a chemical manufacturer under the Clean Water Act for polluting a river used by members of the group.

The trial court found that the defendant committed 150 Clean Water Act violations. On appeal you were the decisive vote in a 2-1 decision overturning the trial court's decision, even though it was undisputed that the defendant committed the 150 violations of the Clean Water Act.

Your decision, as I understand it, was based upon your conclusion that the environmental group did not have standing to sue under the Clean Water Act because even though members of the environmental group had stopped using the river due to the pollution, they did not prove any injury to the environment.

The decision, if broadly applied, would have gutted the citizen lawsuit provision of the Clean Water Act.

Now, three years later, in *Friends of the Earth v. Laidlaw*, the Supreme Court, in a 7-2 decision, rejected this reasoning and held that a citizen only needed to show that he or she was harmed by the Clean Water Act violation. And didn't need to prove a broader injury to the environment.

FEINSTEIN: So you see where the concern comes with respect to overthrowing something on a technicality that can have enormous implications.

Do you agree with the Supreme Court's decision in *Friends of the Earth v. Laidlaw*.

ALITO: Well, it's a precedent of the court, and I have respect for it. And as you mentioned, it's governed by *stare decisis*, and as you mentioned, it was decided after the decision of my court in the *Magnesium Elektron* case, and I haven't gone back and thought about the question of whether *Laidlaw* creates doubt about the soundness of the decision in *Magnesium Elektron*.

If it does, then it does, and 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 if I concluded that it was in conflict with the decision of a prior court of appeals decision.

Our jurisdiction under the Constitution is limited to cases and controversies. The Supreme Court has said that means you have to have a plaintiff who has suffered injury in fact.

And although there was a disagreement on the panel about the procedure we should use going forward, everybody on the panel agreed -- Judge Roth and I who were in the majority and Judge Lewis who dissented on a procedural point that I'll get to -- that the plaintiffs in that case had not even alleged personal injury.

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. 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.

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LEAHY: I'm still having some difficulty in statements you've made about the unitary form of government and how you would apply it.

You suggested an answer to a question I asked. When people's rights are violated they should have their day in court. The court's are there to protect the rights of individuals. I don't think anybody in this room would disagree with that. It's the practice we look at.

In *PIRG v. Magnesium Elektron*, you concluded the Congress didn't have the constitutional authority to authorize citizens to bring a suit against a polluters under the Clean Water Act.

Whether the people had justiciable claims or not, there were a number of people downstream from the Magnesium Elektron. They said the water had been polluted. They brought a suit. You threw it out. Judge Lewis dissented; said it should have gone back to the lower court on the question of facts. I'll give you a two-part question. One, why did you send that back? And do you accept *Laidlaw* as being settled law?

ALITO: Well, Magnesium Elektron presented the question of whether we had a case or controversy under Article III -- and that's the fundamental limit on our jurisdiction. The Supreme Court has said that we do not have a case or controversy before us if we do not have a party that has constitutional standing, which requires injury in fact.

ALITO: And the issue was whether the plaintiffs in that case had established injury in fact.

There was a plant that was discharging certain things into a creek which eventually emptied into the Delaware River. And the plaintiffs in the case alleged that they enjoyed the Delaware River in a variety of ways -- they ate fish from the river, they drank water from the river, they walked along the river -- but there was nothing in the evidence -- and Judge Lewis agreed on this -- Judge Roth wrote the opinion. I agreed with Judge Roth and Judge Lewis with us on this point.

There was nothing in the record...

LEAHY: But didn't Judge Lewis agree with you on the legal point, but he suggested sending it back to the lower court to determine whether there were facts to give standing? I mean, we all agree, you can't be in a case if you don't have standing. But didn't Judge Lewis say, "Send it back to the lower court so they can determine on the facts whether there might be standing"?

ALITO: The evidence that was before us did not show that there was any standing on the part of the plaintiffs. There was no evidence of harm to the Delaware River in any way from the discharges and that was the basis of Judge Roth's opinion with which I agreed. As I recall, Judge Lewis's point was that the case should go back to the district court so that the plaintiffs could have an opportunity to present additional evidence. But as I recall, they were not even arguing before us that they had additional evidence. They were not arguing before us, as I recall, that, "We have additional evidence and we would like the opportunity to go back to the district court to present it." That's my recollection of the matter.

LEAHY: And the other part of my question is Laidlaw settled law?

ALITO: Well, Laidlaw is a precedent on the Supreme Court. And my answer to the question there is the same: It is entitled to the respect of stare decisis.