January 9, 2006

Via Facsimile

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
224 Dirksen Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Judiciary Committee
152 Dirksen Building
Washington, D.C. 20510

Dear Senators Specter and Leahy:

I write as the Executive Director of the Judge David L. Bazelon Center for Mental Health Law to express the Center's opposition to the nomination of Samuel Alito to the United States Supreme Court. The Bazelon Center is a national nonprofit organization that advocates for the rights of individuals with mental disabilities through litigation, policy advocacy, education and training.

The positions taken by Judge Alito during his long tenure as a federal appeals court judge indicate that, if Judge Alito is confirmed, many needed protections for people with disabilities will likely be eliminated. It is clear to us that, were he to replace Justice O'Connor, we would see a significant retrenchment in the Supreme Court's protection of the rights of people with disabilities. Thus, we are compelled to oppose his nomination.

Congress's Power to Pass the ADA

Judge Alito's opinions demonstrate his belief that Congress has very limited authority to pass civil rights laws using either the Commerce Clause or the Fourteenth Amendment. Congress relied on these two powers in passing the ADA, and Judge Alito's cramped reading of these powers strongly suggests that he would find many important parts of the ADA to be beyond Congress's power and thus completely invalid.

Judge Alito's dissent in *U.S. v. Rybar*[1] embraced a view of Congress's power to regulate interstate commerce so restrictive that it would strip Congress of the power to enact many of the important protections contained in the ADA and other disability rights laws. It would leave Congress powerless to require accommodations to enable people with disabilities to enter public buildings and to prohibit the warehousing of people with disabilities in institutions when they are capable of living in the community, as long as the discrimination did not involve the crossing of state lines. Indeed, the Supreme Court squarely rejected this restrictive reading in its *Gonzales v. Raich*[2] decision.

Judge Alito also has an extremely restrictive view of Congress's power to legislate under

[1] 103 F.3d 273 (3d Cir. 1996).

[2] 125 S.Ct. 2195 (2005).

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HIV if the discrimination is based on the person's real or perceived ability to transmit the disease to others. Alito staunchly defended the views expressed in the memo in the face of criticism.

These positions are merely a few highlights of a long record that indicates a willingness to roll back the rights of people with disabilities.[8] Judge Alito's cramped readings of Congress's power to protect people with disabilities, and of the laws that Congress has enacted, convince us that he would vote to eliminate many critical protections. These decisions have a very real impact on the everyday lives of many people with disabilities. We hope that you will not confirm a Supreme Court Justice who will roll back the rights that people with disabilities worked hard to obtain.

Very truly yours,

Robert Bernstein
Executive Director
Bazelon Center for Mental Health Law

[8] Additional concerns about Judge Alito's record are discussed on our website, www.bazelon.org.

STATEMENT OF JUDGE EDWARD R. BECKER TO THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY JANUARY 12, 2006

Sam Alito became my colleague when he joined our Court in 1990. Since that time we have sat on over a thousand cases together, and I have therefore come to know him well as a judge and as a human being. Many do not fully understand the intensity of the intellectual and personal relationship among appellate judges. We sit together in panels of three and, in the course of deciding and writing up cases, engage in the most rigorous dialogue with each other. The great violinist Isaac Stern, describing an afternoon of chamber music, once opined that, after such a session, one knows his fellow quartet members better than a man knows his wife after 30 years of marriage. This analogy, hyperbole aside, vividly describes the intense relationship among appellate judges. I therefore believe myself to be a good judge of the four matters that, I think, are the central focus of the Committee as it decides whether to consent to this nomination: Sam Alito's temperament; his integrity; his intellect; and his approach to the law. My time is brief and I will cover each point succinctly.

First: Temperament. Sam Alito is a wonderful human being. He is gentle, considerate, unfailingly polite, decent, kind, patient, and generous. He is modest and self-effacing. He shuns praise. When he had completed his tenth year of service on our Court Sam declined my offer, extended as Chief Judge, to arrange the usual party to observe ten-year anniversaries. Sam was uncomfortable at the prospect of encomiums to his service. Sam has never succumbed to the lure of big city lights. He has a sense of place, which, for him, is not nearby New York City but New Jersey, which has always been home. Finally, there is an aspect of appellate judging that no one gets to see but the judges themselves – how they behave in conference after oral argument, at

which point the case is decided. In hundreds of conferences, I have never once heard Sam raise his voice, express anger or sarcasm, or try to proselytize. Rather he expresses his views in measured and temperate tones.

Second: Integrity. Sam Alito is the soul of honor. I have never seen a chink in the armor of his integrity, which I view as total. That opinion is not undermined by the furor over the Vanguard issue, by which I remain baffled. My wife holds Vanguard mutual fund shares, which I report on my Financial Disclosure Form. However, I do not identify Vanguard on my recusal list because I am satisfied that my wife possesses no ownership in Vanguard, or more specifically in the Vanguard Management Company, which is what is germane to the recusal determination. She has never received a proxy statement, an opportunity to vote for directors, or any indicia of ownership other than her aliquot share in the fund to the extent of her investment. I believe that Judge Alito was not required to recuse himself in a suit against Vanguard (in which he had no imaginable interest).

That view is corroborated by the learned opinion of Dean Rotunda, which is, I understand, a part of the record..

Third: Intellect. Sam Alito's intellect is of a very high order. He is brilliant. He is highly analytical, and meticulous and careful in his comments and his written work. He is a wonderful partner in dialogue. He will think of things that his colleagues have missed. He is not doctrinaire, but rather is open to differing views and will often change his mind in light of the views of a colleague. Contrary to some reports, Sam does not dissent often. According to our Court statistics, in the last six years he has dissented only sixteen times, or in a little over two cases per year, fewer times than a number of his colleagues. I am a devotee of the Supreme

Court. I have known almost all of its present and recent members extremely well, and am therefore familiar with their enormous intellects. I believe that Sam Alito measures up to them and that, if confirmed, he will be a strong and independent Justice – his "own man" as it were. Finally, Sam's intellect is not abstract but practical. He does not mistake the obscure for the profound.

Fourth: Approach to the Law. As I address this topic I am acutely aware of the deep concern of members of the Committee about this subject. I am also aware that my role here is to testify more to fact than opinion, and hence I will not express either normative or predictive judgments. The Sam Alito that I have sat with for fifteen years is not an ideologue. He is not a movement person. He is a real judge, deciding each case on the facts and the law, not on his personal views whatever they may be. He scrupulously adheres to precedent. I have never seem Sam exhibit bias against any class of litigation or litigants. He was a career prosecutor, but in numerous criminal cases on which we have sat together, if the evidence was insufficient or the search was flawed, he would vote to overturn the conviction. And if the record did not support summary judgment against the plaintiff in an employment discrimination or civil rights case, he would vote to reverse. In their words, Sam's credo is fairness – what is fair.

Sam is said to have certain ideological views, expressed in some twenty-year-old memos. Whatever these views may have been, his judging does not reflect them. The public does not understand what happens when you become a judge. When you take the judicial oath, you become a different person. You decide cases not to reach the result you would like, but based on what the facts and law command. Moreover, what you decide as a judge are not general principles, but the case in front of you. You do it as narrowly as possible – that's what Sam Alito

does, always with great respect for precedent. Sam is faithful to his judicial oath.

Why then, you ask, don't we all decide cases the same way, since we are looking at the same record and the same precedent? There are several answers. First, we are all human beings. Even husbands and wives will look at the same data and see things differently. Second, if I may explode what has become the conventional wisdom, judges do make law – that's what we have been doing in our Anglo-American legal system for hundreds of years. The facts do not always fit existing precedent, and the judge has to apply the precedent to new facts and thereby make new law. Different human beings will do this differently.

So much for background; what of Sam Alito? The best calipers that I could find to measure Sam's approach to the law was to compare it with my own. I have been a federal judge for over thirty-five years. My opinions would fill many bookshelves, but I think that I am fairly viewed as a mainstream or centrist judge. A computer survey run by our Court librarian retrieved 1,050 opinions in cases on which Sam Alito and I have sat together. In these cases we disagreed 27 times, which is probably about the same number of times that I would have disagreed with most other colleagues. Some cases turned on our reading of the record, others on how rigorously or flexibly we interpreted the reach of a statutory or constitutional provision or a state court's jurisprudence or applied our usually deferential standard of review. But in every case on which we differed, Sam's position was closely reasoned and supportable, either by the record or his interpretation of the law, or both. Sam and I saw some cases differently, but we saw over 97% of them the same. To me, this rough survey debunks the notion that Sam Alito is a doctrinaire or ideological judge.

The short of it, members of the Committee, is that Sam Alito is a superb judge in terms of

temperament, integrity and intellect. And he has exhibited a careful, temperate, case-by-case approach to the law.

I thank you for this opportunity to address you.