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January 12, 2006

The Honorable Patrick Leahy
Ranking Minority Member
Senate Judiciary Committee
152 Senate Dirksen Office Building
Washington, DC 20510

Dear Senator Leahy:

Since President Bush nominated Judge Samuel Alito to the Supreme Court, there has been much interest in what his colleagues on the Third Circuit Court think of him. One name in particular—the late A. Leon Higginbotham, Jr., Chief Judge when Judge Alito joined the court—has been invoked, with the suggestion that Judge Higginbotham might have supported Judge Alito's nomination to the Court.

I am a law professor who is related to Judge Higginbotham. I worked closely with him on racial justice issues for more than a decade. With Judge Higginbotham, I taught "Race and the Law" at the University of Pennsylvania Law School and New York University Law School. I co-authored three law review articles with the Judge concerning race in the American justice system. I co-authored with Judge Higginbotham a casebook on race in America. Because of my close relationship with Judge Higginbotham that provided me with insight into his views on racial justice, I feel compelled to set the record straight.

First appointed to a federal judgeship by President Lyndon B. Johnson in 1964, Judge Higginbotham was known as the conscience of the American judiciary on race issues. While Judge Higginbotham undoubtedly shared a collegial relationship with Judge Alito, it is my firm belief that Judge Higginbotham's substantive differences with the nominee on civil rights jurisprudence would have prevented his support.

The only race case on which Judges Higginbotham and Alito sat together illustrates the differences in their judicial philosophy. In *Grant v. Shalala*, 989 F.2d 1332 (3d Cir. 1993), Judge Alito authored an opinion, which held against a class action alleging racial bias by an Administrative Law Judge in deciding appeals of denials of Social Security benefits. The plaintiffs alleged the Administrative Law Judge adopted a biased policy under which he believed that claimants living in Hispanic, black or poor white communities are only "attempting to milk the system," that they are "perfectly capable of going out and earning a living," and that they "preferred living on public monies." *Id.* at 1347.

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The district court had certified the class and set the case for trial. When the government appealed, Judge Alito held that the district court could not make its own findings on the bias claims, but had to defer to the agency findings of no bias. Judge Alito wrote that "we are convinced that the plaintiffs' right to an impartial administrative determination can be fully protected through the process of judicial review of the Secretary's determination." *Id.* at 1346.

Judge Higginbotham, however, issued a strong dissent: "The determination of whether or not plaintiffs' constitutional right has been violated is the province of the courts and not that of an agency." *Id.* at 1357. "What the majority proposes to do in its holding is effectively have courts take a back seat to bureaucratic agencies in protecting constitutional liberties. This . . . is a radical and unwise redefinition of the relationship between federal courts and federal agencies. . . ." *Id.* at 1359.

The district court remanded the case to the agency, which again found no bias. The district court then ruled that the agency's decision was not supported by substantial evidence, and concluded that the Administrative Law Judge "harbored biases which rendered him unable to fulfill his duty to develop the facts and to decide cases fairly." 111 F. Supp. 2d 556, 563 (M.D. Pa. 2000).

Judge Higginbotham strongly believed that the federal courts had a duty to give full effect to the civil rights laws that were being passed just as he was joining the federal judiciary. To him, civil rights laws had little meaning unless federal courts were willing to enforce them.

Sadly, Judge Alito's civil rights record does not reflect such a commitment to the role of the courts in protecting our rights and liberties. Across the subject areas of voting rights, employment discrimination, fair housing, and criminal justice, Judge Alito has demonstrated a narrow, cramped view of laws protecting against discrimination. Although he has served on the bench for fifteen years, Judge Alito's rulings in favor of African Americans number only in the single-digits.

Unfortunately, Judge Higginbotham is not here to share his views. But having known him my entire life, both personally and professionally, I can say unreservedly that he would be deeply concerned that the Supreme Court's civil rights jurisprudence would take a dramatic shift in the wrong direction with the confirmation of Judge Alito.

Thank you for allowing me to share my thoughts with you.

Respectfully submitted,

Michael Higginbotham
The Wilson Elkins Professor of Law