

# Society of American Law Teachers

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The Honorable Patrick Leahy  
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United States Senate  
Washington, D.C. 20510

January 9, 2006

Re: The Society of American Law Teachers' Opposition to the Nomination of  
Judge **Samuel Alito** to the United States Supreme Court

Dear Senators Specter and Leahy:

The Society of American Law Teachers (SALT) opposes - and urges all members of the Senate Judiciary Committee to vote against - the nomination of Judge Samuel Alito to the United States Supreme Court. SALT is the largest organization of law professors in the United States, representing more than 900 professors at more than 160 law schools. SALT has taken a position opposing only a very few judicial nominations. It did not oppose the nomination of Justice Roberts or Harriet Miers. However, it is deeply committed to civil rights, individual rights and liberties, and an interpretation of federalism that retains a robust role for Congress in protecting these rights. Judge Alito's work in the United States Department of Justice and fifteen year record on the United States Court of Appeals for the Third Circuit evidence his disregard for all three. Replacing Justice Sandra Day O'Connor with Judge Alito would result in the Court shifting profoundly to the right.

A Knight-Ridder comprehensive review of published opinions written by Judge Alito concluded that

Alito has worked quietly but resolutely to weave a conservative legal agenda into the fabric of the nation's laws... [His] record reveals decisions so consistent that it appears results do matter to him... [He] rarely supports individual rights claims... [and] often goes out of his way to narrow the scope of individual rights.<sup>1</sup>

While Judge Alito's opinions are devoid of explosive language and appear to reflect a dispassionate application of law to facts, he has used legal craftsmanship and existing precedent in the service of predetermined results. As Professor Lawrence Tribe has stated, "I simply make a plea to quit pretending that law, life and an individual's assumptions about both can be entirely separated...."<sup>2</sup> A judge's values, beliefs, and experiences do matter. Judge Alito has undermined the protections of civil rights laws, devalued individual rights, overturned or weakened federal statutes, and narrowly reinterpreted precedent in the name of dispassionate application of the law.

## *Undermining Civil Rights Protections*

### Employment Discrimination

Judge Alito has engaged in an effort to eviscerate the laws that seek to remedy violations of federal civil rights. This effort can be seen in particular in an evaluation of his opinions in the area of employment discrimination. Judge Alito has written opinions in eighteen employment discrimination cases and has sided with the plaintiff only four times, which includes one case in which he sided with white

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<sup>1</sup> Stephen Henderson & Howard Mintz, *Review of Cases Shows Alito to be Staunch Conservative*, KNIGHT RIDDER, Dec. 1, 2005 available at <http://www.realcities.com/mld/krwashinton/13305409.htm>.

<sup>2</sup> Professor Laurence Tribe, available at [http://www.savethecourt.org/site/c.mwKOJbNTJrF/b.1174435/k.wo53/Others\\_Raise\\_Red...](http://www.savethecourt.org/site/c.mwKOJbNTJrF/b.1174435/k.wo53/Others_Raise_Red...)

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police officers challenging an affirmative action policy.<sup>3</sup> He has evidenced deep skepticism about the legitimacy of most discrimination claims and an unwarranted belief that discrimination is rare in our society.

In three cases in which Judge Alito would have dismissed claims of harassment, he displayed a lack of understanding of the dynamics of harassment and hostile environment discrimination and their impact on a victim's workplace environment and psychological well-being. In one case, writing for the court, he upheld the exclusion of a report showing the harasser had previously harassed another woman because "the report in no way put the City on notice that Dickerson was harassing Robinson."<sup>4</sup>

In another case, *Pirolli v. World Flavors, Inc.*,<sup>5</sup> there was undisputed evidence that an employee with mental disabilities had suffered sexually motivated, physically abusive workplace harassment. The trial court dismissed Pirolli's claim, calling the quite horrifying harassment mere macho horseplay. In a 2-1 decision, the Third Circuit reversed and sent the case back for trial. Judge Alito dissented, not because Pirolli had failed to meet the legal standard for sexual harassment, but because his brief never explicitly asserted that he suffered from a work environment that a reasonable person without mental retardation would find hostile or abusive, even though all the necessary facts had been alleged. In other words, Judge Alito would have dismissed the case for sloppy brief writing. Additionally, he would have held Pirolli to a higher standard of reasonableness than the law requires. Judge Alito would have compared Pirolli to a reasonable person without mental retardation. The Supreme Court had previously emphasized in *Oncale v. Sundowner Offshore Services, Inc.*,<sup>6</sup> Justice Scalia writing for the majority, that the severity of the harassment is to be judged from the perspective of a reasonable person in the plaintiff's position - in this case, a reasonable person with a mental disability.

Lastly, in a dissenting opinion, Judge Alito would have excluded evidence crucial to the victim's discrimination case in *Glass v. Philadelphia Electric Co.*<sup>7</sup> Mr. Glass had worked for Philadelphia Electric for twenty-three years and received only one job evaluation less than satisfactory. He applied for and was denied many promotions. The employer explanation was based in part on the one sub-par evaluation Glass had received. Glass tried to present evidence that during that time period he was assigned to a position where he was subject to racial harassment and a hostile work environment. Amazingly, Judge Alito's dissent argued that allowing Glass to tell his side of the story might cause "substantial unfair prejudice"<sup>8</sup> and, the exclusion of the evidence was, in any case, harmless error.<sup>9</sup>

In several cases, Judge Alito would have granted summary judgment depriving plaintiffs of their right to trial by setting the evidentiary bar so high that it would be almost impossible for a plaintiff to survive summary judgment. In *Sheridan v. E.I. de Nemours and Co.*,<sup>10</sup> a hotel employee brought suit for sex discrimination in the failure to promote her. The District Court granted the employer summary judgment, and the case was appealed to the Third Circuit. The

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<sup>3</sup> *Hopp v. Pittsburgh*, 194 F.3d 434 (3d Cir. 1099).

<sup>4</sup> *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1306 (3d Cir. 1997).

<sup>5</sup> No. 99-2043 (3d Cir. March 12, 2001)(unpublished opinion).

<sup>6</sup> 523 U.S. 75, 81 (1998).

<sup>7</sup> 34 F.3d 188 (3d Cir. 1994), *reh. en banc denied*, 1994 U.S. App. LEXIS 27782 (3d Cir. 1994).

<sup>8</sup> *Id.* at 200.

<sup>9</sup> *Id.* at 201.

<sup>10</sup> 100 F.3d 1061 (3d Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997).

issue was how much evidence a victim of discrimination must present to get her case to trial. In an *en banc* 10-1 decision in which Judge Alito was the only dissenter, the majority overturned the grant of summary judgment and sent the case back for trial. The majority held that a plaintiff would survive summary judgment if she made her prima facie case and presented evidence of pretext to rebut the employer's evidence. Judge Alito would have disregarded the evidence in plaintiff's prima facie case if the employer presented evidence of a non-discriminatory reason for its action and would have required additional evidence of discrimination. Judge Alito's approach misinterpreted a Supreme Court case, *St. Mary's Honor Society v. Hicks*,<sup>11</sup> regarding litigants' shifting evidentiary burdens in Title VII cases. The majority's interpretation of *Hicks* was reaffirmed by the Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*<sup>12</sup> Although the dispute in *Sheridan* appears to be highly technical, it is central to whether victims of discrimination will have their day in court.

In another discrimination case in which Judge Alito dissented from the reversal of a grant of summary judgment, the majority said, "Title VII would be eviscerated if our analysis were to halt where the dissent suggests."<sup>13</sup> An African American woman was denied promotion and alleged race discrimination. The issue was whether the employer's evaluation that a white woman was the best candidate was the result of discrimination. In spite of conflicting evidence, Judge Alito would have simply accepted the employer's judgment of who was the best candidate. The majority accused Judge Alito of overstepping his judicial role and acting as a fact finder in resolving the conflicting evidence in favor of the employer.<sup>14</sup> Judge Alito's hostility toward some employment discrimination cases was reflected in his dissent:

I have no doubt that in the future we are going to get many more cases where an employer is choosing between competing candidates of roughly equal qualifications and the candidate who is not hired or promoted claims discrimination. I also have little doubt that most plaintiffs will be able to use the discovery process to find minor inconsistencies in terms of the employer's having failed to follow its internal procedures to the letter....[W]e are allowing disgruntled employees to impose the costs of trial on employers who, although they have not acted with the intent to discriminate, may have treated their employees unfairly.<sup>15</sup>

Taken together, these cases reflect a palpable hostility toward plaintiffs in employment discrimination cases.

### Discrimination in Jury Selection

Judge Alito has written troubling opinions in two death penalty cases where the defendants challenged jury selection as reflecting discrimination. The cases are troubling for three reasons, First, they reflect a general hostility toward civil rights. Second, they suggest that Judge Alito is among the most conservative judges when it comes to the death penalty (whereas Justice O'Connor was frequently the swing vote in capital cases). Third, one of the cases reflects Judge Alito's hostility to the use of statistics to prove discrimination. This hostility is most troubling because statistics have been an important element of proof in creating an inference of discrimination or a discriminatory impact.

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<sup>11</sup>509 U.S. 502 (1993).

<sup>12</sup>530 U.S. 133 (2000).

<sup>13</sup>*Bray v. Marriott Hotels*, 110 F.3d 986, 993 (3d Cir. 1997).

<sup>14</sup>*Id.* at 991.

<sup>15</sup>*Id.* at 1003.

While picking a grand jury in *Ramseur v. Beyer*,<sup>16</sup> the judge announced that he was not randomly selecting jurors because he was trying to pick a cross section of the community, instead asking some prospective jurors, including at least two African Americans, to sit separately in the body of the courtroom. An *en banc* divided Third Circuit ruled against Ramseur's claim of an equal protection violation. Judge Alito wrote a separate concurrence, making the astounding assertion that defendants have no constitutional basis to challenge a grand jury when certain racial groups were treated differently in order to get a cross section jury. Equally dismayingly, he suggested that defendants may not be able to assert rights of jurors who are the victims of discrimination with respect to grand juries (although the right is clearly established for challenges to petit juries<sup>17</sup>). Judge Alito reached well beyond what was necessary to decide the case in order to present radical ideas in dicta.

In *Riley v. Taylor*,<sup>18</sup> the defendant was convicted of felony murder and sentenced to death. Eventually he filed a motion in federal court challenging his conviction on numerous grounds, including that peremptory challenges were used impermissibly to strike jurors based on race. The full Court reversed his conviction, in part based on a violation of his constitutional rights with respect to peremptory challenges. Judge Alito filed a dissenting opinion. Ramsey presented evidence that all three of the potential Black jurors were struck in his trial and that prosecutors struck every potential Black juror in all four murder trials held the same year in Delaware County. Judge Alito completely discounted the statistical evidence, writing that inferring discrimination was no more reasonable than attempting to explain why a disproportionate number of recent presidents were left handed.<sup>19</sup> As the majority noted, the analogy ignored the underlying constitutional right and "minimize[d] the history of discrimination against prospective black jurors and black defendants."<sup>20</sup> Because of this history of discrimination, courts have consistently held that, barring another explanation by the defendant, statistics can aid in proving discrimination. Judge Alito's approach would completely discount reliance on statistics to help prove discrimination and would fly in the face of years of judicial decisions in discrimination cases.

### ***Endangering Core Legal Rights for Women***

In cases raising issues of gender discrimination, Judge Alito has written troubling decisions in which he appears to accept traditional notions of the subservient role of women in society and to deny the separate rights of women to control their own destiny.

Judge Alito's record, both prior to and subsequent to joining the bench, reflects clearly that he does not support the constitutional right to choose and that his elevation to the Supreme Court would endanger this fundamental right. In 1985, while in the Solicitor General's office, he wrote a memo offering his own strategy for using the government's brief in *Thornburgh v. American College of Obstetricians and Gynecologists* to 1) advance the goal of bringing about an eventual overruling of *Roe v. Wade*, and 2) in the meantime to mitigate its effects by upholding even the most burdensome barriers to abortion.<sup>21</sup> In the same year, Judge Alito submitted an application for a Justice Department promotion, wherein he wrote that he was particularly proud of his contributions in cases in which the government has

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<sup>16</sup> 983 F.2d 1215 (3d Cir. 1992) (*en banc*), *cert. denied*, 508 U.S. 947 (1993).

<sup>17</sup> See e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>18</sup> 237 F.3d 300 (3d Cir. ) *vacated and reh'g en banc granted*, 237 F.3d 348 (3d Cir.), *rev'd*, 277 F.3d 261 (3d Cir. 2001).

<sup>19</sup> 277 F.3d at 327.

<sup>20</sup> *Id* at 292.

<sup>21</sup> Memorandum from Samuel Alito, Assistant to the Solicitor General, to Charles Fried, Solicitor General, re *Thornburg v. American College of Obstetricians & Gynecologists*, No. 84-495; *Diamond v. Charles*, No. 84-1379," at 8 (June 3, 1985).

argued to the Supreme Court that the Constitution does not protect the right to an abortion.<sup>22</sup>

Judge Alito's record in the Third Circuit demonstrates that he has sought to implement his earlier views. In a concurring opinion rejected by the majority<sup>23</sup> and subsequently rejected by the Supreme Court in *Planned Parenthood v. Casey*,<sup>24</sup> Judge Alito would have upheld a requirement that a woman notify her husband before having an abortion. He discounted the liberty and bodily integrity of the woman while showing great concern for the husband's rights. Judge Alito's view that the spousal notification provision in the law caused no undue burden to women suggests that he believes a woman loses her autonomy rights when she marries. Even in two cases concerning abortion rights protections which had previously been struck down by the Supreme Court and in which Judge Alito was compelled to follow precedent, he wrote narrow concurring opinions to insure that there was no language that might support the upholding of *Roe* or inhibit the ability to further narrow the right to choose.

Just as Judge Alito has denied the liberty rights of women to control their bodies, his decision striking down the Family and Medical Leave Act demonstrates that he has no understanding of the distinctive burdens women face in juggling work and family.<sup>25</sup> Likewise, his opinions have demonstrated a lack of understanding of the dynamics of sexual harassment and its detrimental impact on victims of harassment.<sup>26</sup> Even in cases involving fathers of unborn children, Judge Alito's solicitude seems to apply only to married couples. He has shown a lack of sympathy for protection of people and couples who are unmarried. In an immigration case, Judge Alito held that it was justifiable to permit a husband, but not a fiancé, to contest a woman's deportation to China where she fears coerced abortion of the couple's unborn child. In another asylum case, Judge Alito denied asylum to an Iranian woman who asserted she would be persecuted for refusal to wear the traditional veil and for her feminist beliefs if she returned to Iran.<sup>27</sup> While acknowledging that an asylum claim can be based on gender-based persecution, Judge Alito was not convinced that she would be willing to actually defy the authorities and therefore suffer the severe consequences alleged. In other words, a woman must show her willingness to become a martyr in order to prevail in the typical gender-based asylum case.

#### ***An Expansive View of the Police Power at the Expense of Individual Rights***

Judge Alito has advanced an expansive view of the police power. His 1985 application for promotion within the Department of Justice expressed his disagreement with Warren Court decisions concerning criminal procedure. Since ascending to the Third Circuit, he has in criminal cases consistently deferred to state courts, police, and prosecutors. In particular, he has written a series of decisions narrowing the Fourth Amendment protection against unreasonable search and seizure.<sup>28</sup> Judge Alito has sat on at least twelve panels in which judges agreed regarding a citizen's Fourth

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<sup>22</sup> Samuel A. Alito, Attachment to PPO Non-Career Appointment Form (Nov. 15, 1985) [hereinafter 1985 Job Application].

<sup>23</sup> *Planned Parenthood v. Casey*, 947 F.2d 682, 720 (3d Cir. 1991), judgment *aff'd in part, rev'd in part* by 505 U.S. 833 (1992).

<sup>24</sup> 505 U.S. 833.

<sup>25</sup> See p.7 *infra*.

<sup>26</sup> See p.2 *supra*.

<sup>27</sup> *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

<sup>28</sup> Robert Gordon, *If You're Liberal, You'd Prefer Scalia*, Slate, Nov. 1, 2005 at <http://www.slate.com/id/2129107/>.

Amendment rights. In each case, Judge Alito adopted the view most supportive of the government's position.<sup>29</sup>

One of the most troubling examples of Judge Alito's expansive view of law enforcement authority is his dissent in *Doe v. Groody*,<sup>30</sup> where he voted to approve the strip search of a mother and her ten-year-old daughter, even though the search warrant obtained by the police did not name or refer to either of them. As then Judge Michael Chertoff wrote, Judge Alito's position threatened to turn the Constitution's search warrant requirement into little more than a "rubber stamp."<sup>31</sup>

Other dissenting decisions of Judge Alito suggest that he views individual and other constitutional rights as stopping at the prison door. He would have upheld a Pennsylvania law prohibiting certain inmates from having newspapers, magazines, and photos of their family and friends.<sup>32</sup> In a death penalty case, Judge Alito wrote an opinion for the court rejecting a claim of denial of the right to effective counsel.<sup>33</sup> In the sentencing phase of the trial, the attorney had failed to look at materials he knew would be relied on by the prosecutor, materials that would have revealed a range of mitigation leads. The Supreme Court overturned Alito in a 5-4 decision with Justice O'Connor in the majority.

***Extreme View of Federalism and Separation of Powers That Would Limit the Role of Congress in Protecting the Health, Safety, and Welfare of Citizens and Give Unwarranted Power to the Executive Branch***

Limiting the Role of Congress

Judge Alito has written two opinions that reflect an extreme view of the limits of congressional power to pass legislation. He voted to invalidate the federal prohibition on machine gun possession and part of the federal Family Medical Leave Act. His decisions are consistent with his 1985 application to be Deputy Assistant Attorney General, in which he wrote that he "believe[s] very strongly in...federalism."<sup>34</sup>

In *United States v. Rybar*,<sup>35</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. The Commerce Clause undergirds many of the most important civil rights, consumer protection, worker protection, and environmental protection laws. Judge Alito argued that the majority's theory would lead to the conclusion that Congress may ban purely intrastate possession of just about anything.<sup>36</sup> He rationalized his decision in part by claiming that there were no congressional findings or statutory bases for the law, thus imposing a new stringent fact-finding requirement for Congressional justification of its laws. He ignored common sense - the facts involved a licensed gun dealer selling machine guns at a gun show - transactions which involved interstate commerce. Additionally, he ignored references in

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<sup>29</sup> *Id.*

<sup>30</sup> *Doe v. Groody*, 361 F.3d 232 (3d Cir.), *cert. denied*, 125 S. Ct. 111 (2004).

<sup>31</sup> *Id.* at 243.

<sup>32</sup> *Banks v. Beard*, 399 F.3d 14 (3d Cir. 2005).

<sup>33</sup> *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004), *rev'd*, *Rompilla v. Beard*, 2005 U.S. LEXIS 4846 (June 20, 2005).

<sup>34</sup> 1985 Job Application.

<sup>35</sup> 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997).

<sup>36</sup> 103 F.3d at 291.

conference reports and on the floor of Congress concerning the ban's effect on interstate commerce. Judge Alito's colleagues accused him of institutional disrespect by requiring the "coordinate branches of government" to "play" show and tell with the federal courts at the peril of invalidating congressional statutes.<sup>37</sup> All of the other appellate courts which had considered the law in the wake of *United States v. Lopez*<sup>38</sup> agreed with Judge Alito's colleagues, and all but one court to have looked at the law since then has done the same. The Supreme Court rejected Judge Alito's restrictive view of Congress' lawmaking authority in *Gonzales v. Raich*.<sup>39</sup>

In another case concerning Congress' lawmaking authority, Judge Alito again advocated an extremely narrow view of congressional power. *Chittister v. Department of Community and Economic Development*<sup>40</sup> involved a state employee who sued for damages under the Family Medical Leave Act (FMLA) when his sick leave was revoked and he was terminated from his job. Congress claimed the authority to pass the FMLA under section 5 of the Fourteenth Amendment on the grounds that the Act attempted to remedy sex discrimination by allowing women to take leave without sacrificing their jobs.<sup>41</sup> Judge Alito held that Congress does not have the authority to give state employees the right to sue their employers for damages for violating the FMLA. He rejected the justification that the FMLA addressed sex discrimination and claimed that Congress had failed to make any findings that state statutes had discriminated against women. The preamble to the statute explicitly states that the purpose of the Act is to remedy sex discrimination. There is of course, a long history of litigation striking down state statutes disadvantaging women in the workplace. Nevertheless, Judge Alito would require Congress to engage in fact finding specifically directed at the FMLA. The Supreme Court upheld Congress' power to enact the FMLA in complete contradiction to what Judge Alito had held, in *Nevada Department of Human Resources v. Hibbs*.<sup>42</sup>

#### Advocating an Expansive Scope of Executive Power

Since the Nixon Administration, the country has witnessed a legal battle concerning the scope of presidential authority under our Constitution. The present administration advances an extreme, expansionist theory of the scope of presidential power, both foreign and domestic. The theoretical underpinnings for the concept of the "unitary presidency" have been developed by writings of the Federalist Society. Judge Alito's 1985 application to serve as Deputy Assistant Attorney General in the Office of Legal Counsel (OLC) boasts of his regular participation in the Federalist Society, an involvement which continues to this day.<sup>43</sup> OLC, during his tenure, was the source of radical thinking about expansive presidential power. For example, OLC opined that the executive branch could ignore congressionally authorized procedures for federal procurement and determined that the President had constitutionally unfettered authority to determine when to tell Congress of his covert initiative with regard to Iranian arms sales - even though the power to regulate foreign trade is an express congressional authority.

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<sup>37</sup> *Id.* at 282.

<sup>38</sup> 514 U.S. 549 (1995).

<sup>39</sup> 125 S.Ct. 2195 (2005).

<sup>40</sup> 226 F.3d 223 (3d Cir. 2000).

<sup>41</sup> The FMLA allows both men and women to take leave. The legislation was enacted against a history in which women disproportionately jeopardize their jobs to act as care givers in times of family illness. Both men and women are covered by the Act to comply with Fourteenth Amendment equality requirements and in the hopes that providing men leave would encourage them to share more of the burden of care giving.

<sup>42</sup> 538 U.S. 721 (2003).

<sup>43</sup> 1985 Job Application

In memoranda which Judge Alito wrote during his time at the Justice Department, he argued in favor of expanded government authority. For instance, he advised the FBI that it was not bound by two district court decisions, one restricting the Bureau's power to investigate employees whose jobs were not critical to national security,<sup>44</sup> and the other suggesting that the FBI could decline to transfer certain electronic records to the National Archives and Records Administration.<sup>45</sup> He also argued that cabinet officials who authorize illegal wiretaps of Americans in this country to gather intelligence about terrorist activities were entitled to absolute immunity from legal liability.<sup>46</sup>

During his years on the bench, Judge Alito has been extremely deferential to assertions of executive authority, particularly in the area of criminal law, and has gone out of his way to place limitations on Congress's legislative powers. It is this line of thinking that has spawned 1) unprecedented claims of executive privilege, 2) claims of authority to engage in torture, 3) claims to hold U.S. citizens indefinitely as enemy combatants and foreign nationals as enemy combatants in Guantanamo Bay without any right of review of that designation, and now 4) an apparent pattern of flagrant violations of the Foreign Intelligence Surveillance Act by sanctioning domestic wiretapping without obtaining a warrant.

### ***Conclusion***

With the retirement of Justice O'Connor, the direction of the Court stands in the balance. Judge Alito's record demonstrates that he would shift the court radically rightward. His vision of federalism and separation of powers would dangerously expand the power of the executive and the states; shrink the power of Congress to protect the health, safety, and welfare of this nation's citizens; and diminish the role of the courts in guarding against discrimination and undue government intrusion into individual rights. Judge Alito's opinions show an alarming detachment from real life and real people. His opinions are ahistorical and reflect a lack of empathy for or appreciation of the human condition and the role of courts in protecting the rights of minorities.

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

Sincerely,

Eileen Kaufman  
Co-President

Tayyab Mahmud  
Co-President

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<sup>44</sup> Memorandum from Samuel A. Alito to Joseph R. Davis, Assistant Director re: Personnel Security Investigations (Sept. 9, 1986) at 1. The decision at issue was *Flake v. Bennett*, 611 F. Supp. 70 (D.D.C. 1985).

<sup>45</sup> *American Friends Service Comm. v. Webster*, 720 F.2d 29, 76 n.75 (D.C. Cir. 1983); Memorandum from Samuel A. Alito to Richard K. Willard, Assistant Attorney General re: Authority of FBI to Transfer Restricted Records to the National Archives and Records Administration (Feb. 27, 1986) at 2.

<sup>46</sup> Memorandum from Samuel A. Alito to the Solicitor General re: *Forsyth v. Kleindienst* (June 12, 1984) at 5.