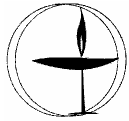


# Unitarian Universalist Association of Congregations



Washington Office for Advocacy  
1320 18th Street, Suite 300B Washington, DC 20036  
(202) 296-4672 x15 fax (202) 296-4673  
rkeithan@uua.org www.uua.org/uuawo

Rob Keithan  
Director

## MEMO

**TO:** Unitarian Universalists

**FROM:** Rob Keithan, Director, UUA Washington Office for Advocacy

**DATE:** December 12, 2005

**SUBJECT: Unitarian Universalist Association of Congregations' Opposition to the Confirmation of Judge Samuel Alito Jr. to the United State Supreme Court**

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After evaluating the record of Judge Samuel Alito Jr., the Unitarian Universalist Association has decided to oppose his confirmation to the United States Supreme Court. Below you will find an explanation of the criteria used in our decision, as well as a review of Judge Alito's key rulings on civil liberties issues.

The decision to take a position on a judicial nominee is not one the UUA takes up lightly—or frequently. Indeed, it was only in 2004 that the General Assembly—our highest policy-making body—approved policy explicitly stating that the Association would oppose nominees. That policy, which can be found at [www.uua.org/actions/civil-liberties/04civil-liberties.html](http://www.uua.org/actions/civil-liberties/04civil-liberties.html), opens with the following:

### **Preamble:**

Liberty is at the core of our Unitarian Universalist faith. Civil liberties are at the heart of our American experiment in democracy. Those civil liberties guaranteed by the Bill of Rights, Amendments I through X to the Constitution of the United States of America, are as fundamental to our practice of democracy as freedom of conscience is to our actions of faith.

Civil liberties carry a history of conflict and struggle between rights for all and privilege for some, between individual liberty and general security, between personal need and the common good, between the aspiration to reason and tolerance and the inclination to scapegoat and punish. Our democracy has the ability to balance these competing claims. Democratic process is at the heart of Unitarian Universalism. Our Unitarian Universalist Principles are grounded in freedom, reason, and tolerance. Ours is a tradition that has sought to uphold the sanctity of the individual voice. We have affirmed that human beings need not adhere to the same beliefs or draw upon the same sources of meaning to discern the common good.

The requirement to oppose nominees comes as the 7<sup>th</sup> of 10 points at the end of the statement, under the heading “**Call To Action:**”

- “We oppose nominees to the federal appeals courts or the Supreme Court whose records demonstrate insensitivity to the protection of civil liberties.”

The staff of the Association is charged with applying General Assembly statements to matters of public policy. In some cases the statement is clear and little interpretation is necessary. In others, such as this one, the language is vague and so we must create criteria for application. Given both the importance and sensitivity of taking informed positions on federal court nominees, the Association's staff took extra care in creating clear criteria for evaluating what would constitute "insensitivity to civil liberties."

### **Definition of "Civil Liberties"**

The phrase "civil liberties" is generally understood to mean protections from the power of government. For these purposes, "civil liberties" includes:

- Rights enumerated in the 1<sup>st</sup> Amendment of the United States Constitution, including religious freedom and the rights of free expression and association;
- Rights enumerated in Amendments 4-8 coming under the umbrella of due process, including the right of people to be secure in their persons, and free from unreasonable search and seizure; the right to a speedy and public trial; the right to counsel; the right to a jury, and the right to not suffer cruel or unusual punishment.
- Rights enumerated in the 14<sup>th</sup> Amendment, including that no state shall make or enforce laws depriving citizens of their privileges or immunities;

### **Criteria for "Insensitivity"**

A nominee shall have demonstrated "insensitivity to civil liberties" if there is a pattern, consisting of no less than three instances, where the nominee has issued a ruling or stated an opinion that shows a strong disregard for the protection of civil liberties, defined as one or more of the following:

- Rulings/statements that are outside the mainstream of legal opinion, such as a ruling that was strongly overturned by a higher court or otherwise rejected;
- Rulings/statements that ignore or show opposition to established precedents that are favorable to civil liberties; and/or
- Ruling/statements that demonstrate a nominee's willing to put personal beliefs ahead of the law.

Using these criteria, we did not find cause to take a position in the nomination of either Judge John Roberts or Harriet Myers. Although aspects of their records raised concerns, there was not sufficient evidence of a pattern of insensitivity.

The nomination of Judge Samuel Alito Jr. is significantly different, in that he has an extensive judicial record—more than 15 years on the 3<sup>rd</sup> Circuit Court of Appeals—that clearly reveals his judicial philosophy on a wide range of issues. After extensive research, Unitarian Universalist Association staff agreed that Judge Alito's rulings demonstrate a pattern of views that were outside the mainstream and hostile to established precedent favoring civil liberties. In case after case, Judge Alito found against the rights of individuals in relation to government or corporations. In at least six cases, the Supreme Court voted to

overturn decisions of the Third Circuit or Alito's dissent in Third Circuit cases. Several notable cases and patterns are mentioned below.

### Police Power

In the case of *Doe v. Groody*,<sup>1</sup> Judge Alito dissented from a Third Circuit ruling that police officers had violated clearly established constitutional rights. Police had strip-searched a mother and her ten-year-old daughter while executing a search warrant authorizing only the search of her husband and their home. Then-Third Circuit Judge Michael Chertoff, now Secretary of Homeland Security, held that the unauthorized search violated "clearly established" rights. Alito disagreed, arguing that even if the warrant did not authorize the search, an officer still could have read the warrant as allowing it.

### Religious Liberty

In the case of *ACLU-NJ v. Schundler*, Judge Alito held that religious symbols displayed on government property during the holiday season (in this case a crèche and menorah) were not unconstitutional when "secular" decorations such as Frosty the Snowman and Santa Claus were subsequently added to the display. While Justice O'Connor has voted to allow secular holiday displays, she has rejected efforts for religious symbols, including the Ten Commandments, to stand alone in public display.

In *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, Judge Alito joined a dissent from the Third Circuit's ruling which struck down a public school board policy allowing high school seniors to vote on whether to include student-led prayer at their school-sponsored graduation ceremonies. In a subsequent case (*Santa Fe Independent School District v. Doe*), the Supreme Court, with Justice O'Connor in the majority, struck down a public school board policy allowing students to vote on whether to include student-led prayer at high school football games.

### Limiting Access to the Courts:

Among the most troubling pattern is Judge Alito's consistent finding that plaintiffs in discrimination cases did not have enough evidence to bring their cases to trial. By denying even the opportunity for judicial remedies, Judge Alito's philosophy undermines one of the most fundamental checks and balances in our system of government. For example:

- Judge Alito has strongly disagreed with Third Circuit rulings protecting the civil rights of African Americans. In *Bray v. Marriot Hotels*,<sup>2</sup> Alito disputed a ruling by Theodore McKee – the Circuit's only African American judge – allowing a race discrimination case to go to trial. McKee said that Alito's position would "immunize an employer from the reach of Title VII if the employer's belief that it had selected the 'best' candidate, was the result of conscious racial bias."
- Judge Alito has narrowly construed statutes in gender discrimination cases. In *Sheridan v. E.I. DuPont de Nemours and Co.*,<sup>3</sup> Alito was the only judge to dissent from a ruling clarifying the nature of evidence permitting a jury to find an employer engaged in discrimination. Alito's position would have denied the plaintiff the opportunity to go to trial despite significant evidence of discrimination.

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<sup>1</sup> 361 F.3d 232 (3<sup>rd</sup> Cir. 2004).

<sup>2</sup> 110 F.3d 986 (3<sup>rd</sup> Cir. 1997).

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

- Judge Alito’s dissents would have made it harder for victims of discrimination based on disability to prove their cases. In *Nathanson v. Medical College of Pennsylvania*, the majority lamented that under Alito’s restrictive standard for proving discrimination based on disability under the Rehabilitation Act of 1973, “few if any Rehabilitation Act cases would survive summary judgment.”

### Reproductive Freedom

Dissenting in *Planned Parenthood v. Casey*, Judge Alito wrote that the right to reproductive freedom does not prevent states from requiring women to notify their spouses, except in limited circumstances, before getting an abortion.<sup>4</sup> Justice O’Connor cast the deciding vote rejecting Judge Alito’s position. Joined by Justices Kennedy and Souter, O’Connor held that the provision Alito supported harkened back to the days when “a woman had no legal existence separate from her husband” and created an undue burden on a woman’s ability to obtain an abortion.<sup>5</sup>

### **We Are Not Alone**

When the Unitarian Universalist Association makes a decision to adopt a particular stance, we generally find ourselves in the company of other religious organizations with similar views. This holds true for our opposition to the confirmation of Judge Alito.

In late November, the biennial convention of the Union for Reform Judaism (URJ)—the largest branch of Judaism in North America—voted overwhelmingly to oppose Judge Alito’s confirmation, saying that it “would threaten protection of the most fundamental rights” that the Reform Movement supports. “On choice, women’s rights, civil rights and the scope of federal power,” Alito would “shift the ideological balance of the Supreme Court on matters of core concern to the Reform Movement,” according to the resolution adopted by the more than 2,000 voting delegates from more than 500 congregations in all 50 states.

Like the UUA, the URJ reviewed Judge Alito’s rulings against their criteria and found that his record was hostile to their stated values. The UUA will use the Union for Reform Judaism’s policy in relation to the confirmation hearings, which is that we have ample evidence to oppose now, and we will continue to do so unless the hearings manage to bring forth information which allays our concerns. The Union’s full resolution, including background information, [is available for your review](#).

### **Conclusion**

The UUA Washington Office for Advocacy is communicating our opposition to the US Senate, and has background information, talking points, and action recommendations for individuals and congregations who want to take action. That information is available at [www.uua.org/alito](http://www.uua.org/alito).

Please note that the positions taken by the Unitarian Universalist General Assembly and advocated by UUA staff represent the views of the Unitarian Universalist Association of Congregations as a whole, as adopted

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<sup>4</sup> *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991)

<sup>5</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

by representatives of congregations. They do not represent, and are not portrayed as representing, the views of individual Unitarian Universalists or particular congregations.