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A liberal's opinion

By ANDREW H. BAIDA

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Prior to reading the newspaper this past Sunday, I was poised to put the final touches on an article about how to write a persuasive legal argument. Although I've discussed the subject in various ways throughout the course of this column, I concluded that the time had arrived to address it head on by setting forth several principles to consider when writing the argument section of the brief.

I decided on Sunday, however, to discuss those principles next month, after I read an article that attempted to predict the type of Supreme Court Justice Judge Samuel Alito, Jr., would be in light of two opinions he authored in which he concluded that Congress exceeded its constitutional authority by, respectively, authorizing state employees to sue their government employers for violating the Family and Medical Leave Act, and restricting the possession of machine guns.

This newspaper article is the most recent among several that I have read, not just about Alito, but also about now-Chief Justice John Roberts and the legal positions that he had advocated when he represented the federal government as a member of the U.S. Solicitor General's office. The common thread running throughout these articles is that each jurist's conservative values are defined by the views they expressed, either as an intermediate appellate court judge applying precedent or as an advocate for a client. I disagree.

Before proceeding any further, I want to make clear that I am not a conservative. In fact, for many years I was a card-carrying member of the American Civil Liberties Union. Although I terminated that status when the organization defended the First Amendment rights of Nazis to march in Skokie, Illinois in the late 1970s, I have since returned to the fold and am at present co-counsel with the ACLU in a case filed in the Circuit Court for Baltimore City on behalf of a number of individuals who are challenging a Maryland statute that prohibits same-sex couples from marrying. I am also the parent of a teenager whose car bears a bumper sticker that says, "Ban Republican marriage. Hatred is unnatural and disgusting." I am, in short, a liberal.

Despite my left-leaning views, however, I have twice been labeled anything but a liberal on the basis of legal positions that I advocated on behalf of my then-client, the state of Maryland.

The first time my personal politics were challenged was when a member of the judicial nominating commission asked me, during my interview for a position as an appellate judge, how I could square the importance of being fair with an argument I successfully made in the 4th U.S. Circuit Court of Appeals that the state could not be sued for monetary relief under the FMLA, the same federal law that Alito concluded did not authorize such relief against a state.

The second time my commitment to justice was questioned was when several civil rights lawyers with whom I met to discuss a position with their organization pulled out a copy of a reported decision in a case I argued, and expressed disapproval of my representation of the Medicaid officials who were sued in that case for failing to pay for a medical procedure for children who the officials determined were ineligible for government funding. In each case, the positions that I advocated were on behalf of my client and completely unrelated to my personal views.

I have serious reservations, in light of each of these experiences, about whether Alito's opinions in federalism cases, or Chief Justice Roberts' briefs on behalf of the government, provide any basis at all for determining what their beliefs and values may be. Even assuming that those beliefs and values have any relevance in determining whether either man should be on the Supreme Court, neither individual's ideology can be reliably gleaned from these opinions and briefs.

Alito's "states rights" opinions are a reflection of the controlling cases decided by a conservative Supreme Court, rather than of a renegade judge with a right wing agenda. His decision for the court in *Chittister v. Dept. of Community and Econ. Dev.*, 226 F.3d 223 (3rd Cir. 2000), the FMLA case, seems a particularly poor barometer of his personal leanings, given that at least six other federal appellate courts, including the 4th Circuit in the case that I argued, reached the same conclusion that Congress lacked the authority to authorize suits against the states under that federal law. These decisions were subsequently overruled by the Supreme Court, but their uniformity evidences an attempt to adhere to precedent, not judicial activism.

In the other case mentioned in Sunday's newspaper article, Alito filed a dissenting opinion stating that the federal machine gun legislation at issue in that appeal could not survive a Supreme Court case decided the previous year, but that is hardly smoking-gun proof (sorry about the pun) that this is a man who is conservative to the core.

On a personal level, I find more troubling the notion that Chief Justice Roberts' representation of the government provides a ground for questioning his values. Whether I would be a fair judge has nothing to do with zealously representing my client and making a "states' rights" argument on its behalf that ultimately proved to be successful. Nor does the mere act of defending government officials and their interpretation of the statute they administer mean that I'm too conservative to represent the poor and the oppressed.

I realize that there are other reasons that people have for drawing the conclusion that Alito and Chief Justice Roberts are to the right of Justices Scalia and Thomas. But that conclusion should be based on something meaningful. Shouldn't it?

Andrew H. Baida is a partner at Rosenberg|Martin|Funk|Greenberg LLP in Baltimore. He is an adjunct professor of appellate advocacy at the University of Maryland School of Law, and of Maryland administrative law at the University of Baltimore School of Law.