

The Honorable Arlen Specter  
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The Honorable Patrick Leahy  
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January 5, 2006

Dear Senators Specter and Leahy,

As law professors from across the United States, we write to express our opposition to the confirmation of Judge Samuel Alito to the United States Supreme Court.

Nominated by President Bush to replace moderately conservative Justice Sandra Day O'Connor, Judge Alito has a 15-year record of trying to push the law sharply to the right. According to the *National Law Journal*, Judge Alito "is described by lawyers as exceptionally bright, but much more of an ideologue than most of his colleagues."<sup>1</sup> Analyses show that in close cases – the kinds of cases the Supreme Court reviews – Judge Alito consistently takes positions that devalue individual rights and protections. And despite the president's pledge to nominate someone who embraces the principle of judicial restraint, Judge Alito often reaches his conclusions by overturning or weakening federal statutes, diminishing constitutional safeguards, and hollowing out precedent.

### ***Invalidating Federal Statutory Protections***

Judge Alito has sought to curb Congress' authority to tackle issues of national importance, voting to invalidate the federal prohibition on machine gun possession and part of the federal Family and Medical Leave Act. Republicans and Democrats alike have criticized both the Supreme Court and lower federal courts for voting to strike down federal protections without appropriately deferring to Congress as a co-equal branch of government. While several decisions in the past two years have slowed the trend, Judge Alito's record suggests that he would accelerate it once again.<sup>2</sup> There are several significant federalism cases already before the Court this term.

*Machine Gun Ban.* In *United States v. Rybar*,<sup>3</sup> Judge Alito argued in dissent that the federal ban on machine gun possession – which had been on the books in some form since 1934 – is unconstitutional Commerce Clause legislation. His colleagues accused him of disrespectfully requiring the "coordinate branches of government" to "play 'Show and Tell' with the federal courts at the peril of invalidation of a Congressional statute."<sup>4</sup> All of the other appeals courts that had considered the law in the wake of the Supreme Court's 1995 ruling in *United States v. Lopez*<sup>5</sup> agreed with Judge Alito's colleagues. Every court to have looked at the law since then has done the same, except one, and the Supreme Court

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<sup>1</sup> Joseph Slobodzian, *Third Circuit – Microcosm of Change*, NAT'L L. J., Dec. 7, 1992, at 1.

<sup>2</sup> As Jeffrey Rosen has noted, between 1995 and 2003 the Rehnquist court struck down thirty-three federal laws on constitutional grounds, doing so at a higher annual rate than any court in American history. Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, Apr. 17, 2005.

<sup>3</sup> 103 F.3d 273 (3d Cir. 1996), cert. denied 522 U.S. 807 (1997).

<sup>4</sup> *Id.* at 282.

<sup>5</sup> 514 U.S. 549 (1995).

summarily vacated that decision this year after issuing its decision in *Gonzales v. Raich*,<sup>6</sup> which rejected Judge Alito's cramped view of Congress' law-making authority.

*Family and Medical Leave Act.* In *Chittister v. Department of Community and Economic Development*,<sup>7</sup> Judge Alito held that Congress does not have the authority to give the country's nearly five million state employees the right to sue their employers for damages for violating the Family and Medical Leave Act's guarantee of personal unpaid sick leave. Facing a similar challenge in *Nevada Department of Human Resources v. Hibbs*,<sup>8</sup> the Supreme Court later found that a state employee can enforce his or her rights under the part of the law requiring employers to provide for family leave.

### ***Weakening Federal Statutory Protections***

Judge Alito has voted, often in dissent, to curb judicial enforcement of vital federal statutes, including the following.

*Title VII of the Civil Rights Act of 1964.* In several divided decisions, Judge Alito has also undermined Congressional intent by voting in dissent to make it harder to prove claims of job discrimination. In *Bray v. Marriott Hotels*,<sup>9</sup> Judge Alito unsuccessfully tried to keep a worker's claim of race discrimination from being heard by the jury. His colleagues in the majority asserted that anti-discrimination statutes "would be eviscerated if our analysis were to halt where [Alito's] dissent suggests."<sup>10</sup> In *Sheridan v. E.I. Dupont de Nemours & Co.*,<sup>11</sup> he was outvoted 10-1 by the *en banc* Third Circuit when he tried to get around precedent to throw out a jury verdict in favor of a worker claiming sex discrimination.

*Clean Water Act.* In *Public Interest Research Group, Inc. v. Magnesium Elektron, Inc.*,<sup>12</sup> Judge Alito voted to make it harder than Congress intended for citizens to establish standing to sue for toxic emissions that violate the Clean Water Act; in fact, he agreed that Congress lacked the authority to authorize certain citizen suits. Several years later, by a 7-2 vote in *Friends of the Earth v. Laidlaw*,<sup>13</sup> with only Justices Scalia and Thomas dissenting, the Supreme Court effectively rejected Judge Alito's position.

*Sherman Antitrust Act.* In *LePage's, Inc. v. 3M Corp.*,<sup>14</sup> Judge Alito voted in dissent to strike down a \$68 million jury verdict against 3M Corporation for violating the Sherman Antitrust Act by monopolizing scotch tape sales at the expense of a smaller competitor with less diverse product lines.

*Rehabilitation Act.* In *Nathanson v. Medical College of Pennsylvania*,<sup>15</sup> Judge Alito tried to raise the bar for proving disability discrimination. He dissented from a ruling finding that a disabled medical student had produced sufficient evidence to take to a jury her claim that she had to drop out because the school failed to provide her a seating arrangement that accommodated her disability. The majority

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<sup>6</sup> 125 S. Ct. 2195 (2005).

<sup>7</sup> 226 F.3d 223 (3d Cir. 2000).

<sup>8</sup> 538 U.S. 721 (2003).

<sup>9</sup> 110 F.3d 986 (3d Cir. 1997).

<sup>10</sup> *Id.* at 993.

<sup>11</sup> 100 F. 3d 1061 (3d Cir. 1996) (*en banc*).

<sup>12</sup> 123 F.3d 111 (3d Cir. 1997).

<sup>13</sup> 528 U.S. 167 (2000).

<sup>14</sup> 324 F.3d 141 (3d Cir. 2003) (*en banc*).

<sup>15</sup> 926 F.2d 1368 (3d Cir. 1991).

accused Judge Alito of raising the student's burden of proof to the point where "few if any Rehabilitation Act cases could survive" a defendant's motion to have a case dismissed before trial.<sup>16</sup>

*Immigrants' Statutory Rights.* In *Dia v. Ashcroft*, a majority of the full court accepted a Guinean citizen's asylum claims and said that Judge Alito's dissent "not only guts the statutory standard, but ignores our precedent."<sup>17</sup> In *Lee v. Ashcroft*, the court majority agreed with a Korean immigrant's claim that a conviction for filing a false tax return did not make him deportable and said that Judge Alito's dissent engaged in "speculation" about what Congress intended, in violation of the "well-recognized rules of statutory construction."<sup>18</sup> In *Sandoval v. Reno*,<sup>19</sup> Judge Alito wrote in dissent that certain aliens in custody could not seek waivers of their deportation orders in court; the Supreme Court rejected his view in *INS v. St. Cyr*.<sup>20</sup>

### ***Diminishing Constitutional Protections and Hollowing Out Precedent***

*Freedom from Illegal Search and Seizure.* In a series of cases, Judge Alito pushed to narrow the Fourth Amendment's protection against unreasonable search and seizure.<sup>21</sup> In *Doe v. Groody*,<sup>22</sup> for instance, he wrote in dissent that police officers did not violate the Constitution when they strip-searched a mother and her 10 year-old daughter – who were not criminal suspects – while executing a warrant that only authorized the search of the target of their investigation. Homeland Security Secretary and long-time federal prosecutor Michael Chertoff, then Judge Alito's colleague on the Third Circuit, wrote the majority opinion, asserting that if the court were to accept Judge Alito's theory that the judge who issued the warrant intended to authorize everything the police sought, even though the warrant he signed did not, it would "transform the judicial officer into little more than the cliché 'rubber stamp.'"<sup>23</sup>

*Women's Reproductive Freedoms.* In *Planned Parenthood v. Casey*,<sup>24</sup> Judge Alito wrote in dissent that he would uphold a Pennsylvania law requiring a woman in certain circumstances to notify her husband before obtaining an abortion. The Supreme Court, including Justice O'Connor, rejected that view. It found that the restriction placed an undue burden on women's reproductive freedom, saying that "women do not lose their constitutionally protected liberty when they marry."<sup>25</sup> Commentators from across the political spectrum believe that Judge Alito's dissent in *Casey*, together with his terse, seemingly grudging concurrences in other abortion cases, demonstrate that he disagrees with *Roe v. Wade*<sup>26</sup> and would, at the very least, uphold significant restrictions on the right to choose.<sup>27</sup>

*Right to Effective Counsel.* In *Rompilla v. Horn*,<sup>28</sup> Judge Alito evaded recently decided Supreme Court precedent to hold that a death row inmate's defense attorneys were not constitutionally ineffective, even though they failed to investigate key files containing important evidence about their client's

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<sup>16</sup> *Id.* at 1387.

<sup>17</sup> *Dia v. Ashcroft*, 353 F.3d 228, 251 n.22 (3d Cir. 2003) (*en banc*).

<sup>18</sup> *Lee v. Ashcroft*, 368 F.3d 218, n.11 (3d Cir. 2004)

<sup>19</sup> 166 F.3d 225 (3d Cir. 1999).

<sup>20</sup> 533 U.S. 289 (2001).

<sup>21</sup> Robert Gordon, *If You're a Liberal, You'd Prefer Scalia*, SLATE, Nov. 1, 2005 at <http://www.slate.com/id/2129107/>.

<sup>22</sup> 361 F.3d 232 (3d Cir.) *cert. denied*, 125 S. Ct. 111 (2004).

<sup>23</sup> *Id.* at 243.

<sup>24</sup> 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

<sup>25</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992).

<sup>26</sup> 410 U.S. 113 (1973).

<sup>27</sup> See Charles Lane, *Nominee's Reasoning Points to a Likely Vote Against Roe v. Wade*, WASH. POST, Nov. 2, 2005.

<sup>28</sup> 355 F.3d 233 (2004), *rev'd*, 125 S. Ct. 2456 (2005).

troubled childhood which may have persuaded a jury not to impose the death sentence. The dissent called the lawyers' performance "shocking," and Judge Alito's holding "inexplicable."<sup>29</sup> By a 5-4 margin, with Justice O'Connor casting the deciding vote, the Supreme Court rejected Judge Alito's conclusion. Justice O'Connor noted in a concurrence that the evidence the lawyers failed to investigate went to the "very heart" of the prosecution's case for the death penalty.<sup>30</sup>

*Right to Race-Neutral Jury Selection.* In *Riley v. Taylor*,<sup>31</sup> Judge Alito dissented from the full Third Circuit's grant of *habeas corpus* to a death row inmate who claimed that the prosecution violated the holding of *Batson v. Kentucky*<sup>32</sup> by using racially-motivated peremptory strikes to remove African Americans from the jury. Judge Alito said that inferring racial discrimination from the striking of every single potential black juror from all of Delaware's four first-degree murder trials during the year Riley was tried was no more reasonable than inferring an electoral preference for lefties from the hypothetical fact that five of the last six presidents happened to be left-handed. The majority condemned the analogy, writing that it ignored the underlying constitutional right and "minimize[d] the history of discrimination against prospective black jurors and black defendants . . . ."<sup>33</sup>

*Church-State Separation.* In *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*,<sup>34</sup> Judge Alito argued in dissent that a public school board could get around an earlier Supreme Court ruling, which barred school-approved, clergy-led prayers at graduation ceremonies, by allowing students to approve student-led prayers at graduation ceremonies. Effectively disagreeing with Judge Alito in *Santa Fe Independent School District v. Doe*,<sup>35</sup> decided several years later, a six-justice Supreme Court majority, including Justice O'Connor, held that a public school board policy of allowing student-approved, student-led prayers at public high school football games was unconstitutional.

The Supreme Court is the guardian of our rights and freedoms. For decades to come, Judge Alito's one vote could work significant changes in the law affecting these rights and freedoms. This is particularly true given that Judge Alito is nominated to replace Justice O'Connor, who has provided the swing vote in many important 5-4 decisions. Based on his fifteen-year record on the bench, we believe that Judge Alito would reshape the law in ways that make our country less equal and less free.

We urge you to reject the nomination of Judge Alito nomination to the Supreme Court.

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<sup>29</sup> *Id.* at 273-274 (Sloviter, J., dissenting).

<sup>30</sup> *Rompilla v. Beard*, 125 S. Ct. 2456, 2470 (2005) (O'Connor, J., concurring).

<sup>31</sup> 277 F.3d 261 (3d Cir. 2001) (*en banc*).

<sup>32</sup> 476 U.S. 79 (1986).

<sup>33</sup> *Riley*, 277 F.3d at 292.

<sup>34</sup> 84 F.3d 1471 (3d Cir. 1996) (*en banc*).

<sup>35</sup> 530 U.S. 290 (2000).

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