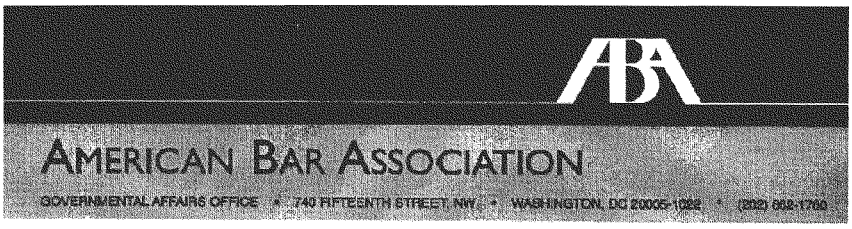

STATEMENT

OF

STEPHEN L. TOBER

STANDING COMMITTEE ON FEDERAL JUDICIARY
AMERICAN BAR ASSOCIATION

concerning the

NOMINATION OF

THE HONORABLE SAMUEL A. ALITO, JR.

to be an

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

JANUARY 12, 2005

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Mr. Chairman and Members of the Committee:

My name is Stephen L. Tober of Portsmouth, NH, and it is my privilege to chair the American Bar Association Standing Committee on Federal Judiciary. I am joined by Marna S. Tucker of Washington, our DC Circuit representative, and by John Payton, also of Washington, our Federal Circuit representative.

For well over 50 years, the ABA Standing Committee has provided a unique and comprehensive examination of the professional qualifications of candidates for the Federal bench. In fact, we have performed that very service, and have provided our ratings to this Committee, since 1948. It is composed of fifteen distinguished lawyers who represent every judicial circuit in the United States. These individuals, who volunteer hundreds of hours of public service annually, conduct a thorough, non-partisan, non-ideological peer review, using long-established standards that measure a nominee's integrity, professional competence, and judicial temperament.

The Standing Committee's investigation of a nominee for the United States Supreme Court is based upon the premise that such an individual must possess exceptional professional qualifications. The significance, range, and complexity of issues that such a nominee will confront on that Court demands no less. As such, our investigation of a Supreme Court nominee is more extensive, and procedurally different in two principal ways.

First, all circuit members on the Standing Committee reach out to a wide range of individuals within their respective circuits, who are most likely to have information regarding the nominee's professional qualifications.

Second, reading groups of scholars and distinguished practitioners are formed, to review the nominee's legal writings and advise the Standing Committee. The reading groups are guided by the same standards that are applied by the Standing Committee, and assist in evaluating the nominee's analytical skills, knowledge of the law, application of the facts to the law, and the ability to communicate effectively.

In the case of Judge Alito, circuit members combined to contact well over 2000 individuals across the nation. These contacts cut across virtually every demographic consideration, and it included judges, lawyers, legal scholars, bar leaders, opposing counsel, co-counsel, colleagues, and members of the general community. Thereafter, circuit members interviewed more than 300 people who knew, had worked with, or had substantial knowledge of the nominee. All interviews regarding the nominee were, in conformity with long-established practice, fully confidential to assure the most candid of assessments.

Judge Alito has created a substantial written record over his years of public service. Three reading groups—two from academia and one from the profession—worked collaboratively to read and evaluate nearly 350 of his published opinions, several dozen unpublished opinions, a number of his Supreme Court oral argument transcripts and corresponding briefs, and other articles and legal memos. The academic reading groups were composed of distinguished faculty from the Syracuse University College of Law, and from the Georgetown University Law Center. The practitioners' group was composed of nationally recognized practicing lawyers intimately familiar with the demands of appellate practice at the highest level.

Further, as part of any investigation performed by the Standing Committee, a personal interview is also conducted with the nominee. Judge Alito met with the three of us present today on December 12th, and provided us with a full opportunity to review matters with him in detail.

After the comprehensive investigation is completed, the findings are assembled into a detailed, confidential report. Each member of the Standing Committee reviews that final report thoroughly and individually evaluates the nominee using three rating categories: "Well Qualified," "Qualified," and "Not Qualified." Needless to say, to merit an evaluation of "Well Qualified," the nominee must possess professional qualifications and achievements of the highest standing.

Questions were raised during our investigation regarding the nominee's recusal practices, and also concerning some aspects of his judicial temperament. We have carefully reviewed and resolved those concerns to our satisfaction, as detailed in our accompanying correspondence to your Committee, which we ask to be made part of this record. We are persuaded by what Judge Alito has demonstrated in the totality of fifteen years of public service on the Federal bench. He has, during that time, established a record of both proper judicial conduct and practical application in seeking to do what is fundamentally fair.

On the basis of its comprehensive investigation, and with one recusal by our Third Circuit representative,[1] the Standing Committee has unanimously concluded that Judge Alito is "Well Qualified" to serve as Associate Justice on the United States Supreme

[1] Roberta D. Liebenberg, the Third Circuit representative who would normally have been the lead investigator, recused herself from the outset of this nomination under established Standing Committee practice, since she is counsel in a matter previously heard by a panel that included Judge Alito. That matter

Court. His integrity, professional competence, and judicial temperament are indeed found to be of the highest standing.

Judge Alito is an individual who, we believe, sees majesty in the law, respects it, and remains a dedicated student of it to this day.

Mr. Chairman, let me say once again what we noted here back in September: the goal of the ABA Standing Committee has always been—and remains—in concert with the goal of your Committee: to assure a qualified and independent judiciary for the American people.

Thank you for the opportunity to present these remarks.

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was argued prior to the announcement of his nomination, and the decision is still pending. John Payton shared responsibility for the Third Circuit investigation with Marna Tucker.