

Alito's red flags

Supreme Court nominee or GOP call to arms?

Editorial
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By nominating Samuel Alito to the Supreme Court to replace Sandra Day O'Connor, a moderate, President Bush is asking for a fight. He should get it.

Alito is an activist whose judicial philosophy scorns modern jurisprudence in deference to pre-New Deal interpretations of the Constitution. He's no conservative, if by conservative one implies, as John Roberts implied in his recent confirmation hearings, judicial restraint and respect for precedent. Alito is a judicial fundamentalist who sees virtually no role for the federal government in regulating civil rights, privacy, the workplace or the environment -- regulations foreign to the framers of the Constitution. His opinions advocate for a regression to such a 19th century interpretation of the Constitution. That makes him a radical, not a conservative. His philosophy places him to the right of Antonin Scalia, where the only thing left is the apostolic legalism of Clarence Thomas. Nothing in the last five years, and even less in the last five months, has earned Bush a mandate to so extremely shove the court rightward.

No question: Alito's public service is stellar, his credentials irreproachable. But it's the least they should be for a nominee to the Supreme Court. It isn't because Bush is recovering from a dud nomination that we should be thankful for a qualified one and call it a day. The question isn't whether Alito is a deserving nominee. He is. The question is whether the nation deserves his judgments for the next generation. It does not.

Alito's rich record is a Christo exhibit of red flags. His coldhearted application of the law favors evidence presented by the powerful against evidence presented by the weak. He has taken a majority but fractious First Amendment opinion by the Supreme Court to mean that his appeals court could create its own First Amendment standard contradicting that of the Supreme Court's (in a 1994 case involving political signs). In dissent, he favored spousal notification in a 1991 abortion case (and reasons like a judge who'd favor overturning *Roe v. Wade*, the 1973 decision legalizing abortion). And in an opinion with far-reaching consequences, if it carried a majority on the Supreme Court, he has ruled Congress' right to regulate guns null and void with the sort of reasoning that would nullify Congress' right to regulate the environment, civil rights, education, or extend federal anti-discrimination and privacy laws to the states.

Details tell a troubling story. In 1997, Alito's dissent in an employment discrimination case criticized plaintiffs who use the legal process "to find minor inconsistencies in terms of the employer's having failed to follow its internal (hiring) procedures to the letter. What we end up doing then is allowing disgruntled employees to impose the costs of trial on employers who, although they have not acted with the intent to discriminate, may have treated their employees unfairly. This represents an unwarranted extension of the anti-discrimination laws."

Those few, Clarence Thomas-like sentences are a study in contempt -- for law, for the weak against the powerful, for evidence. Rare is the judge who'll have the audacity to suggest that employees "impose" the cost of trial on employers (when employees' own costs are the first

obstacle to take an employer to trial). Rarer still is the judge who presumes to excuse "minor inconsistencies" against written procedures, to mind read innocent "intent" ahead of evidence of unfairness, or to judge "unwarranted" the reasonable application -- not "extension" -- of anti-discrimination laws. Alito's rhetorical tricks are smooth. His conclusions are offensive. Bush's nomination of Alito to the Supreme Court is equally so.

Alito supporters point to the Senate's backing in 1990 -- even from New Jersey's Frank Lautenberg, a liberal Democratic senator -- for his nomination to the Third District Court of Appeals. But that court has long been a liberal bastion. Balance is good wherever groupthink of the one-sided reign. It's for that very reason that Alito's appointment to the Supreme Court should be opposed. There are no liberals on the Supreme Court. There are moderates and conservatives. Alito's appointment would magnify and lock in a right-wing imbalance reflective neither of the electorate today nor of the nation's long-term interest.

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