Testimony of U.S. Representative Charles A. Gonzalez (D-TX)
Before the United States Senate Committee on the Judiciary
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Confirmation Hearing of Judge Samuel A. Alito, Jr.
to the United States Supreme Court

Chairman Specter, Ranking Member Leahy and Members of the Committee. On behalf of the Congressional Hispanic Caucus (CHC), I thank you for the opportunity to testify on the confirmation of Judge Samuel A. Alito, Jr. to the Supreme Court of the United States. Today, I am representing the Caucus in my capacity as the Chairman of its Hispanic Judiciary Initiative and Task Force on Civil Rights.

Let me begin my remarks by stating the Congressional Hispanic Caucus' disappointment that in three separate instances President Bush had the opportunity to make a history-making appointment to the bench yet could not identify a single qualified Hispanic judge to be nominated to the Supreme Court. We did not expect a Hispanic to be nominated for the sake of being Hispanic. We did expect the Administration to have recognized the need for our nation's highest court to also reflect the nation's diversity, in all its forms – thought, experience and expression, so that Hispanics could have a full voice in ensuring the protection of our civil liberties and civil rights. Given the size of the Hispanic community in the United States, the under-representation of Hispanics in the judiciary and the abundance of Hispanics qualified for appointment, it is difficult to comprehend the President's decision.

The Congressional Hispanic Caucus' policy with respect to the evaluation of nominees for judicial vacancies requires an extensive examination of each nominee's record and background in order to assess the following: his or her commitment to equal justice and right of access to the courts, his or her support for Congress' constitutional authority to pass civil rights legislation, and his or her efforts in support of protecting employment, immigrant and voting rights, as well as educational and political access for all Americans. Although we originally adopted this process to consider Hispanic nominees we now apply this process to all nominees for judicial posts including Supreme Court vacancies.

Due consideration is given to the nominee's honesty, integrity, character and intellect with special emphasis on concerns specific to the Latino community such as equal justice and advancement opportunities for Hispanics. We require each nominee have a demonstrated commitment to protecting the rights of ordinary residents of the United States, through professional work, pro bono work, and volunteer activities. We also require a commitment to preserving and expanding the progress that has been made on civil rights and individual liberties. These include rights protected through core provisions of the Constitution, such as the Equal Protection and Due Process Clauses, First and Fourth Amendments, and the right to privacy, as well as statutory provisions that protect Latinos' legal rights in such fundamental areas as education, voting, affirmative action, employment and contracting. In all, we make every effort to research a nominee's background and examine his or her decisions and writings. We then discuss the relevant findings to decide on whether to favor or oppose a nominee's confirmation or to remain neutral and take no position.

Our process is also assisted by the excellent work of many legal and advocacy organizations. They provide a critical service by further evaluating and commenting on the nominees' legal opinions and background, and the consequences for the Latino community. Their work has afforded our members the opportunity for more in-depth discussions about nominees and their qualifications for judicial posts.

Congressional Hispanic Caucus members know that the nomination of a new Supreme Court Justice has significant ramifications not just for Hispanics but for all Americans. Therefore, great effort is made through our Initiative and Task Force to consider fully a nominee's qualifications for the Court, as well as the implications his or her ascendancy would have on the civil and constitutional rights of all Americans and their expectation of equal protection under the law. Our positions on nominations are not arrived at lightly or without thorough deliberation.

As part of my responsibilities as Chair of the Hispanic Judiciary Initiative, I evaluated Judge Alito's qualifications and background, applied the Caucus' stated criteria and considered the opinions of respected Latino leaders and members of the legal, academic and advocacy community. Allow me to highlight a few areas that cause the

Hispanic Caucus great concern for they provided significant insight into how Judge Alito's approach and philosophy would determine his rulings from the bench:

Discrimination in Jury Selection

Pemberthy v. Beyer 19 F. 3d 857 (3d Cir. 1994)

In the 1994 case of *Pemberthy v. Beyer*, Judge Alito issued a decision as a member of the Third Circuit Court of Appeals that had the effect of barring many Latinos from serving on juries in cases in which Spanish-language evidence is at issue. In *Pemberthy*, the prosecution's case featured testimony in Spanish that was translated by the police and used in translation by prosecutors in presenting their case. In selecting jurors, prosecutors exercised peremptory challenges to strike five jurors who understood Spanish. The prosecutors indicated they barred these jurors because jurors who speak Spanish might not credit the official, State-provided translations of the evidence and may use their special knowledge to glean additional information from the evidence.

After being convicted in New Jersey state court, the defendants petitioned the federal district court for review. The district court in New Jersey overturned the convictions, holding in part that dismissing Latino jurors because they can understand Spanish is tantamount to dismissing them based on race and is therefore unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

The State of New Jersey appealed to the Third Circuit, where Judge Alito heard the case and wrote the majority opinion, which reinstated the convictions. Judge Alito held that the Constitution does not prohibit a trial attorney from dismissing jurors because of their proficiency in Spanish when translations of evidence are at issue.

Clearly, not all Americans who are proficient in Spanish are Latinos, and not every potential juror dismissed on this basis will be Latino. But a clear majority of Spanish-speakers in America are Hispanic, and a substantial segment of the Latino community in this country is Spanish speaking. The rule of law applied in *Pemberthy*, therefore, clearly acts to prevent Spanish-speaking Latino litigants from enjoying equal access to justice in America by not being heard by a jury of their peers and allows language to serve as a pretext to discriminate on the basis of ethnicity.

Voting Rights Act

Jenkins v. Manning 116 F.3d 685 (3d Cir. 1997)

In this case African-American voters brought an action against the Red Clay school district in Delaware, contending that, as the courts have found in many other cases, the district's at-large voting system improperly diluted the voting strength of minorities. After reversing and remanding the District Court's ruling that no violation of the VRA took place, the District Court considered additional evidence and again found no violation. The lower court found that although all of the criteria for such a claim established by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986) were met, and even though there was evidence of racial polarization and that the lingering effects of discrimination could depress voter turnout, section 2 of the Voting Rights Act had not been violated. Judge Alito appears to have joined the majority in affirming the District Court's ruling. Judge Rosenn (a Nixon appointee) vigorously dissented. He explained that the majority had improperly "placed its imprimatur on a system which only by a series of flukes and anomalies has permitted any minority representation at all" contrary to Congress' intent and had "overlooked the broad sweep of the Voting Rights Act." *Id.* at 701, 700. The "Senate Factors" (after finding Gingles factors present) were additional and necessary considerations and consisted of (1) the extent to which minority group members had been elected to public office in the jurisdiction and (2) the extent to which voting in the elections of the political subdivision is racially polarized. Judge Alito found that the Senate Factors were met when historically only 3 of 10 black candidates over a 10 year period were successful (one in a never-repeated plurality win and one by a black candidate defeating another black candidate). Rosenn pointed out that the court's decision appeared to contradict a previous Third Circuit decision in the case, in which the court had "repeatedly" emphasized the "rarity" of a case in which facts as in *Jenkins* are "not violative" of the Voting Rights Act. *Id.* at 702.

Constitutional Rights of Immigrants

1986 Memo to FBI Director William Webster

In 1986, as an attorney in the Reagan Administration, Judge Alito drafted a legal opinion for then FBI Director William Webster which went beyond the scope of the

question submitted by the FBI Director to the Department of Justice. In his response he provides an overly narrow interpretation of the constitutional protections available to undocumented immigrants in the United States. Judge Alito wrote that case law "suggests" that undocumented immigrants have no claim to nondiscrimination with respect to non-fundamental Constitutional rights. The original question submitted by the FBI related to whether it was constitutionally proper to collect fingerprint and criminal information of nonresident non-citizens.

What is noteworthy in this instance is that Judge Alito's legal opinion in his communication to the FBI Director fails to mention *Plyler v. Doe*, 457 U.S. 202 (1982), a case regarding undocumented immigrant students who were barred from Texas schools in violation of their equal protection rights. The *Plyler* Court expressly held that education is not a fundamental right but that undocumented immigrants have equal protection rights in this context despite the right being "non-fundamental." *Plyler* was decided four years prior to Alito's letter to the FBI Director, but he ignores it entirely and chooses to cite older cases that were not directly relevant to the legal question presented but which suggested limited readings of the availability of constitutional protections for undocumented immigrants.

I am concerned that Judge Alito's misstatement of the law regarding the constitutional rights of non-citizens may reflect a tendency on his part to disfavor constitutional protections for undocumented immigrants, many of whom are Hispanic. The nominee's bias against expansive interpretations of the constitutional protections properly afforded to undocumented immigrants might be considered predictive of a willingness to overturn Supreme Court precedent, like *Plyler*, that has favored expansive views of the constitutional protections afforded to non-citizens of the United States. Furthermore, the effects of the application of Judge Alito's restrictive and aggressive legal analysis raises concerns regarding the extent to which he might, as a Supreme Court Justice, permit the government to mistreat both nonresident aliens outside of the United States and undocumented immigrants within the United States.

Limiting Commerce Clause Application

United States v. Rybar, 103 F.3d 273 (3d Cir. 1996).

Raymond Rybar, a licensed firearm dealer, challenged his indictment for a violation of the federal Firearm Owners' Protection Act. At issue was whether Congress has the authority to regulate the possession and/or transfer of machine guns under the Commerce Clause of the Constitution.

Writing in dissent, Judge Alito noted that the federal statute in question regulated "the purely intrastate possession of firearms" and that Congress made no findings regarding the link between the regulation of machine guns and interstate activity. Purporting to apply *United States v. Lopez*, Judge Alito found that the federal government exceeded its regulatory authority under the Commerce Clause such that indictments under the Firearm Owners' Protection Act are invalid. Judge Alito suggests that Congress could regulate the private possession of machine guns if Congress makes findings that "the purely intrastate possession of machine guns has a substantial effect on interstate commerce."

The *Rybar* majority explicitly rejected Judge Alito's interpretation of the Commerce Clause. Citing a long line of Supreme Court precedent, the majority held that "Supreme Court cases have long sustained the authority of Congress to regulate singular instances of intrastate activity when the cumulative effect of a collection of such events might ultimately have substantial effect on interstate commerce." The majority also holds that the congressional regulation of firearms is supported by substantial historical legislative findings and that "we find no authority" to require that Congress demonstrate a specific link between the subject matter regulated and the regulation in question. "[M]aking such a demand of Congress or the Executive runs counter to the deference that the judiciary owes to its two coordinate branches of government, a basic tenet of the constitutional separation of powers," the *Rybar* majority noted.

If Judge Alito's view of the Commerce Clause as manifested in his *Rybar* dissent becomes settled federal law, it will curtail federal power to regulate civil rights under the Commerce Clause, which has been the constitutional vehicle for much federal civil rights legislation.

Title VII Employment Discrimination

Bray v. Marriott Hotels, 110 F.3d 986 (3d Cir. 1997).

An African American female hotel employee, passed over for a promotion in favor of a white employee sued Marriott Hotels under Title VII of the Civil Rights Act of 1964. The plaintiff employee established a prima facie case of unlawful employment discrimination under Title VII, but when the hotel proffered a nondiscriminatory explanation for her non-promotion, the district court granted the employer's motion for summary judgment. The plaintiff employee appealed to the Third Circuit, alleging that the hotel's proffered reason was merely a pretext that concealed the fact that the employment action was taken on a discriminatory basis.

The Third Circuit majority reversed the district court's order for summary judgment and remanded for further consideration of the motivations of hotel management in not promoting the employee in question. During a deposition of the hotel manager charged with making promotion decisions for the hotel, the manager stated that he "was looking for the best candidate" and passed over the plaintiff for promotion because she was not the "best candidate." Further evidence showed that the hotel did not follow its usual procedures for promoting employees internally. The Third Circuit majority held that the manager's decision not to promote the plaintiff may have been "driven by racial bias" and, as such, the plaintiff's Title VII claim should have survived summary judgment and proceeded to trial.

Faced with uncertainty regarding the motivations of the manager in making a promotion decision, the majority held that "a fact finder should determine why [the employer] felt that [the employee] was not qualified or 'capable of doing the job'" and decide whether the proffered reason was a pretext that concealed discriminatory motivations. The majority noted that "[a] reasonable jury could conclude from [management's statements] that the decision to reject her and interview [the white candidate] was driven by racial bias and not by the explanations offered by Marriott."

In his *Bray* dissent, Judge Alito established an elevated standard that plaintiffs must meet to survive summary judgment in Title VII cases. Even when an employee shows that an employer has not followed its own policies and has made an employment decision based in unclear motivations, the employee's Title VII action should not survive summary judgment. The plaintiff, in essence, is denied an opportunity to explore the employer's underlying motivation in court.

The *Bray* majority strongly criticized Judge Alito's dissenting Title VII analysis:

> "[Title VII] must not be applied in a manner that ignores the sad reality that racial animus can all too easily warp an individual's perspective to the point that he or she never considers the member of a protected class the "best" candidate regardless of that person's credentials. The dissent'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... Title VII would be eviscerated if our analysis were to halt where the dissent suggests."

Under Judge Alito's Title VII analysis established in *Bray*, minorities' ability to pursue fair employment under Title VII would be severely curtailed.

The CHC wishes to acknowledge the indispensable role the United States Senate plays in determining the composition of the Supreme Court. We know that the nominee will be someone of President Bush's choosing, a Republican, a so called "conservative", and a person acceptable to the president's political base. This is the political reality. However, this does not necessarily mean that the Supreme Court should be a mere extension of the Executive Branch. This nation's Founding Fathers did not intend it to be and therefore subjected the president's nominees to Senate approval by way of advice and consent.

There may be a good faith disagreement as to the appropriate parameters limiting the types of questions asked of the nominee by this committee, but no one would argue that questions establishing a nominee's judicial philosophy are universally contemplated under advice and consent.

The Hispanic Caucus believes the cases earlier cited, Judge Alito's 1986 memo, and other judicial opinions are powerful indicators of his judicial philosophy. We believe it reflects an approach that (1) can conveniently ignore precedent; and (2) favors strained readings of the law to the detriment of individual rights and statutory remedies. It is a judicial philosophy that pushes the judicial envelope of strict constructionism to the point where the letter of the law is viewed and weighed without any consideration for the spirit of the law.

The CHC is aware that political, social and economic forces in any society play to the advantage of the employer over the employee, the able-bodied over the disabled, the

citizen over the immigrant, the majority over the minority, the wealthy over the poor and the state over the individual. But in the United States it has been the third branch of government, the judicial branch, which has countered the tendency to abuse this innate "advantage" by acting as the great equalizer regardless of one's status.

For the CHC, the desired judicial philosophy is a simple one and is best expressed in Bernard Malamud's work "The Fixer":

> "There is so much to be done that demands the full capacities of our hearts and souls, but, truly, where shall we begin? Perhaps I will begin with you? Keep in mind...that if your life is without value, so is mine. If the law does not protect you, it will not, in the end, protect me. Therefore I dare not fail you, and that is what causes me anxiety-that I must not fail you."

The CHC does not believe that Judge Alito's writings and decisions embrace this simple but profound judicial sentiment. We do not argue that he possesses a brilliant legal mind and has had an accomplished career. But this is not the controlling issue, the issue is what judicial philosophy guides and motivates such a gifted and talented person in his decision making process. In the end this should not be a question of party affiliation, or conservative versus liberal beliefs...any Republican, Democrat, conservative or liberal should share a judicial compass that points them to the inevitable truth that indeed "if the law does not protect you" then it protects no one.