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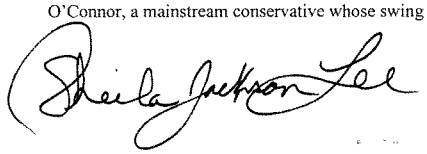
Statement by Congresswoman Sheila Jackson Lee

Confirmation Hearing for Judge Samuel A. Alito

Senate Judiciary Committee

January 18, 2006

Allow me to acknowledge Chairman Specter and Ranking Member Leahy in their respective capacities and for overseeing these hearings. The appointment of a Supreme Court Justice is an important issue and for that reason I am submitting this written testimony in as much as my request to provide oral testimony was not responded to. I would like to begin by noting that if confirmed as the next Associate Justice, Judge Samuel A. Alito would bring dramatic, sweeping change to the Supreme Court. While his words are carefully chosen and his demeanor is measured, Judge Alito's ultraconservative judicial philosophy is nothing short of radical. He would join other Justices who are at the center of a radical right-wing bloc that would change the direction of the Court and the country for decades to come, and threaten fundamental rights and legal protections. He stands in sharp contrast to the justice he would replace: Sandra Day O'Connor, a mainstream conservative whose swing vote has helped to preserve hard-won



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progress on civil rights, reproductive freedom, environmental protections, and a host of other issues preserving equality and justice for every American. The White House has tried to distance Judge Alito from his lengthy record, which demonstrates he is among the most extreme members of the federal bench. His nomination has been unanimously acclaimed by the leaders of the Radical Right. He has shown a pronounced willingness to impose a narrow right-wing ideology from the bench, and has compiled an extraordinary record of dissents to mainstream opinions. He has the largest number of dissents on the Court of Appeals on which he currently sits. My testimony will focus on areas which are very important to my constituents and I believe all Americans. These include civil rights, immigration, privacy issues, the Voters Right Act, and Judge Alito's record on civil liberties.

As a government lawyer and a federal judge, Judge Alito has consistently failed to protect civil rights. He has said he disagrees with historic Supreme Court decisions articulating the "one person – one vote" principle. As a judge, he has rarely sided with individuals seeking relief from discrimination on the basis of race, age, gender, or disability, and he has opposed efforts to redress the historic effects of discrimination in the workplace. Indeed, in civil rights cases where the Third Circuit was divided, Judge Alito advocated positions detrimental to civil rights 85 percent of the time. He once argued that it was permissible to seat an all-white jury in a case in which the evidence indicated that prosecutors had rejected black jurors on the basis of race. As part of a 1985 application for promotion in the Justice Department, he highlighted his membership in a reactionary Princeton alumni group that opposed the admission of women and attempts

by the university to increase minority enrollment. Also in his 1985 application, Judge Alito expressed pride in his contributions, as Assistant Solicitor General, to cases in which "the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed." In fact, Judge Alito erroneously conflated "quotas" with permissible affirmative action programs and remedies that courts appropriately order in cases of egregious discrimination. It is important to note that the Supreme Court specifically rejected Reagan Administration efforts to restrict such remedies in two cases that Alito participated in.[1] Later, Judge, Alito wrote several dissents demonstrating a similar disregard for victims of sex and race discrimination. In one case, ten other appeals court judges, Republican and Democratic, agreed that a victim of sex discrimination had enough evidence to at least present her case to a jury; Judge Alito alone disagreed.[2] In another case involving race discrimination in employment where Alito again tried to prevent a case from even going to a jury, the court majority sharply criticized Alito's dissent, stating that "Title VII would be eviscerated if our analysis were to halt where [Alito's] dissent suggests."[3] All of these actions by Judge Alito have served to erode civil rights in this country that have been fought so hard far and in many cases lives have been lost.

Turning to immigration, it goes without saying that immigration is a specialized area of the law with important civil rights implications. As a Member of the House Homeland Security Committee and the Ranking Member on House Judiciary Subcommittee on Immigration, this is a very important issue to me. Although the

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[1] See PFAW, Samuel Alito: 1985 Application Reveals Right-Wing Ideology"
[2] Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061 (3d Cir. 1996), cert. denied, 521 U.S. 1129

Supreme Court has often issued rulings that have limited the rights of immigrants, Judge Alito's record suggests that his confirmation would likely make matters even worse. Judge Alito's record as a government lawyer and federal judge raise serious concerns about his views on immigrants' rights. In his capacity as Deputy Assistant Attorney General, in 1986 Judge Alito advised William Webster, Director of the Federal Bureau of Investigation (FBI), that the FBI's desire to document fingerprint and criminal information of nonresident non-citizens of the U.S. was constitutionally proper. He went further and issued a broad legal opinion regarding the constitutional protections that should properly be afforded to undocumented immigrants living in the United States. He argued that the Supreme Court's decision in Matthews v. Diaz,[4] suggests that "illegal aliens have no claim to nondiscrimination with respect to nonfundamental rights," and the Constitution "grants only fundamental rights to illegal aliens within the United States. In fact, Alito's analysis rests on a flawed interpretation of *Matthews* and ignored a more recent case in which the Supreme Court had held to the contrary. In Plyler v. Doe,[5] the Court held that the Fourteenth Amendment prohibited states from discriminating against undocumented immigrant children in the provision of public education, even though the Supreme Court has held that education is not considered a "fundamental right" under the Constitution. Even the dissenting Justices in *Plyler* indicated that they "ha[d] no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment applies to aliens, who, after their illegal entry into this country, are indeed physically

[3] *Bray v. Marriott Hotels*, 100 F.3d 986 (3d Cir. 1997) at 993.
[4] 426 U.S. 67 (1976) (addressing whether Congress may condition a non-citizen's eligibility for Medicare's supplemental insurance program upon continuous residence in the United States for a 5 year period and permanent residency status).
[5] 457 U.S. 202 (1982)

'within the jurisdiction' of a state."[6] None of the Justices on the *Plyler* Court would have gone as far as Judge Alito to restrict equal protection rights of undocumented immigrants. It is clear that Judge Alito has issued troubling dissents from decisions protecting immigrants' rights. As a Member of the House Homeland Security Committee and the House Judiciary Subcommittee on Immigration, this strongly concerns me.

As it relates to privacy rights and reproductive freedoms, Judge Alito's opinions are very troubling. When the Third Circuit upheld most of Pennsylvania's very restrictive anti-abortion law in 1991 in Planned Parenthood of Southeastern Pennsylvania v. Casey. In this case, Judge Alito wrote separately to say that he would have upheld the whole law, including restrictions requiring a woman to notify her spouse before obtaining an abortion. The Supreme Court majority disagreed with Alito, but justices who sought to overrule Roe v. Wade agreed with his view. This case raises key questions about whether, if confirmed to a seat on the Supreme Court, Alito would be a vote for overturning Roe v. Wade. In addition, in the late 1980's, the Pennsylvania state legislature passed a number of amendments to the Pennsylvania Abortion Control Act of 1982 which placed restrictions on the right of women to obtain an abortion. For example, the amendments required: 1) women to wait for 24 hours after being given certain information about abortion before undergoing the procedure; 2) minors to obtain parental consent or a judicial bypass; 3) women to inform their spouses of their decision to seek an abortion except in very narrow circumstances; 4) reporting requirements for abortion clinics and public disclosure of those reports. The district court found that all of these provisions were unconstitutional, and the state appealed. On appeal, a three-judge panel

[6] Id. At 243.

of the Third Circuit, including Judge Alito, upheld the district court on every issue except the spousal notification provisions, which they found unconstitutional. Specifically, the panel found that none of the provisions -- except spousal notification -- subjected women seeking abortions to an undue burden. A majority of the panel agreed that the spousal notification provision did pose an undue burden on women seeking an abortion and was unconstitutional.

Judge Alito went even further and dissented in part because he felt that none of the provisions, even the spousal notification provision, posed an undue burden on women seeking abortions. Judge Alito argued that any minimal burden posed by the spousal notification provisions was justified by Pennsylvania's legitimate interest in furthering the husband's interest in the fetus carried by his wife. Part of Judge Alito's decision appeared to rest on the fact that, according to him, those challenging the provision "failed to show even roughly how many of the women in this small group would actually be adversely affected by" the spousal notification provisions. Since no undue burden was imposed by the statute, argued Judge Alito, the regulation needed only to meet a lower level of scrutiny. Given the state's legitimate interest, Judge Alito believed the spousal notification requirement was constitutional. This dissenting view demonstrates Judge Alito's extremely narrow construction of what constitutes an undue burden on a woman's right to obtain an abortion.

Before closing, let me take a moment to discuss Judge Alito's record on voting rights in general and apportionment in particular. There are few citizens or scholars who would deny that the Supreme Court's interpretations of the Constitution as a shield against the excesses of unchecked power have often crystallized the Court's intended and imperative role. For many, the Court's civil rights and voting rights jurisprudence capture the essence of these tests of the measure of our commitment to equality. The most significant Supreme Court decisions in the area of voting have elevated and not shrunk from the principle of equality embodied in the Constitution. Accordingly, a discussion of Judge Alito's record on voting rights must begin with his comments on judicial usurpation of authority and the Supreme Court's reapportionment cases. These statements appeared in Judge Alito's 1985 Department of Justice application to become Deputy Assistant Attorney General. In his application, Judge Alito wrote: "In the field of law, I disagree strenuously with the usurpation by the judiciary of decisionmaking authority that should be exercised by the branches of government responsible to the electorate."[7] He also wrote that he had developed in college "a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions," including those involving "reapportionment."[8]

It is clear that during her years on the Rehnquist Court, Justice Sandra Day O'Connor has manifested an awareness of the centrality of the Court's voting rights jurisprudence that led her to deliberative case-by-case assessments. Given the stakes involved in filling the replacement for Justice O'Connor, Judge Alito's statements are of

[7] PPO Non-Career Appointment Form, Nov. 15, 1985, Bates No. WH-120.
[8] Id.

grave concern to me. At the very least, Judge Alito should be thoroughly questioned during his hearing before the Senate Judiciary Committee about which cases decided by the Warren Court animated his strenuous objections, and about the precise grounds for his disagreement with the principles enunciated by the Court. The Warren Court, spanned the years from 1953 to 1969, and presided over a series of seminal cases involving voting rights generally, and apportionment in particular. The cases largely addressed the power of the federal courts to ensure that voting rights were meaningfully protected. Among other things, the Warren Court's reapportionment decisions are lauded for their role in barring state legislative schemes that dilute the voting strength of racial minorities by perpetuating inequitably drawn voting districts – districts in which the votes of citizens in one part of a state would be afforded, in some cases two times, five times or even ten times more weight than the votes of citizens in another part of a state. Recognizing the concept of "one person, one vote," the Court enshrined the principle that every citizen has the right to an equally effective vote, rather than the right to simply cast a ballot. In doing so, the Court set into motion a process that led to the dismantling of a political system infected both by prejudice and other forms of patent electoral manipulation.

In conclusion, Judge Alito's quiet demeanor cloaks a far right ideology that places him among the most conservative judges on the federal bench. If he replaces Justice O'Connor, he would be a consistent vote to turn back the clock on decades of progress in civil rights, civil liberties, health and safety, environmental protection and religious liberty. His extreme judicial philosophy threatens fundamental rights and legal

protections for all Americans – for decades to come. The Senate should reject his confirmation to a lifetime seat on the Supreme Court. In the alternative, those of us who believe in a balanced U.S. Supreme Court in which all Americans would be able to receive a fair and objective review of their petitions. We are asking that committed Members of the Senate engage in a principled filibuster to ensure that the integrity and balance of the U.S. Supreme Court.