January 18, 2006

The Honorable Arlen Specter
Chairman, Senate Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member, Senate Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy:

I am writing to express Community Rights Counsel's opposition to the confirmation of Judge Samuel A. Alito to the United States Supreme Court. Before Judge Alito's hearings began, Community Rights Counsel released the enclosed report, detailing serious concerns about Judge Alito's nomination and the future of environmental law. Because our concerns have not been dispelled, and have in some areas been exacerbated, by Judge Alito's Senate Judiciary Committee testimony, we cannot support his confirmation.

We have not previously opposed a Supreme Court nominee and we take this step only after the deepest consideration of the matter. Indeed, we raised concerns with Chief Justice Roberts' views on environmental issues before his confirmation hearings and decided thereafter that he warranted confirmation.

After listening carefully to Judge Alito's testimony, we have concluded that Judge Alito is a man of integrity and great intellect. However, at least since 1795, when the Senate refused to confirm John Rutledge as Chief Justice of the United States primarily over Rutledge's opposition to Jay's Treaty, the Senate's advice and consent process has been about more than a review of a nominee's resume, intellect, and integrity. It is also about assessing a nominee's constitutional vision and whether that vision is right for the nation at the particular time. As an organization whose mission is to defend laws that protect this nation's health and natural environment, we do not believe that Judge Alito's constitutional vision – to the extent this vision can be accurately ascertained by a review of his record and his Senate testimony – is right for the nation at a time when the Supreme Court is already deeply divided on fundamental issues regarding the constitutionality of environmental protections.

In our pre-hearing report, we raised three serious concerns about Judge Alito's record and views on (1) the scope of congressional powers, including prominently the power of Congress under

the Constitution's Commerce Clause, (2) the ability of citizens to bring suit to ensure corporate polluters in their area comply with environmental safeguards, and (3) the theory of the unitary executive. As explained below, Judge Alito's testimony on these topics did not allay these concerns. In important areas, Judge Alito's testimony made our concerns more pronounced.

Congressional Power under the Commerce Clause

Virtually every major environmental law passed by Congress in the past 100 years has been enacted pursuant to Congress's power under the Constitution's Commerce Clause. Because Judge Alito had a troubling record on this issue and because two monumental Commerce Clause cases involving the Clean Water Act are set to be argued before the Supreme Court in February, we explained that a full explication of Judge Alito's views on the Commerce Clause was of the utmost importance. Unfortunately, Judge Alito's testimony did not reduce our concerns about his views on this critical topic.

In particular, we found Judge Alito's testimony about his dissent in *United States v. Rybar,* 103 F.3d 273 (3d Cir. 1996) troubling. For example, Judge Alito continued to assert that the law in *Rybar* was almost identical to the law at issue in the *United States v. Lopez,* 514 U.S. 549 (1995). *See* Alito Testimony, January 11, 2006 (Response to Senator Cornyn) ("the *Rybar* case, seemed to me to be as close to the situation in *Lopez* as any case that I was aware of."). But as our report explained, there were very important differences between the laws at issue in *Lopez* and *Rybar.* Most importantly, the law at issue in *Lopez* applied only to the possession of guns within a school zone. The majority in *Lopez* concluded, based on this fact, that Congress's real objective was school safety and, as such, the law had only an attenuated impact on interstate commerce. The statute at issue in *Rybar*, on the other hand, regulated possession and transfer of any machine gun anywhere in the country that was not legally owned prior to the passage of the law. This fact led the majority in *Rybar* (and the five other courts of appeal that upheld the machine gun ban before *Rybar*) to hold that "Congress' intent to regulate possession and transfer of machine guns as a means of stemming interstate gun trafficking is manifest" and that the "concerns expressed by the majority in *Lopez* *** about federal intrusion into local schools, an area traditionally left for the overview and regulation of the states, are not presented" by the machine gun ban. *Rybar*, 103 F.3d at 282.

This same distinction was critical to the Supreme Court in its recent decision in *Gonzalez v. Raich,* 125 S. Ct. 2195, 2206-07 (2005), which upheld a federal prohibition on the possession of medical marijuana. Like Judge Alito, the plaintiffs in *Raich* argued that the medical marijuana statute was akin to the school zone gun possession law struck down in *Lopez*. The Court rejected this analysis, calling the possession statute at issue in *Raich* the "opposite end of the regulatory spectrum" from the school zone gun restriction at issue in *Lopez* because "prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Id*. at 2210-11. After *Raich*, the Supreme Court summarily vacated and remanded the one court of appeals ruling that had agreed with Judge Alito's analysis of the machine gun possession law.

The *Raich* ruling thus confirms what the majority in *Rybar* was saying: Judge Alito was not simply following *Lopez* in his *Rybar* dissent, he was urging *Lopez's* extension to a law that had a much more direct connection to interstate commerce. If that wasn't clear to Judge Alito in 1996, when he wrote his *Rybar* dissent, it should have been completely clear by the time of his Senate testimony. Yet, despite being asked repeatedly about his *Rybar* decision, Judge Alito refused to recognize that the Supreme Court in *Raich* rejected key parts of his *Rybar* analysis. Indeed, Senator Schumer had a private meeting with Judge Alito before his Senate testimony and asked Judge Alito to consider the impact of the *Raich* decision on his *Rybar* dissent. Alito Testimony, January 12, 2006 (Statement of Senator Schumer). Judge Alito recognized that he had considered the issue but would only concede that his "thinking" about the case would have been different. He was unwilling to say that he would have reached a different result. *Id.* (Response to Senator Schumer).

Given the similarity between the marijuana possession law at issue in *Raich* and the machine gun possession law at issue in *Rybar*, and given the analysis used by the *Raich* majority – which seems unquestionably to cover the machine gun ban – it is hard to understand why Judge Alito would not simply admit that, in light of *Raich,* his prediction about the direction of the Court's Commerce Clause jurisprudence after *Lopez* missed the mark. In this respect, Judge Alito's testimony differed significantly from that of Chief Justice Roberts, who repeatedly emphasized that *Raich* was a "very important" case that clarified that the appropriate way to view *Lopez* and *United States v. Morrison* (which struck down a portion of the Violence Against Women Act as beyond Congressional authority) "is [as] two decisions in more than a 200-year sweep of decisions in which the Supreme Court has given extremely broad – has recognized extremely broad authority on Congress's part, going all the way back to *Gibbons v. Ogden* and Chief Justice John Marshall when those Commerce Clause decisions were important in binding the nation together as a single commercial unit." Roberts Testimony, September 13, 2005 (Response to Senator Feinstein).

The Future of Citizen Suits to Enforce Environmental Mandates

Judge Alito's testimony regarding the ability of citizens to ensure that polluting corporations in their area comply with basic environmental safeguards was equally problematic.

As part of most major environmental statutes, Congress enacted broad citizen suit provisions, allowing citizens impacted by pollution to sue polluting corporations and ensure that federal environmental mandates are followed even in situations where the political will or resources are lacking in Washington. These citizen suit provisions are an essential part of our nation's environmental enforcement regime, protecting both human health and our natural environment.

Like his record on congressional power under the Commerce Clause, Judge Alito's record on this topic is troublesome. Most importantly, Judge Alito cast the deciding vote in *Public Interest Research Group v. Magnesium Elektron Inc.,* 123 F. 3d 111 (3d Cir. 1997), one of the most disturbing rulings on environmental standing issued in the last decade by a court of appeals. In *Magnesium Elektron*, Judge Alito found that the plaintiffs did not "show any actual injury or credible threat of injury to the Delaware River," despite the 150 uncontested Clean Water Act permit

violations by the corporate polluter and the fact that the plaintiffs had stopped drinking, swimming, and fishing in the river because of the pollution. Three years later, in *Friends of the Earth v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167 (2000), the Supreme Court rejected this analysis concluding that what matters for standing "is not injury to the environment, but injury to the plaintiff" and that focusing on harm to the river, rather than plaintiffs' harm "is to raise the standing hurdle higher than … necessary…" *Id.*, at 181. The *Laidlaw* Court found standing based on the precise type of affidavits – alleging forgone activities by plaintiffs because of the concern about pollution – rejected as inadequate by the *Magnesium Elektron* court.

We had hoped that Judge Alito would use his Senate testimony to distance himself from the opinion in *Magnesium Elektron,* which he had joined, but had not written. Instead, he reiterated his judgment in *Magnesium Elektron* that the citizens did not have standing, explaining to Senator Leahy: "There was no evidence of harm to the Delaware River in any way from the discharges and that was the basis of Judge Roth's opinion with which I agreed." Alito Testimony, January 12, 2006 (Response to Senator Leahy). Even after Senator Feinstein explained that *Laidlaw* had rejected the premise of *Magnesium Elektron* – the need for scientific proof of harm to the river -- Judge Alito defended *Magnesium Elektron* and stated that he would have to review *Laidlaw* to determine if it even "creates doubt about the soundness of the decision in *Magnesium Elektron*." *Id.* (Response to Senator Feinstein).

Judge Alito's unwillingness to concede that *Laidlaw* rejected a fundamental premise of his decision in *Magnesium Elektron* significantly adds to our concern about his initial decision in *Magnesium Elektron* to deny standing and impose an unjustifiable obstacle to citizen suits.

The Theory of the Unitary Executive and Its Implication for Environmental Law

Finally, our report raised three environmental issues stemming from Judge Alito's embrace of what he has called the "theory of the unitary executive." First, the theory, as articulated by Justice Scalia, finds statutes allowing citizens to bring suit to enforce federal mandates to be "constitutionally bizarre" and would limit or eliminate them altogether. Second, the theory depends upon a narrow interpretation of Congress's constitutional powers, particularly under Article I's Necessary and Proper Clause. Third, a broad application of this theory could possibly upset the cooperative federalism programs that form the heart of modern environmental laws such as the Clean Air Act and the Clean Water Act, because these laws give state officials an important role in executing federal law.

Judge Alito's testimony on this topic was not particularly illuminating. For example, Judge Alito testified that "we would look to *Morrison* for the best expression of [the theory of the unitary executive]." Alito Testimony, January 10, 2006 (Response to Senator Kennedy). But as our report explains in detail, Judge Alito has stated repeatedly in the past that the *Morrison* opinion is antithetical to the theory of the unitary executive. For Judge Alito to argue now that *Morrison* represents the "best expression" of the theory of the unitary executive is to suggest that the "theory of the unitary executive" has no fixed content or meaning. But as explained in our report, and by Judge

Alito in speeches on the topic, the "theory of the unitary executive" has a specific meaning and the theory was rejected, not embraced, by the *Morrison* majority.

Similarly, Judge Alito told Senator Leahy that he does not "see a connection between the unitary executive theory" and citizen suit provisions under environmental law. Alito Testimony, January 12, 2006 (Response to Senator Leahy). This statement would be more comforting if the connection were not so clear. As explained in our report, Justice Scalia has used the core idea of the theory of the unitary executive – the idea that the Constitution vests the exclusive power to enforce the laws with the President and those subject to his control – in contesting the constitutionality of statutes that allow citizens to enforce environmental mandates. Three justices currently on the Court – Justices Scalia, Thomas and Kennedy – have questioned whether citizen suits can be squared with the executive authority granted to the president by Article II of the Constitution. This means Chief Justice Roberts and Judge Alito, if confirmed, could be the deciding votes concerning the constitutionality of citizen suit provisions. Judge Alito's assertion in 2000 he is a "strong proponent[] of the theory of the unitary executive" and that he believes "this theory best captures the meaning of the Constitution's text and structure…." gave rise to our concern over his views in this regard. His testimony did not meaningfully allay these concerns.

Conclusion

In his Senate Judiciary Committee testimony, Chief Justice Roberts was able to address many of the environmental concerns raised by his nomination. As a result, Community Rights Counsel decided that he warranted confirmation as Chief Justice of the United States. In the case of Judge Alito, the opposite is true: on important issues such as his views on the extent of federal power under the Commerce Clause and the ability of citizens to bring suit to enforce environmental mandates, Judge Alito's testimony exacerbated our concerns. We do not question Judge Alito's intelligence, integrity, or experience. We simply believe that at this moment in our nation's history, where the future of environmental law hangs in the balance, Judge Alito is the wrong choice for the environment and we therefore oppose his confirmation.

Thank you for your consideration of our views on this matter.

Sincerely yours,

Douglas T. Kendall
Executive Director