



January 20, 2006

Honorable Arlen Specter, Chairman
Honorable Patrick Leahy, Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20010

Dear Senator Specter and Senator Leahy:

After carefully reviewing the record of the Committee's recent hearing, the National Senior Citizens Law Center opposes confirmation of Judge Samuel Alito to the Supreme Court. Prior to the hearing, NSCLC issued a statement, based on Judge Alito's Third Circuit opinions, raising concerns about his record on major questions affecting the needs of older Americans. In that statement, we observed that the question is simple:

Will he be a principled conservative who leaves policymaking to Congress and is willing to uphold and enforce the landmark safety net, civil rights, and consumer protection laws enacted in the 20th century? Or is he a conservative activist who will use his new power to restrict congressional authority to enact, and to deny seniors . . . the ability to enforce, laws on which they depend?

The concerns we raised significantly parallel concerns about judicial activism in the guise of "federalism," stressed by several members of the Committee, representing both political parties, in questioning both Chief Justice John Roberts in his September 2006 hearing and Judge Alito. But unlike Chief Justice Roberts, Judge Alito – despite numerous opportunities – did little to dispel, and in certain respects actually exacerbated, these concerns. So there is now no choice but to conclude that, as a life-tenured member of the Supreme Court, Judge Alito is likely to threaten guarantees of health and economic security, and equal opportunity, on which senior Americans have long depended.

We reach this conclusion reluctantly. The National Senior Citizens Law Center has rarely taken positions on judicial nominations. We have never, until now, opposed a Supreme Court nominee. As indicated above, we did not oppose Chief Justice Roberts. Furthermore, we in no way dispute Judge Alito's integrity, intellect, dedication, or his professional qualifications as a lawyer and a judge. But the most significant question ultimately is the impact that, if confirmed, Judge Alito is likely to have on the substance of the law and the needs of American citizens.

The specific questions that we identified in our pre-hearing statement, which we further evaluate

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here, are these:

No Patient Enforcement of Medicaid Act? In 2003, in *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004), Judge Alito ominously went out of his way to predict that in the future Medicaid patients may not be allowed to enforce their rights under the Medicaid Act. In a concurring opinion, he joined his appellate court in reversing a lower court's decision which would have closed courthouse doors to Medicaid patients, even if their statutory rights had been flagrantly violated, despite Congress's endorsement of the critical enforcement role played by individual court actions over the 40 year history of the Medicaid Act. However, in doing so, Judge Alito volunteered his view that "the analysis and decision of the District Court may reflect the direction that future Supreme Court cases in this area will take...."

Judge Alito's comment suggesting that future Supreme Court decisions may bar enforcement of the Medicaid Act case is seriously troubling to seniors for obvious reasons. The Medicaid Act requires state Medicaid programs to cover nursing services or home or community based alternatives. Medicaid pays for 58% of American nursing home residents, and increasingly is being used to provide assistance to seniors who need help but are able to stay at home. The Medicaid Act also includes the Nursing Home Reform Act, which protects all nursing home residents in the nation. Almost seven million of the nation's seniors are "dual eligibles," who cannot meet their health needs without coverage by Medicaid as well as Medicare. But as the baby boomers age, states are looking for ways to avoid the requirements of federal law. If individuals could not enforce the Medicaid law, those requirements could be meaningless in practice. It would then be unrealistic to continue characterizing the nation's 50 million Medicaid beneficiaries as "insured."

Judge Alito's concurrence seems instructive concerning both his approach to appellate judging and his likely posture on the Supreme Court. As an appellate judge, to his credit, he was evidently able to subordinate his own preferred, narrow view of the law to Supreme Court precedent. That the District Court's across-the-board bar on citizen Medicaid enforcement suits is his preferred view seems strongly indicated, because: (1) there was no apparent reason for him to state that *future* Supreme Court decisions may change current law; and (2) there was little concrete basis for his forecast, since, as his colleagues noted, solid Supreme Court majorities had repeatedly, and only a year before, rejected such a bar. Hence, his "forecast" seems more like wishful thinking. Our concern here is not only based on the *Sabree* decision, but also Judge Alito's documented tendency to side against individuals in disputes with the government. As a critical vote on the Supreme Court, where he will feel far less pressure to abide by disagreeable controlling precedent, Judge Alito will be well positioned to literally turn his grim forecast about the unenforceability of the Medicaid Act into a self-fulfilling prophecy.

Roll Back Commerce Clause Authority? The Commerce power is the most critical source of congressional authority to enact laws important to seniors, including the Americans with Disabilities Act and the Age Discrimination in Employment Act. Upholding Congress's commerce power is especially important to seniors and individuals with disabilities because the Supreme Court has in recent years drastically restricted Congress's Fourteenth Amendment power to protect those individuals.

In his dissent in *United States v. Rybar*, 103 F.3d 273, 286 (1996), Judge Alito split with two judges on the Third Circuit, and disagreed with six other circuit courts of appeal, when he voted to find that Congress exceeded its power under the Commerce Clause when it banned possession of machine guns. He disregarded the majority's view that Congress could rationally find widespread machine gun possession as a serious threat to interstate commerce, and he brushed aside years of congressional reports as "snippets." In this year's medical marijuana case, *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), the Supreme Court rejected Alito's restrictive approach to Congress's commerce power by a six (including Justices Scalia and Kennedy) to three majority.

Judge Alito's dissenting vote to invalidate the federal machine gun law was not by any means dictated by precedent. He reached out for a radical interpretation of the governing Supreme Court decision, *United States v. Lopez*, 514 U.S. 549 (1995), to further his own subjective philosophical goal of "protect[ing] our system of constitutional federalism." His idiosyncratic view was rejected by his two Third Circuit colleagues, six previous circuit court decisions, by the Supreme Court itself in 2005, as noted above, and also by Chief Justice John Roberts in his recent confirmation hearing.

On this important issue, the contrast between Judge Alito's hearing performance and that of Chief Justice Roberts seems particularly revealing and particularly disturbing. Chief Justice Roberts went out of his way to state that the Supreme Court's 2005 medical marijuana decision definitively rejected the interpretation embraced by Judge Alito in his *Rybar* dissent, that cast the 1995 *Lopez* decision as a radical new departure. In contrast, Judge Alito declined to seize the opportunity to acknowledge that his position had been superseded. On the contrary, he continued to defend his *Rybar* dissent, along with its underlying reasoning. This response suggests that he may continue to promote that position on the high Court, and aggressively champion retrenchment of Congress's domestic social and economic regulatory authority.

Neutralize Equal Opportunity Guarantees? As retirement security erodes, and tenure in the workforce lengthens, older Americans increasingly require the assurance of equal opportunity that they receive from civil rights laws like the Age Discrimination in Employment Act and the Americans with Disabilities Act. One of the most troublesome aspects of Judge Alito's Third Circuit career is his persistent pattern of dismissing employment discrimination claims and not allowing plaintiffs to present their evidence to juries. In rejecting such claims, he has articulated evidentiary standards virtually requiring "smoking gun" evidence – which few practitioners of discrimination are foolish enough to provide. In one such case, *Bray v. Marriott Hotels*, 110 F.3d 986, 993 (3d Cir. 1997), the majority observed that Judge Alito's dissenting position "would immunize an employer" even if he or she were motivated by "conscious racial bias." In another case involving a claim of discrimination on disability grounds, *Nathanson v. Med. College of Pa.*, 926 F.2d 1368, 1387 (3d Cir. 1991), the majority stated that if Judge Alito's dissent were the law, "few if any [disability discrimination] cases would survive summary judgment." If the Supreme Court adopts Judge Alito's activist approach to discrimination cases, insisting on usurping the jury's role in deciding the facts, older workers' freedom from bias will be far less secure than Congress intended, and far less secure than workers have enjoyed since those landmark laws were enacted.

Undermine Fourteenth Amendment Enforcement? An additional threat to equal opportunity for older Americans is the recent drive of narrow 5-4 Supreme Court majorities to limit Congressional authority to enforce the Fourteenth Amendment. In *Chittister v. Department of Community and Economic Development*, 226 F.3d 223 (3d Cir. 2000), Judge Alito interpreted these decisions to immunize a Pennsylvania state agency from liability for violating the 1993 federal Family and Medical Leave Act. This landmark law is important to seniors, both as employees with a disproportionate need for medical leave and as receivers of care.

Three years after *Chittister*, the legal landscape changed, when, in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721(2003), the Supreme Court upheld a state employee's FMLA claim, outlining a comparatively generous interpretation of Congress's authority. Yet at his hearing, Judge Alito refused to acknowledge that *Hibbs* – or a subsequent decision supporting a relatively liberal view of Congress's Fourteenth Amendment power, *Tennessee v. Lane*, 541 U.S. 509 (2004) – necessitated any change in the restrictive interpretation he had imposed on the FMLA. Rather, he defended his opinion in *Chittister* as involving the personal sick leave provision of the FMLA instead of the family leave provision at issue in *Hibbs*. This defense of *Chittister* is especially troubling because it indicates that, if the FMLA sick leave provision does come before the Supreme Court, Judge Alito will stick with his vote to deny Congress the ability to protect state employees who need unpaid sick leave. As in the Commerce Clause area, Judge Alito was unwilling to acknowledge that more recent Supreme Court decisions about Congress's Fourteenth Amendment power cast doubt on his earlier decision, apparently leaving open his option, once confirmed, to continue to press the comparatively restrictive view reflected in his 2000 FMLA decision.

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To be sure, there were aspects of Judge Alito's testimony that could preview a Supreme Court career that fits a "principled conservative" profile rather than that of an activist. At one point, he noted instances in which the Court itself had designated significant questions about "federalism" and the scope of federal authority over state governments as matters for Congress, not the courts, to resolve. At another point, he endorsed the view that conservatives as well as liberals could be activists, and expressed his disapproval of judges on either side of the ideological spectrum who substitute their views for the correct meaning of the Constitution or laws.

But, while reassuring, such professions of restraint and even-handedness came almost exclusively in the form of generalities. On specific matters which members of the Committee spotlighted as instances of conservative judicial activism, Judge Alito provided little if any reassurance. In many of these instances, legal guarantees critical to older Americans are at risk. Hence, it is unrealistic not to anticipate that confirming Judge Alito to a seat on the Supreme Court will threaten further, significant erosion of those guarantees. Accordingly, we at the National Senior Citizens Law Center urge you and your colleagues to give weight to this prospect, and vote to keep Judge Alito in his present position on the Court of Appeals for the Third Circuit.

Sincerely,

A handwritten signature in black ink, appearing to read "E. King", written over a horizontal line.

Edward King
Executive Director
National Senior Citizens Law Center