

13 January 2006

~ POSITIONS & COMMENTARY  
ON JUDICIAL CONFIRMATION ~

attn: U.S. Senators  
Senate Judiciary Committee  
Concerned Public & Press

OPPOSING ALITO – THE ILLOGIC OF THE JURISPRUDES

On behalf of associates and supporters deeply concerned for the future of constitutional law, and alarmed at its current course, *PCU\_/Free Assembly Project* calls upon all U.S. Senators to *reject* the nomination of Samuel Alito to the Supreme Court.

At this juncture as the Judiciary Hearings conclude, it is clear how much is at stake. We are moved by urgency to speak up now and re-frame key issues on the table... these cogent points should stir new considerations, and contribute to meaningful debate on the Senate floor:

•• Chilling First Amendment Rights:

Many opinions on a judicial appointment are hypothetical or 2nd-hand, but this position is pointed, direct, and personal: Alito was on the 3rd Circuit panel that reviewed a pivotal First Amendment appeal from a District Court trial in Erie, which I observed. Based on the ruling in which he concurred, three friends, good people, were then sent to Federal PRISON for no more than exercising the right of assembly. U.S. v. Kalb, 234 F.3d 827, 833 (3d Cir. 2000).

At the heart of this case were issues of official bias, fraud, and 'compelled association' in Federal restrictions against expressive assemblies in the National Forests (36 CFR 251.54). It was much about the discretion of Federal officers to target these people as 'leaders' of an alleged 'group' that did not exist, entrap them as 'de facto agents' refusing to sign a permit on its behalf, and charge them as 'criminals' under this regulation, *at will*.

It is most significant that Alito supported such extreme police powers against 1st Amendment rights, and ignored the 'prior restraint' test that should have applied in judgment – with the further effect of subverting the core principle of *personal standing* under criminal law & the Constitution. It is also telling he could only uphold these convictions by ignoring the trial record and strong arguments in the briefs, and transposing blind dicta from other cases. This is *not* what a judge is supposed to do – much less the work of an insightful or disciplined legal mind.

•• judicial and Executive Powers:

The Kalb case shows Alito's priorities in a most revealing light – knee-jerk expansion of police powers in lieu of rigorous scrutiny to protect speech, altering accepted standards of review. Other critics have noted his pro-police bent in rulings affecting Fourth Amendment rights. This pattern bears upon his pretenses as a 'Conservative' jurist, and his proclivities on the 'war powers' of the Executive branch, with major issues impending before the Supreme Court.

It's a deep irony that Alito is marketed to Conservatives, for whom the belief in '*small-government*' is a unifying legacy – yet his record stands starkly at odds with these ideals: His consistent rulings for maximum police power foster the most sweeping and intrusive Big Government, by definition. In fact this is the common thread among 'Neo-Con' judges of this breed, an ideological bait-&-switch that politically exploits the loyalties of these constituents, and betrays them.

The nexus to current events is profound, given the understated premise of the Constitution, derived from English law: Police agencies are part of the Executive branch, and their powers accrue in the Presidency, now to an unprecedented extent. There are huge controversies at-hand – over detainees held without due process, extraordinary rendition & torture abroad, domestic surveillance, suppression of political dissent, and the sanctions of military courts and secret tribunals. The Bush administration

is invoking the President's war powers to justify these devices, and arguing their necessity for 'national security' in the 'Post-911' world. Yet they are throwbacks to the antiquated legal logic and inquisitorial powers of the "Star Chamber" courts abolished by the English Parliament in 1641 – and banished by the U.S. Constitution 150 years later. At stake are the very foundations of American law.

Alito's embrace of unbounded police powers predicts his stand on Executive powers – and this is probably the real reason he was nominated. He is at heart an ardent federalist, his career indebted to presidential favors and dedicated to blurring the separation of powers. This further belies his ruse of a 'conservative' philosophy banked on *judicial restraint* – which would limit the jurisdiction of a federal judge as an exercise of government power strictly limited by the Constitution. In fact Alito and his ilk are the most strident 'activist judges', perhaps the most glaring hypocrisy of this debate.

•• Patronage Views on the Bench:

There are widespread fears of Alito's views on abortion, ecology, corporations, and rights. The media tend to cast the contentions as just more partisan politics, but this distracts us from the obvious thing that is more profound: The big news is that this debate comes up at all, that the infusion of ideological views into the courts is now an issue in confirming a Federal Judge: By definition, personal politics should be out of the picture, in accord with the historic mandate upon judges *and* their appointment... and this gets to a core paradox.

It's pointless to lob Alito softballs in the hearings, asking to be assured that his views will never ever enter his rulings as a judge – which of course he will readily extend – so Senators should not be wooed in this way. Given human nature, it is naive to believe that any judge's discretions wholly exclude personal views... the honest ones who respect this standard will at least admit this. However where the core tenet of Alito's views – and indeed, his *career* – is that ideological politics can and should be imposed by judicial powers, such belief is just blithe and dumb.

Realize that he rose in the ranks on just this proposition, as a job applicant and regime lawyer under Reagan, then as a Federal Judge. No question he has "credentials", but if he landed every legal job on the favor of political patrons, this is a red-herring issue. What is defining is that Alito advanced on the premise & pledge of politicizing the Courts for partisan ends, and the record of ideological rulings is apparent. So it is absurd to entertain promises that he would never do this, or speculations that he might change this conduct as a Supreme Court Justice. If demonstrated legal merit, scholarship, and objectivity are essential qualifications for the job, Alito is demonstrably unfit.

•• Tactics of Nondisclosure:

Media pundits have purveyed discussions on Alito's performance in the Hearings and the process overall, measured by what he *does not say* – i.e., his tactical ability to reveal little or nothing of his judicial views, in order to be confirmed. Maybe this serves our insight into the political interests in play, but it is also a most cynical and deceiving analysis, where the central purpose of all these proceedings is *disclosure* of such views, to the greatest extent possible. By validating such tactics, making them part of the game, Senate oversight and public transparency are subverted.

A frequent cover line is that a judicial nominee ought not speak of legal matters that may come before the court. This is vexing, since any and all legal matters *could* come up, and moreover these are precisely the views that Senators and Citizens *need to know*. This inquiry need not prejudice subsequent rulings, for it goes to legal theories on the issues, and the nominee's aptitude and tilt – not the facts or outcome of any case. Then if withholding such discussion is simply a custom of propriety unsupported by law, it defeats the intent of the review process.

Where Alito is known to have expressed extreme views as a Reagan lawyer, Senators should not be lulled by disclaimers that such statements are solely matters of attorney-client colloquy, or things of the past, and will not affect his rulings as a judge. Of course it is humanly absurd to assume that personal views vented, vested, and paid for in the past might not enter one's logic later on. More important, judges are lawyers first and foremost, officers of the court and under oath from the outset, so this is no excuse: If Alito has a history of advising his presidential 'clients' on how to break, bend, or circumvent the law, this is within the scope of Senate review, and fair game for critique.

•• The Anti-Abortion Trap

Much debate has focused on Alito's known anti-abortion views, and how he is pre-disposed on such issues coming before the Supreme Court. In the hearings, there were arcane crossfires on whether *Roe v. Wade* is settled or mutable law... Alito either hedged the question, or didn't get it:

In the doctrine of *stare decisis*, the test of deference goes beyond the mere fact that a prior court ruling was made and reaffirmed. A ruling stands through time because it secures enduring principles and protections of the Constitution; it supercedes precedents that failed to do so, and there is no turning back. The example made of *Brown v. Board of Education*, though intended to diminish the weight of precedent behind *Roe*, actually reinforced this concept: *Brown* gave force to the 'equal protection' clause of the 14th Amendment, regardless of discriminatory laws upheld in the past. It remains a landmark decision by upholding basic rights, and is irreversible on this strength.

The same principle of *stare decisis* applies to *Roe*, which also affirmed rights denied before – protections against government intrusion upon personal and medical privacy, ethical beliefs, and the wellbeing and choices of women in their lives. To be clear, the question at stake is not whether abortion is good or bad... the real issue is the reach of government power, and its use to enforce religious precepts upon other citizens.

Typically, Alito's answer was disingenuous: A Judge cannot "keep an open mind" about fundamental rights, as if they were negotiable. If any question is resolved and closed under American Constitutional law, it is that government powers are strictly limited, and that rights are to be preserved – including those stated by the framers, and 'rights retained by the people' they could not enumerate or foresee, as the Ninth Amendment provides. Their understanding on the nature of a *free society* is profound in this regard. They knew immanently that its sustenance and ultimate progress lay in the ability of citizens to make intelligent choices in personal & civil life... and that government, by definition, is unfit for such choices, and cannot incur upon them.

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In sum, the nomination of Samuel Alito to the Supreme Court is inimical to basic principles of law, and the constitutional mandates of the President and Senate.

We join many in opposition, with caution to the invocation of some "to keep the values and integrity of the Supreme Court intact...": In truth, the horse is way out of the barn... our Federal Courts are already stacked with partisan appointees and agendas of power – all the '*NeoCon-Artists*' going back to the Nixon era. Much damage is already done, and keeps happening.

So, stopping Alito will not save the Supreme Court... that is a big job for the long haul. However an informed public demands that true standards of judicial practice be upheld *here & now*, and the U.S. Senate is obligated to this purpose. What it CAN do is affirm the "values and integrity" of the American People, and send a vivid enduring message to every American Judge.

in Respect & Justice,



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