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Who's Out of the Mainstream?
An Examination of the Record of the Coalition
Opposing Judge Alito

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Since Judge Samuel Alito was nominated to the Supreme Court on October 31, his supporters and detractors have been doing battle across the nation's television screens and newspapers. Prominent in the battle have been a handful of groups on both sides of the debate, such as Progress for America and the Committee For Justice on the right, and People for the American Way and the Alliance For Justice on the left. However, behind this relatively simple picture is the untold story of a giant coalition of ultra-liberal organizations, united by their singular desire to defeat Judge Alito, and motivated by their devotion to ensuring that the Supreme Court remains hospitable to their left wing agenda.

This anti-Alito coalition calls itself the Coalition for a Fair and Independent Judiciary (CFIJ) and warns us to "make no mistake, our members know what's at stake and all hands are on deck." Although the Coalition does not include all groups opposed to Judge Alito's nomination, it is nonetheless vast, spanning a far-flung collection of causes and numbering nearly 100 organizations that, but for Alito, would seem to have little in common. Member organizations include gay rights groups, abortion activists, hardcore environmentalists, powerful labor unions, feminist groups, anti-war activists, minority and other special interest groups, and the anti-religion crowd. A full list of members – including such household names as the ACLU, the NAACP, NOW, and the infamous MoveOn – is available on the Internet at IndependentCourt.org.

It is ironic that the Coalition's number one talking point is that Judge Alito is out of the mainstream. One need only examine the other causes CFIJ members support to know that the Coalition stands too far to the left of the average American's views and values to be arbiters of what is mainstream. What follows is a look at some of those causes.¹ It is intended not only to illustrate the marginal nature of those causes, but also to challenge journalists to cover the extreme views and agenda of these groups, rather than reporting their accusations in a relatively uncritical manner more appropriate for objective sources.

Family Values

Beginning with religion, it is safe to say that the Coalition is out of touch with the values of most Americans. Its members are often hostile to the public expression of religious belief, especially of the Christian kind. Among the causes supported by CFIJ organizations are removal of public Christmas and Chanukah displays – a campaign pursued through numerous lawsuits across the nation – and removal of “under God” from the Pledge of Allegiance. Never mind polls showing that a large majority of Americans see no problem with including the phrase in the Pledge. Coalition members have even gone so far as to try to rid schools of Christmas carols and Easter vacation. And the head of one Coalition group, the Feminist Majority, complained that Alito's confirmation would result in too many Catholics on the Supreme Court.

¹ As indicated by the footnotes that follow, the list of causes supported by CFIJ members has been culled from amicus briefs, statements by the leaders of member groups, organizations' web sites and publications, and secondary sources.

The Coalition is no more mainstream on other traditional values issues. Take gay marriage for example. A large majority of Americans oppose it, but Coalition members are at the forefront of the effort to see that the traditional definition of marriage is overturned by the courts. "I think it's inevitable now," said an attorney for CFIJ member Lambda Legal, speaking about gay marriage after the Supreme Court struck down a Texas sodomy statute in *Lawrence v. Texas*. It is a bit puzzling why Americans United for Separation of Church and State are among the Coalition groups working for same-sex marriage, but perhaps the group believes that only a religious zealot would have concerns about gay marriage. At least one CFIJ member's hostility to the traditional definition of marriage does not stop at the issue of gay marriage. The ACLU defends the right of individuals to engage in polygamy and believes that laws prohibiting it should be abolished.

Not surprisingly, Coalition members are active across the array of causes that make up the "gay rights" agenda. These include support for the ironically titled Military Readiness Enhancement Act, which would repeal the U.S. military's "don't ask, don't tell" policy so that lesbian, gay and bisexual troops can serve openly in the military. At least one CFIJ organization, the Human Rights Campaign, goes so far as to criticize the military's ban on transsexual soldiers. The same group is lobbying Congress to amend immigration laws so that the same-sex partners of lesbian, gay, and bisexual U.S. residents have the same immigration rights as husbands and wives abroad.

When, in 2000, the U.S. Supreme Court ruled in *Boy Scouts of America v. Dale* that the Scouts' First Amendment rights meant they could not be forced to permit gay Scoutmasters, a wide array of Coalition members were on the losing side. They argued that gay rights trumped the Scout's First Amendment right to express a message of traditional values. That general argument – that gay rights statutes trump constitutional rights – is hardly limited to the Scouts. Lambda Legal's guide to judicial nominees instructs that a "good nominee" is one whom will force religious organizations to hire homosexuals even when it violates "their personal religious beliefs."

The Lambda Legal guide also reveals a basic misunderstanding of constitutional law that is puzzling for a group of attorneys so involved in opposing Judge Alito. The guide states that bad nominees include those judges who "have ruled that there is no constitutional prohibition on government funding to religious agencies that refuse to hire gay people." However, the truth is that it would be wholly irresponsible for a judge to rule otherwise, given that there is no constitutional prohibition against gay discrimination, let alone one that has to be weighed against religious agencies' First Amendment rights.

Finally, we would be remiss if we omitted the recommendations for college campuses made by the National Gay and Lesbian Task Force², a group which asserts that "Judge Alito's appointment would spell disaster for LGBT [lesbian, gay, bisexual and

² The National Gay and Lesbian Task Force is a member organization of the Leadership Conference on Civil Rights, a leading member of the Coalition for a Fair and Independent Judiciary, rather than a direct member of the Coalition.

transgender] Americans for decades to come." This organization recommends creation of "LGBT studies" centers and departments; provision of "single stall gender-neutral restroom facilities" (presumably for transgender students); a campaign to combat "heterosexist assumptions and language" in the classroom; and creation of separate campus groups for "LGBT people of color, LGBT international people, transgender people, bisexuals, etc." The Task Force also has recommendations for K-12 education. It opposes abstinence-only programs in the nation's schools, and considers such programs to be "deeply sexist and antigay."

Given the Boy Scouts' reluctance to allow gay Scoutmasters, it is no surprise that People for the American Way (PFAW) – which effectively heads the Coalition – opposed a law designed to ensure that politically correct schools give the Boy Scouts equal access to school facilities. The Boy Scouts remain popular in mainstream America, but given their promotion of traditional values, hostility to the Scouts within the Coalition is hardly limited to PFAW. For example, the ACLU sued the City of San Diego to force it to expel the Boy Scouts from the city's most popular park. The ACLU contends that the Scouts are a religious organization, such that their use of a public park is an unconstitutional establishment of religion.

While the Boy Scouts' First Amendment right to express their message of traditional values finds little support in the Coalition, freedom of expression for pornographers and flag burners is a different story. Some of CFIJ's biggest members – the ACLU, the NAACP, NOW, and PFAW – have fought for the right to desecrate the American flag. Even the gay rights group Lambda Legal joined the fight. And, despite the fact that the vast majority of American families are concerned about their children's exposure to Internet pornography, both the ACLU and PFAW have been dogged in their determination to see that children are not protected from online pornography. Their lawyers have gone to court to strike down the Children's Internet Protection Act – which instructs libraries receiving federal assistance to install filters blocking obscene or pornographic images – as well as the Child Online Protection Act and the Communications Decency Act.

The ACLU's protection of pornographers goes beyond the issue of children's exposure to obscene materials to include the use of children in pornography. This Coalition member believes that child pornography is protected by the First Amendment, such that neither its distribution, reproduction, sale, nor use can be prohibited.

Predictably, Coalition groups are at the forefront of the battle for unrestricted abortion on demand, including taxpayer-funded abortions. While the American people are split on a general right to abortion, a strong majority support a ban on partial birth abortion, as well as requirements for spousal notification and, in the case of minors, parental notification. However, Coalition members know better and have fought all these common sense provisions in the courts. In fact, in a prelude to their attacks on Judge Alito, the Coalition blocked the confirmation of appeals court nominee Priscilla Owen simply because she had voted to uphold a Texas statute that required underage girls seeking an abortion to notify – not get the consent of – their parents.

Other Domestic Issues

Within the Coalition, unfettered choice for minors is worth fighting for when it comes to pregnancy, but even modest choice proposals are shot down where K-12 education is concerned. CFIJ organizations have been in the vanguard of the campaign to kill school voucher programs designed to give inner city kids a way out of failing public schools. At least one Coalition group, Americans United for Separation of Church and State, opposed even the temporary vouchers designed to allow the school-age victims of Hurricane Katrina to return to school.

One suspects that CFIJ members are reflexively against any reform that weakens government's grip on the provision of education and social services. Thus, welfare reform gets the same cold shoulder from the Coalition as does school reform. Despite being enormously popular among Americans, welfare reform was opposed by members such as the Leadership Conference on Civil Rights (LCCR), one of the Coalition's leaders.

While providing competition for failing public schools is anathema within the Coalition, forcing state governments to pour more money into such schools is a popular cause, even when it means bypassing the normal democratic methods of budget allocation. PFAW, the NAACP, and the American Association of University Women are among the Coalition members who have asked the courts to override elected officials by ordering education budget increases, effectively resulting in judicially mandated tax hikes and budget cuts in other programs.

The Coalition has been heavily involved in another education issue that recently came before the Supreme Court in *Rumsfeld v. Forum for Academic and Institutional Rights*. Despite the U.S. military's crucial need for robust recruiting during the war in Iraq, a host of the Coalition's most prominent members have gone to court to see to it that universities can bar military recruiters from coming to campus, even when those universities accept federal funds

Elsewhere in the education debate, most Americans do not believe that K-12 pupil assignment and college admissions should be race-based. However, that does not stop Coalition members – such as the ACLU, NAACP, LCCR, and National Women's Law Center – from fighting to prevent race-blind policies. Unfortunately, members' support for racial preferences does not stop at the admissions office. They are also fighting to preserve equally unpopular preferences in hiring and public contracting. Again, efforts to get help to the victims of Hurricane Katrina are no bar to pursuit of the Coalition's agenda. When the U.S. Labor Department temporarily waived "affirmative action" requirements for federal contracts for Katrina recovery, in order to expedite the relief process, Coalition leader Wade Henderson of LCCR called the waiver “doubly shameful.”

On the crime front, Coalition members typically take positions considerably to the left of the 'tough on crime' stance favored by most Americans. Decade after decade of polls show that the American people consistently support the death penalty. Not so for the Coalition, whose members are amongst those leading the charge to abolish death row. CFIJ members are also fighting to secure voting privileges for convicted felons. And the Leadership Conference on Civil Rights, as well as other CFIJ groups, oppose the Gang Deterrence and Community Protection Act of 2005, at least in part because the statute would make it easier to deport aliens convicted of crimes.

While the Coalition is generally soft on crime, the ACLU may be the member whose views are farthest from the American mainstream. The ACLU does not just oppose the death penalty, but believes it violates the Constitution "in all circumstances." The ACLU's pattern of consistently siding with criminal defendants against the police – for example, arguing recently that a detained suspect should not be compelled to identify himself even if officers have a reasonable suspicion of criminal activity – is well known. However, it is the ACLU's tendency to embrace defendants shunned even by other ultra-liberal groups that puts the organization so clearly at odds with mainstream values. Consider the ACLU's representation of the notorious North American Man-Boy Love Association (NAMBLA) in a lawsuit by the parents of Jeffrey Curley, a 10-year-old Massachusetts boy sexually molested and murdered by two men. One of the men admitted to being influenced by NAMBLA, publishers of the "Man's Guide to Staying Alive in Man-Boy Sexual Relationships" and other materials that provide advice on pursuing boys and escaping punishment. Whatever one thinks of the merits of the lawsuit, the ACLU's choice of clients reveals a lot about its values.

Border Control and The War on Terror

The Coalition's pattern of supporting causes far to the left of the American mainstream is not limited to domestic issues. It extends to issues of terrorism and border control, as illustrated by opposition to the Gang Deterrence and Community Protection Act. While Congress is working to strengthen the laws against illegal immigration, Coalition members are working in the courts and legislatures to thwart the popular desire for a tough approach. In fact, Coalition members are attempting to weaken enforcement of the current immigration laws. For example, the ACLU argues that state or local authorities should not enforce the immigration laws or even "interrogate or investigate aliens concerning their compliance with the federal immigration laws."

Similarly, the Service Employees International Union (SEIU), another CFIJ member, lists among its achievements an effort to block federal legislation that would facilitate the detention of illegal aliens by state and local police. SEIU goes so far as to advocate that illegal aliens – who, by definition, are not supposed to be in this country – should nonetheless have the *full* constitutional protections enjoyed by legal residents and citizens. In fact, one of SEIU's stated reasons for opposing Judge Alito is its belief that he would support less-than-full constitutional rights for illegal aliens.

Efforts by Coalition members to blur the distinction between legal residents and those breaking the nation's immigration laws includes a campaign to give illegal immigrants both drivers' licenses – in California and other states – and a wide range of taxpayer-funded social services. The latter includes a drive to make illegal aliens attending college eligible for in-state tuition rates and federal financial aid. This effort was successful in California, where citizens of other states now pay higher tuition at California's universities than do illegal immigrants. The campaign has also met success in the courts, where Coalition members undermined California's Proposition 187, which was enacted by the state's voters to limit illegal aliens' entitlement to California's social service and education benefits.

There are indications that Coalition groups' support for illegal aliens is motivated as much by a desire for political power as by concern for immigrants. For instance, the SEIU has proclaimed its desire "to build a powerful, new immigrant electorate." And, in a dramatic illustration of how far the Coalition's views can stray from the mainstream, the co-founder of the Mexican American Legal Defense and Educational Fund stated a more ambitious goal. "California is going to be a Mexican state, we are going to control all the institutions," said Mario Obledo. "If people don't like it they should leave."

Given their hostility towards protecting this nation's borders and their permissive approach to crime, it should come as no surprise that Coalition members are amongst those who believe in a softer approach to preventing terrorism. For example, the Alliance for Justice (AFJ), a Coalition leader, has been critical of the nation's war on terror and has allied itself with Michael Moore. The Service Employees International Union has taken similar positions. It is not clear why a labor union takes positions on foreign policy, but at its June 2004 national convention in San Francisco, SEIU did just that. Among the foreign policy resolutions adopted was a demand for "an end to the U.S. occupation of Iraq." While many Americans want to see a gradual withdrawal of American troops, it is only the Michael Moore crowd that refers to the United State's involvement in Iraq as an "occupation." Today, even eighteen months after the SEIU resolution, most Americans remain opposed to the immediate withdrawal endorsed by the union.

However, it is Coalition member MoveOn that is most jarringly out of the mainstream when it comes to the war on terror. Despite almost unanimous public support for the war in Afghanistan, MoveOn opposed it, while also opposing funding for troops and reconstruction in Iraq. MoveOn, which has compared Bush to Hitler and the Nazis, also believes America should not hold countries "unduly accountable" for crimes of terrorist groups operating within their borders.

MoveOn is not alone among Coalition members in appearing to view American foreign policy with hostility. After filing a human rights complaint against the United States in the United Nations, ACLU executive director Anthony Romero expressed his organization's "solidarity" with foreigners who have accused the U.S. of contributing to human rights violations abroad. One would have thought the ACLU was busy enough tracking down human rights violations against this country's illegal aliens and Internet pornographers.

In conclusion, we remind readers that CFIJ *itself* has not endorsed this long list of ultra-liberal causes, which run the gamut from support of gay marriage and racial preferences to hostility to school choice and the war on terror.³ Nor do all CFIJ members endorse each position listed. However, the overall picture is one of a Coalition with an affinity for causes decidedly to the left of the American mainstream. It is also worth noting that, if the organizations supporting Judge Alito advocated positions equally far from the mainstream – no less dozens of such positions collectively – those views would already have been examined by many of the articles covering the battle over Judge Alito's nomination.

Judicial Philosophy

It is remarkable that nearly 100 organizations representing such a wide array of causes could agree on anything. However, they have been brought together by a common interest more fundamental than opposition to a particular judicial nominee. These groups realize that, because their views are out of the mainstream, their agendas cannot be implemented through democratic means such as legislation and ballot initiatives. Therefore, the success of their agendas depends on a liberal, activist judiciary that is willing to legislate from the bench. AFJ's Nan Aron, a leading figure in the Coalition, admitted as much. "We have to look to the courts to create new rights that we won't be able to get from the legislature," she said.

CFIJ member Lambda Legal is equally open about the Coalition's aims. Its guide to judicial nominees instructs that a "good nominee" is one whom "interprets the U.S. Constitution as a living document," while a "bad nominee" interprets the Constitution according to what it actually says. While the standard-less theory of a "living Constitution" – which view judges as policy makers rather than as impartial arbiters of existing law – may once have been fashionable among liberals, this synonym for judicial activism is no longer mainstream. Witness the Senate Judiciary Committee's hearings for now-Chief Justice John Roberts. During the Committee's five days of hearings and voting, the term "living Constitution" and its equivalents were used only once by a Democratic senator. Dahlia Lithwick of *Slate* reports a similar abandonment of the term in the literature.

Conclusion:

You cannot blame Nan Aron and her colleagues for hoping they can continue to use the courts to bypass Congress, state legislatures, and other majoritarian means of implementing one's agenda. After all, this approach has produced many successes in the activist courts that have dominated the nation's judiciary for the last several decades. The

³ The list would be even longer were we to include positions advocated by groups which oppose Judge Alito's nomination but are unaffiliated with the Coalition for a Fair and Independent Judiciary.

Supreme Court alone has already come through for them on many of their pet issues, including discovering rights to unrestricted abortion, homosexual sodomy, and Internet pornography, as well as constitutional prohibitions against religious expression in the public square and use of the death penalty for 17 year old murderers.

So why stop there? Coalition members don't plan to, and that is why they have come together to try to stop Judge Alito. They know that Alito will adhere to the plain meaning of statutes and the Constitution, rather than inventing the "new rights" Aron and her colleagues seek. While the noise they make in public harps on the prospect of the Court overturning abortion rights and other already-created rights, most legal scholars think that is highly unlikely. What the Coalition really fears is that, with the addition of Alito or any other constitutionalist justice to the Supreme Court, the Court will be unwilling to create any more of the rights that Aron and friends cannot "get from the legislature." And in that fear, they are likely correct.

Faced with the prospect of an end to decades of judicial excess and the threat that would pose to their ultra-liberal agendas, Coalition groups can be expected to pull out all of the stops – including waging a massive advertising blitz – as the Senate takes up Judge Alito's nomination in January. The Coalition's influence on the public debate and the debate in the Senate would be as marginal as its views, but for the large war chests accumulated by its members. People for the American Way, just one of the nearly 100 organizations in CFIJ, had a budget of \$27 million in 2004 and spent \$5 million defending efforts by Senate Democrats to prevent an up or down vote on many of the President's nominees to lower federal courts. Now, with the higher stakes of a Supreme Court nominee – indeed, one they view as "extreme" – there is no telling how many millions of dollars the Coalition will unleash in the coming weeks in a campaign to paint Judge Alito as out of the mainstream.

The irony of this campaign of distortion is that the views of mainstream America – including support for the death penalty, a traditional definition of marriage, and the like – are exactly the ones Coalition members are trying to circumvent in the courts. Perhaps their distorted characterization of Alito's record can best be explained by the world they inhabit, a world in which Michael Moore is a god, George Bush is the devil, and religion is the opiate of the masses. From that perch, the values held by Judge Alito and most Americans must genuinely seem extreme.