



Senator Dianne Feinstein Details Her Reasons for Opposing Judge Samuel Alito to be an Associate Justice of the Supreme Court  
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*Washington, DC – U.S. Senator Dianne Feinstein (D-Calif.) today described her reasons for voting against the nomination of Judge Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court when his nomination comes to the full Senate for a vote. The following are the remarks by Senator Feinstein, as delivered on the floor of the Senate:*

“I thank the ranking member of the Judiciary Committee and I thank the Chair.

I come to the floor to offer my reasons for opposing Judge Alito. Let me begin with this: If the Supreme Court’s decisions were simply mathematical computations of legal points, our job would be easy and all of the Court’s decisions would be 9 to 0. But the legal philosophy and views of each individual Justice do play a role in decisionmaking on the Court. Perhaps not the majority of the time, when the question before the Court is not controversial; but certainly when the question is controversial and divisive, legal views and philosophies do play a role.

We just had a recent example. Last week the Supreme Court upheld Oregon’s Death with Dignity Act by a 6-to-3 decision in a case called *Gonzales v. Oregon*. When then-Judge Roberts came before the Senate, I and others questioned him on his end-of-life views. He then replied that the Government should not enter the arena. When discussing my point that he would not want the Government telling him what to do, he said:

‘The basic understanding that it’s a free country and the right to be left alone is one of our basic rights.’

He gave us the impression that he believed there was, in fact, a right to die. However, just last week, Chief Justice Roberts joined the two most conservative members of the Court, Justices Scalia and Thomas, in an opinion that, if it had carried the day, would have allowed the administration to invalidate the end-of-life initiative twice supported by Oregon voters in State elections, once when it was enacted and once when it was reaffirmed.

Secondly, history reveals that legal views and philosophies have been the rationale for the rejection of at least 12 Presidential nominees for the Supreme Court. Members on the other side of the aisle often say these legal views and philosophies are not a bona fide consideration. But what I say is these have been used as the rationale for the rejection of at least a dozen Presidential nominees in history.

Let me mention a few of them. It began with President George Washington when he nominated John Rutledge in 1795. Rutledge was rejected by a vote of 10 to 14 because he made a speech denouncing the Jay Treaty between the United States and Great Britain.

Fifteen years later, President James Madison's nomination of Alexander Wolcott was rejected by the Senate by a vote of 9 to 24, in part, based on his policies while a U.S. collector of customs and his actions strongly enforcing controversial embargoes.

President Andrew Jackson, in 1835, nominated Roger Taney to the Supreme Court. He had served as the Secretary of Treasury, and he removed the Government's deposits from the Bank of the United States. Senators who were opposed to that move offered a motion postponing his nomination indefinitely, which passed 24 to 21.

President James Polk, nominated George Woodward in 1845, and allegations arose that as a delegate to the 1837 Constitutional Convention, he introduced an amendment that would have prohibited any foreigners who came to Pennsylvania after 1841 from voting or holding office.

President Ulysses S. Grant nominated Ebenezer Hoar in 1869, who had served as Attorney General. Senators were upset by the fact that he recommended nominees to the circuit courts without taking into consideration Senators' preferences. His nomination was defeated 24 to 33.

The same thing happened in 1881, when President Rutherford Hayes nominated Stanley Mathews. He was defeated because of his close ties to railroad and financial interests.

President Warren Harding, in 1922, nominated Pierce Butler. His nomination was blocked from consideration on the Senate floor because of an alleged procorporation bias and his previous advocacy for railroad issues that were coming before the Court.

In 1930, President Herbert Hoover's choice of John Parker was rejected because he made statements opposing the participation of African Americans in politics and because of his labor record while chief judge of the U.S. Fourth Circuit Court of Appeals.

John Marshall Harlan II was nominated by Dwight Eisenhower in 1954. The nomination was never reported out of committee because some members felt he was 'ultraliberal' and hostile to the South and dedicated to reforming the Constitution by 'judicial fiat.'

In 1968, President Lyndon Johnson nominated Abe Fortas to be elevated to Chief Justice of the Supreme Court. His nomination was defeated after the Senate failed to invoke cloture 45 to 43. One Senator is reported as saying that Fortas' 'judicial philosophy disqualifies him for this high office.'

It went on for two of President Nixon's nominees. Clement F. Haynsworth, Jr. was rejected in 1969 by a vote of 45-55. At that time, five senators issued a joint statement that expressed 'doubts about his record on the appellate bench,' and one senator opposed the nomination on the basis of his record on civil rights issues.

The other, G. Harrold Carswell, was rejected by a vote of 45-51, in part based on his judicial philosophy. A statement issued by four senators at the time stated they opposed his nomination because his 'decisions and his courtroom demeanor had been openly hostile to the black, the poor and the unpopular.'

And, of course, one of President Ronald Reagan's nominees, Judge Robert Bork, whose views and legal philosophy were of great concern. Judge Bork believed Americans had no constitutional right to use contraception. He argued that in guaranteeing one man, one vote, the Court 'stepped beyond its boundaries as an original matter.' And he had a broad view of Executive power. He once asserted that a law requiring the President to obtain a court order before conducting surveillance in the United States, and against U.S. citizens was 'a thoroughly bad idea and almost certainly unconstitutional.'

Most recently, White House Counsel Harriet Miers was withdrawn even before consideration by the Judiciary Committee due to the rightwing's objections.

So it is abundantly clear that judicial philosophy and legal views have been evaluated by senators from both sides of the aisle throughout history, and they are valid reasons to reject a nominee for the U.S. Supreme Court.

To now argue that evaluating one's judicial philosophy is setting a new precedent is simply turning a blind eye to history. So while none of us can predict how any person will act in the future, we do have to thoroughly consider information available that provides insights into a nominee's judicial philosophy and legal reasoning. I want to make clear.

Secondly, many of my colleagues on the Judiciary Committee have argued that the nomination of Justices Ginsburg and Breyer have set a precedent for how Supreme Court nominations should be handled, that no one questioned their judicial philosophy, and that they swept through by large votes. I want to take a moment to answer that.

The fact of the matter is that there was real advice and consent in the nominations of Justices Ginsburg and Breyer. Senator Hatch, in his book *Square Peg: Confessions of a Citizen Senator*, who was then the ranking member of the Judiciary Committee, gave the following account of the Ginsburg nomination:

'It was not a surprise when the President called to talk about the appointment and what he was thinking of doing.'

So President Clinton told Senator Hatch what he was thinking of doing. Senator Hatch goes on:

'President Clinton indicated he was leaning toward Bruce Babbitt...Clinton asked for my reaction. I told him the confirmation would not be easy. I explained to the President that although he might prevail in the end, he should consider whether he wanted a tough, political battle over his first appointment to the Court. I asked whether he had considered Judge Stephen Breyer of the First Circuit Court of Appeals or Judge Ruth Bader Ginsburg of the District of Columbia Court of Appeals.'

Both were confirmed with relative ease. So since the ranking member of the Judiciary Committee -- the minority ranking member -- had recommended these nominees, it is not surprising that they moved through the confirmation process relatively easy. I am confident that if President Bush had decided to nominate any of the candidates suggested by the current ranking member of the committee, Senator Leahy, the process could have been smooth this time as well. But he didn't.

With that said, I also believe that today is a very different day than the time when Justice Ginsburg and Justice Breyer were before the Senate. Let me point out some of the differences. There was not the polarization that there is within America today. There was not the clear effort to upset the current balance of the Court and move it far to the right.

When Justices Ginsburg and Breyer were before the Senate, it had been more than 50 years since any statute had been struck down by the Supreme Court on commerce clause grounds.

It wasn't actually until April 26, 1995, after both Justices had been confirmed, that the Supreme Court began to revisit an area that had been well settled since the New Deal in the mid-1930s in its decision on a case known as *Lopez*. In *U.S. v. Lopez*, the Court struck down the Gun-Free School Zones Act that had been passed by the Congress, which essentially prohibited the possession of a firearm within a thousand feet of a school.

It was this decision that signaled the beginning of the Rehnquist Court's federalism 'revolution.' In the next decade, from 1995 to 2005, the Rehnquist Court struck down all or portions of 30 congressionally enacted laws, 10 of them on federalism grounds. Here they are on this chart. I will point out some of them to you: The Indian Gaming Regulatory Act, the Federal Election Campaign Act, the Cable Television Consumer Protection and Competition Act, the Religious Freedom Restoration Act, the Communications Decency Act, the Brady Handgun Violence Prevention Act, the Water Resources Development Act, the Coal Industry Retiree Health Benefit Act, section 316 of the Communications Act, the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Violence Against Women Act, the Telecommunications Act, the Americans with Disabilities Act, section 2511 of the Omnibus Crime Control and Safe Streets Act, the FDA Modernization Act, the Child Pornography Act, the Bipartisan Campaign Reform Act, the Child Online Protection Act and on and on and on, using various sections of the Constitution to hold impermissible congressional actions in these areas.

Now, this is a major thrust of the Court, and it is a serious thrust. It is one that this body and the other body ought to understand because, with these actions, the Court was essentially declaring that the Congress cannot legislate in many important areas, areas that are very important to me and to my constituents.

When Justice Ginsburg and Justice Breyer were before the Senate, we were not in the midst of a war with Iraq, nor was our country faced with a war on terror that could last for our lifetime and, for all we know, for our children's lifetime. Few would have predicted that the President would authorize the use of torture in defiance of the Geneva Convention and the Convention Against Torture and Military Law; that the President would argue that he had inherent plenary authority to detain Americans without due process; and that the President would authorize the electronic surveillance of Americans in direct violation of the law, a law passed by this body, the other body, and signed by President Carter in 1978.

In addition, when Justices Ginsburg and Breyer were before the Senate, *Planned Parenthood v. Casey* had just recently been decided. *Casey* made it clear that *Roe v. Wade* remained controlling precedent; it affirmed a woman's constitutional right to privacy; it clarified that States have an interest to protect viable unborn life; and it held that many State laws relating to abortion were valid.

With the *Casey* decision, there was a general acceptance that a woman's right to choose was secure. There had been a clear and direct challenge to *Roe* -- as a matter of fact, it has been challenged at least three dozen times -- and the Court had affirmed in *Casey* *Roe's* central holding.

Finally, as I noted when discussing Senator Hatch's book *Square Peg*, at the time Justices Ginsburg and Breyer were before the Senate, we didn't have an administration that was bent on moving the Court dramatically in one direction. Yet today, when we are evaluating a nominee to replace Justice Sandra Day O'Connor -- a pivotal Justice, a Justice who was the fifth vote in 148 out of 193 5-4 decisions -- the President continues to assert that he will only nominate those who view the Constitution through a lens of strict constructionism and originalism.

I think we must remember what these terms mean. I want to take a moment to do so. It is widely accepted among legal scholars that strict constructionists and originalists look to evaluate the Constitution based on what the words say as written and what the Framers intended those words to mean at the time they were written.

If we examine what these terms could mean when applied to actual constitutional questions today, it becomes clear why most legal scholars view the Constitution as a living document, able to adjust to the differences of the country today. Remember, in colonial times, there were 13 colonies and around 4 million people. Today we are close to 300 million people and we are 50 States.

Justice Brennan wrote in 1986 about this, and I quote him:

'During colonial times, pillorying, [flogging], branding, and cropping and nailing of the ears were practiced in this country. Thus, if we were to turn blindly to history for answers to troubling constitutional questions, we would have to conclude that these practices would withstand challenge under the cruel and unusual clause of the eighth amendment.'

He wrote that in the *Harvard Law Review* in December of 1986.

If an originalist analysis were applied to the 14th amendment, women would not be provided equal protection under the Constitution, interracial marriages could be outlawed, schools could still be segregated, and the principle of one man, one vote would not govern the way we elect our representatives.

My concerns about confirming a strict constructionist or originalist to the Court are best demonstrated by what this legal reasoning could mean in three important areas: congressional authority to enact legislation, checks on Presidential powers, and individual liberty and privacy interests. I want to talk about these for a minute in the context of Judge Alito.

It is my conclusion that Judge Alito would most likely join Justices Thomas and Scalia in the originalist and strict constructionist interpretations of the Constitution. And those are the interpretations that have been used by the Rehnquist Court in the past decade to overthrow all or portions of the 30 laws to which I just referred. I have come to this conclusion based on Judge Alito's record in the Reagan administration and on the bench.

In 1986, Congress passed what seemed to me a pretty simple law. It was called the Truth in Mileage Act. It basically forbid anyone from tampering with odometers in automobiles. As a deputy at the Office of Legal Counsel, Judge Alito recommended that President Reagan veto this bill because it violated principles of federalism.

Judge Alito also drafted a statement for President Reagan to make when he vetoed the bill, asserting 'it is the States and not the Federal Government that are charged with protecting the health, safety, and welfare of their citizens.'

It is the States, not the Federal Government. The implication is the Federal Government does not have a role in protecting the health, safety, and welfare of our citizens.

Judge Alito's restricted views of congressional authority later surfaced in his decisions while on the Third Circuit. For me, a prime example is the case of *U.S. v. Rybar*. This case is significant because it was a case where Congress clearly had the authority to enact legislation, and yet Judge Alito wrote a separate opinion, a dissent, to argue against the law. He was the sole dissenter, and he was outvoted.

In his opinion, he used a legal technicality that would have thrown out the conviction of a man who had illegally possessed and sold fully automatic machine guns in the State of Pennsylvania.

In reaching his conclusion, he seemed to ignore past precedents, clearly establishing congressional authority to regulate firearms, such as the Miller case of 1939.

He also dismissed previous statutes that had already outlined the obvious impact guns have on interstate commerce, even when sold within a State. To me, that was a major indication of his thinking.

The facts in this case make this point even more obvious: one gun was from China, the other was a military M3 submachine gun made during World War II by General Motors. Clearly, both guns had traveled through interstate commerce before reaching Pennsylvania where the arrest took place.

Judge Alito's views on congressional power could also limit Congress's ability to protect the environment. In the next few years, the Supreme Court is likely to hear a number of cases challenging Congress's authority to pass laws protecting the environment, such as the Clean Water Act and the Endangered Species Act. In fact, later this term, the Supreme Court will hear two cases. One is *Carabell v. Army Corps of Engineers*, and the other *Rapanos v. U.S.*

The issue in both is whether the Congress has the authority to regulate nonnavigable waterways under the Clean Water Act. Both are brought to the Court on the basis that Congress could not regulate environmental control in nonnavigable waterways. If the Supreme Court were to strike down this provision, the Federal Government would lose its primary tool to protect wetlands.

If confirmed, Judge Alito could be the decisive vote in these environmental cases, and his record on the environment, in this regard, is not reassuring. Let me give an example.

In the case *Public Interest Research Group v. Magnesium Elektron*, it was undisputed that a chemical company had committed 150 different violations of the Clean Water Act by illegally dumping chemicals into a river. The plaintiffs in the case were members of an environmental group and had stopped using the river because of the pollution.

Judge Alito voted in a 2-to-1 decision to throw the case out. He adopted a narrow reading of both the Clean Water Act and the legal concept of standing. In doing so, his conclusion would have gutted the provision that allows individual citizens to enforce the law.

Three years later, the Supreme Court in a 7-2 decision in *Friends of the Earth v. Laidlaw* rejected Judge Alito's expansive view of the standing requirement, making it easier for individuals to sue to stop violations of the Clean Water Act.

So this is a serious concern -- Clean Water Act, Clean Air Act, Endangered Species Act. Our ability to legislate in these areas is very much at stake with this judge.

Judge Alito's views on the scope of Presidential powers are deeply concerning to me at this point in American history. The Constitution gives both the President and the Congress critical roles in the defense of our Nation. The Constitution specifically provides in article I, section 8:

The Congress shall have Power To...provide for the common Defense and general Welfare of the United States...  
To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;  
To raise and support Armies...  
To provide and maintain a Navy;  
To make Rules for the Government and Regulation of the land and naval Forces...  
To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;  
To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Services of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress...and  
To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers....

In other words, we are responsible to give the powers to the President for him to execute in these areas. That is a very important article, and it is the heart of congressional authority and the balance of power at a time of crisis.

Our national security and constitutional liberties suffer when either branch oversteps its bounds. Today our Nation is in a very different place than it was 10 years ago. We face new challenges to our constitutional framework of checks and balances.

This President has asserted unprecedented authority in many areas which has raised profound constitutional questions. They include: may the President authorize torture; does the Constitution permit the President to order the arrest and detention of individuals inside the United States without due process or access to counsel; does the Constitution allow the President to violate laws based on inherent plenary power; and is it constitutionally permissible for the

President to authorize electronic surveillance of Americans without a warrant in violation of Federal law?

Given the critical importance of these questions to both our national security and our constitutional democracy, I asked Judge Alito a variety of questions to get a sense of his vision of the balance of power between the President, the Congress, and the courts.

Rather than engage in a productive discussion about the issues, he simply repeated obvious truisms, such as ‘nobody is above or below the law,’ or agreed to the unsurprising proposition that the Constitution and the laws of the Nation are supreme. He did not answer whether the President had to follow these laws.

His answers were inadequate, so I was left to evaluate his views based on his prior record.

At the Department of Justice, Judge Alito was part of the effort to press for expanded Presidential power, and there is no doubt about that.

While serving in the Department of Justice, he wrote a memo on Presidential signing statements, and here is what he argued:

‘From the perspective of the executive branch, the issuance of interpretive signing statements would...increase the power of the Executive to shape the law.’

‘The power of the Executive to shape the law.’ Do we believe this is correct, or do we believe that the ability to make and shape the law rests with the Congress, and the President can sign it or veto and indicate his reasons for so doing, but not shape the law to his specific demand?

Then when speaking before the Federalist Society in November of 2000, Judge Alito expressed his support for the unitary executive theory. In 1988, this unitary executive theory was rejected by the Supreme Court in a decision called *Morrison v. Olson*. It was rejected overwhelmingly. The majority was 7 to 1. The opinion was offered by Justice Rehnquist. The Court rejected Justice Scalia's argument that the independent counsel must be under the executive branch and report to the President. That took care of what is called the theory of the unitary executive.

Yet more than a decade later, Judge Alito declared:

‘I still think that this theory best captures the meaning of the Constitution's text and structure.’

Clearly, this is a statement for expanded Presidential authority and for the unitary executive.

Judge Alito's vague answers at the hearing, coupled with the specific statements made a few years ago, lead me to conclude that he is a strong proponent of expanded Presidential authority and that he is not committed to a proper system of checks and balances, which brings me to my third point.

If one is pro-choice in this day and age, with the balance of the Court at stake, one cannot vote to confirm Judge Alito. I, for one, really believe there comes a time when you just have to stand up, particularly when you know the majority of people stand as you do. And I don't make that statement simply based on my gut instincts. It is reflected in the polls we see.

A Gallup poll released earlier this week, January 24, stated that 63 percent of Americans do not want to see *Roe* overturned. And that is backed up by other polls.

A CNN/USA Today/Gallup poll released earlier this month, January 9, said a majority of Americans, 56 percent, do not believe Judge Alito should be confirmed if his confirmation hearings reveal he would vote to overturn a woman's right to have an abortion.

Around here when it comes to the issue of abortion the tail wags the dog. The minority is the dominant voice, while the majority of people out there feel very differently on the question. A majority of people, it is clear, in the United States of America believe that a woman should have certain rights of privacy -- privacy that is limited by the State's interest to protect potential life, but a certain right to privacy. If you know this nominee is not going to respect those rights but holds differing views, then you have to stand up.

I am very concerned about the impact Judge Alito could have on women's rights, including a woman's right to make certain reproductive choices as limited by State regulation.

When the issues of *Roe* and precedent came up during the hearings for Chief Justice Roberts, he engaged in a conversation with me and other Senators. He acknowledged that *Roe* is well settled. He discussed the different factors the Court considered when *Casey* affirmed the central holding of *Roe*. In fact, during Judge Alito's hearings, I read part of the Roberts transcript to him and I gave him an opportunity to review it. I then asked him to tell me where he differed from Chief Justice Roberts and if he, too, believed *Roe* is well settled. He responded this way:

'I think that depends on what one means by the term well settled.'

That was after reading an explicit and full description of what the now Chief Justice had said before us. His response clearly indicated, at least in my view, that he didn't regard precedent that highly.

I next tried to talk to him about his legal views and what he meant when he said 'precedent is not an inexorable command.' I specifically stated:

'Those are the words that Justice Rehnquist used arguing for the overturning of *Roe*. So my question is did you mean it that way?'

The most Judge Alito would say is this:

'The statement that precedent is not an inexorable command is a statement that has been in the Supreme Court case law for a long period of time. And sitting here, I can't remember what the origin of it is....'

In providing nothing more than this for an explanation, Judge Alito spoke volumes about his view on *Roe*. I listened carefully to the testimony of many legal scholars, including

professors in constitutional law. One I want to quote, and I quoted it in the committee as well because it meant a great deal to me, is a professor of constitutional law at Harvard, Professor Larry Tribe. He said that, with the addition of Judge Alito:

‘The Court will cut back on *Roe v. Wade*, step by step, not just to the point where, as the moderate American center has it, abortion is cautiously restricted, but to the point where the fundamental underlying right to liberty becomes a hollow shell.’

It is important to remember that *Roe*, as modified by *Casey*, is in fact a moderate compromise that considers both sides of the question. Together, *Roe* and *Casey* protect women's privacy interest but also allow States to pass regulations to restrict that interest postviability.

If you look carefully at Judge Alito's decisions in three cases -- *Planned Parenthood v. Casey*, *Blackwell v. Knoll*, and *Planned Parenthood v. Farmer* -- you will see in his writing where serious questions of his views arise. While sustaining *Roe* in these cases, Judge Alito's opinions also raised serious questions indicating if Judge Alito was not bound by precedent, or there was a gray area, he would weaken *Roe* by narrowly interpreting what constitutes an undue burden, since in his dissent in *Casey*, Judge Alito argued that spousal notification was not an undue burden - a position rejected by the Supreme Court.

Judge Alito may have a different interpretation of when life begins that could dramatically alter the Court's rulings and impact women's access to contraception. This concern was highlighted when in *Alexander v. Whitman*, Judge Alito wrote a separate opinion to clarify that he disagreed with the Court's 'suggestion that there could be "human beings" who are not "constitutional persons."'

Judge Alito may not agree with the Supreme Court's holding in *Roe* that a woman's health must be protected for a law to be constitutional. This issue was raised in *Planned Parenthood v. Farmer* where Judge Alito agreed with the decision of the Court to strike down a New Jersey abortion law. However, he asserted that the Court's opinion, including the discussion about the lack of a health exception, was 'never necessary.'

In addition, I was deeply troubled by Judge Alito's 1985 job application. Let me tell you where he was in 1985. He was not a youngster. Senator Durbin pointed this out in the Judiciary Committee. He had already clerked at a New Jersey law firm. He had already clerked for a Federal court of appeals judge. He had spent 4 years as an assistant U.S. attorney, and he had spent 4 years as Assistant to the Solicitor General in the Department of Justice, and he had argued 12 cases on behalf of the Federal Government before the Supreme Court and numerous other cases before the Federal courts of appeals. So this was not some naive ingenue coming down the pike, trying to get a job in the administration. He filled out the job application and gratuitously added these words, that he believed 'the Constitution does not protect a right to an abortion.' He was not asked the question; he simply added those words. Why would you do that if you have argued 12 cases before the Supreme Court, if you spent 4 years as an assistant U.S. attorney, if you have argued before Federal circuit courts, you have clerked for judges -- why would you do it unless it was a deeply held view of yours that you wanted to express?

I asked him about this privately in my office and he said that he was attempting to get a political appointment. But he also told me that the application speaks for itself and he did not disavow what he wrote. That spoke volumes about where he is today. It is pretty clear to me that, given a chance, he would vote to overthrow *Roe*.

He also wrote in that same application:

‘In college, I developed a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment.’

The Warren Court's reapportionment decisions established the principle of one man, one vote, and they stopped the abhorrent practice of diluting votes by making some voting districts larger than others. For example, prior to these decisions some voting districts in the same State were 41 times the size of others.

As an attorney with the Solicitor General's Office of the Department of Justice, Judge Alito argued three affirmative action cases, each time urging the Supreme Court to strike down affirmative action programs. The arguments he made in these cases are contrary to the Supreme Court's subsequent decision in *Grutter v. Bollinger*, another 5-4 decision where Sandra Day O'Connor was the decisive fifth vote. In *Grutter*, the Court held that the University of Michigan and other colleges and universities receiving Government funding could consider race, ethnicity, and gender in school admissions policies in order to encourage a diverse student body.

Judge Alito encouraged the Senate to judge him on his 15-year record on the Third Circuit. An examination of this record reveals a judge who tends to rule against civil rights more often than his colleagues. A review of Judge Alito's opinions by Yale Law School professors concluded that in the area of civil rights law, he consistently used procedural and evidentiary standards to rule against female, minority, age, and disability claimants. Similarly, a review of 311 published opinions by Knight-Ridder found that, although his opinions were rarely written with obvious ideology, he seldom sided with an employee alleging discrimination.

Here again, there is a case, *Riley v. Taylor*, that is particularly troubling. This case took place in Delaware, where prosecutors had excluded every African-American juror in all four of its first-degree murder trials that had taken place in a Delaware county that year. A majority of the Third Circuit, sitting en banc, concluded that excluding every Black juror in four State murder trials was evidence of race-based discrimination. I would conclude that, too. The Court noted that it is not ‘necessary to have a sophisticated analysis by a statistician to conclude that there is little chance of randomly selecting four consecutive all white juries.’

Judge Alito dissented. In contrast, he argued that ‘there is little chance of randomly selecting left-handers in five out of six Presidential elections. But does it follow that the voters cast their ballots based on whether a candidate was right- or left-handed?’

This dissent demonstrates a failure to grasp the critical point. Left-handed individuals have not suffered the long history of discrimination in this country the way African Americans have. I think to use that, as a Federal appellate court judge, as a bona fide argument to say that you can have four consecutive murder trials in a county and exclude every African American from the jury shows you have a mode of thinking that is not in the mainstream of American legal thinking.

So, bottom line, based on all of the information before me, I have decided to vote against Judge Alito's confirmation. Mine is a vote that is made with the belief that a person's legal reasoning and judicial philosophy, especially at a time of crisis, at times of conflict, and at times

of controversy, do mean a great deal. It is my belief that this nominee's legal philosophy and views will essentially swing the Court far out of the mainstream, toward legal philosophy and views that do not reflect the majority views of this country. I will vote no. I urge my colleagues to vote no.

I ask unanimous consent to have printed in the Record a list of California organizations that oppose Judge Alito's confirmation and a set of letters from pro-choice organizations following my full remarks, and I yield the floor.”

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