TESTIMONY OF

THEODORE M. SHAW

DIRECTOR-COUNSEL AND PRESIDENT

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

ON THE NOMINATION OF

JUDGE SAMUEL ALITO

TO THE UNITED STATES SUPREME COURT

NAACP LEGAL DEFENSE

AND EDUCATIONAL FUND, INC.

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Testimony of Theodore M. Shaw, Director-Counsel and President of the NAACP Legal Defense & Educational Fund, Inc., on the Nomination of Judge Samuel Alito to the United States Supreme Court

Good afternoon, my name is Theodore M. Shaw, the Director-Counsel and President of the NAACP Legal Defense & Educational Fund, Inc. ("the Legal Defense Fund").

The Legal Defense Fund, whose first Director-Counsel was Thurgood Marshall, and which is no longer a part of the N.A.A.C.P., is the nation's oldest civil rights law firm and has served as legal counsel for African-American civil rights claimants in most of the major racial discrimination cases decided by the United States Supreme Court.

Through every step of the African American experience in this nation, the Supreme Court has – in ways both positive and otherwise – shaped the lives and opportunities of black Americans. *Dred Scott, Plessy v. Ferguson, Brown v. Board of Education, Grutter v. Bollinger*: these cases describe not only where we have stood as a nation, but in so many ways have circumscribed and defined the lives of African-American people. The Supreme Court is just as important today as it was in 1857 when *Dred Scott* was decided, or in 1954, when the late Justice Thurgood Marshall argued before the Court in *Brown*. From voting to education, criminal justice to employment, civil rights issues continue to affect the lives of African Americans every day. Who is on the Court – who decides – is thus a decision which merits the highest consideration.

As a lawyer, as a member of the Bar of the Supreme Court of the United States, as the head of an organization, the primary responsibility of which is to provide legal representation in cases involving racial discrimination, including in cases before the Supreme Court, and as a representative of the civil and human rights community that places so much trust and hope in our judiciary, I take no pleasure in the task that brings me here today. I am acutely aware that some people will dismiss all opposition to the nomination of Judge Alito to the Supreme Court as knee-jerk liberalism. For us, however, this is not about liberal or conservative, right or left. We do not oppose nominees merely because they are conservative. Our concern is that judges are open minded, and that they decide cases based on the facts and the law.

Justice O Connor's judicial philosophy has been conservative. In fact, in many race discrimination cases coming before the Supreme Court, the claimants did not win her vote. But, importantly, her vote was always in play. For a quarter of a century, the Supreme Court has decided most race discrimination cases by razor thin 5-4 margins. Justice O Connor's vote was widely perceived to be the swing vote; the Court could go either way.

Unfortunately, Judge Alito's record does not reveal any of the pragmatism for which Justice O'Connor is well known. The overwhelming majority of African-American litigants whose claims Judge Alito have adjudicated has lost his vote. Judge Alito's confirmation to the Supreme Court will cause a substantial shift in the Court's civil rights jurisprudence in a manner that will make it significantly more difficult for civil rights plaintiffs to prevail. As a result, we and a number of other civil rights organizations oppose the nomination of Judge Samuel Alito to the United States Supreme Court as an Associate Justice.

We have prepared a detailed report discussing Judge Alito's record on various civil rights subject areas and detailing the reasons for our opposition, and I ask that the report be entered into the record. In my limited time today, I will highlight only a few issues.

First, for minority workers, women and others who depend on the nation's fair employment laws, Judge Alito's record is deeply troubling. In his fifteen years on the bench, Alito has almost never voted in favor of African-American plaintiffs in employment discrimination cases. Of the dozens of employment discrimination cases involving race in which Judge Alito has participated, he ruled for African Americans on the merits in only two instances. Further, he has never authored a majority opinion favoring African Americans in such cases. Moreover, in key cases, he has dissented from rulings of his colleagues for African-American plaintiffs and sought to impose upon plaintiffs claiming racial discrimination a higher burden of proof than Congress intended.

Judge Alito's comments regarding the Warren Court's decisions on "reapportionment" also are deeply troubling. 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. The Court established the principle that

every citizen has the right to an equally effective vote. 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. These decisions have resulted in more effective political participation in the political process for all voters. Nevertheless, Judge Alito has criticized them. Just as importantly, in his only voting rights decision on the bench, he voted to uphold at-large electoral districts, thereby tolerating the types of electoral abuses that the principle of one person, one vote as well as the Voting Rights Act of 1965 were intended to end.

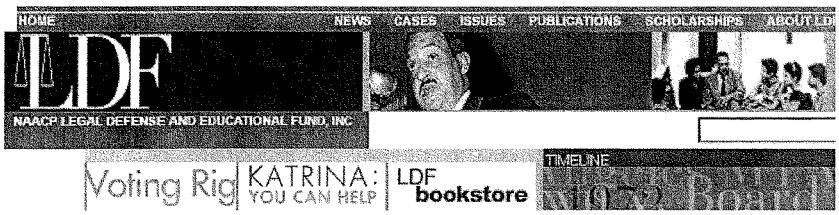
In the area of criminal justice, Judge Alito twice has written separately to express troubling views on a defendant's right to have a jury selected free of racial discrimination. In one case, he trivialized the serious matter of race discrimination in the selection of jurors by comparing it to whether someone is left-handed or right-handed. In another, Judge Alito suggested that a standard different from that announced by the U.S. Supreme Court should prevail.

Finally, we are deeply troubled by Judge Alito's record on affirmative action. In a brief attacking affirmative action, Samuel Alito used the following analogy: "Henry Aaron would not be regarded as the all-time home run king, and he would not be a model for youth, if the fences had been moved in whenever he came to the plate." This statement reveals a fundamental misconception of what affirmative action is about. Civil rights and affirmative action advocates are not asking for fences to be moved in; they are seeking opportunities to take the field, to stand at the plate. Hank Aaron, like Jackie Robinson, would never have had the opportunity to play in the Major Leagues, if Branch Rickey of the Brooklyn Dodgers and others had not "affirmatively acted" to desegregate baseball.

Our review of Judge Alito's record reveals that he has been remarkably consistent over the years. His views expressed as an advocate do not differ from his jurisprudence during fifteen years as an appellate judge. He has demonstrated a strong deference to government actors and employers in race discrimination cases, a narrow and cramped interpretation of civil rights laws, and a skewed skepticism of the claims of minority, female and other civil rights plaintiffs. Simply put, the question before us is whether African-American and other civil rights claimants would be better off before or after Judge Alito's confirmation to the Supreme Court. The clear answer is that civil rights claimants would be harmed by this confirmation.

While we would like to believe that Judge Alito would approach civil rights cases with an entirely open mind if he were confirmed to the Supreme Court, his

record as an appellate judge contradicts any such view. We therefore respectfully but vigorously oppose his confirmation as Associate Justice of the United States Supreme Court.



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December 19, 2005

NAACP Legal Defense Fund Opposes Alito Nomination

Report details hostility to civil rights and warns of tipped balance on High Court

On December 15, 2005, the NAACP Legal Defense and Educational Fund, Inc. (LDF) announced opposition to the nomination of Samuel Alito, Jr. to the U. S. Supreme Court, citing his hostility to strong enforcement of civil rights laws. LDF warned that confirmation of Judge Alito would threaten to shift significantly the Supreme Court's jurisprudence relating to affirmative action, voting rights, employment and criminal justice issues.

At a press conference in Washington, D.C., LDF released a 70-page report detailing what it called an "extreme" judicial approach by Judge Alito that would demonstrably impact important future decisions of the High Court. The LDF report cites cases in which Alito has attacked congressional legislative authority in a manner that his colleagues viewed as extreme. As a Justice Department lawyer, he argued to uphold police use of deadly force and undermine the rights of criminal defendants. In the area of affirmative action, LDF highlighted "troubling signals" that Alito would tip the delicate Court balance to unravel policies "at the epicenter of the modern struggle for racial equality."

"We can predict with substantial certainty that Judge Alito will very likely vote in a manner that, given the current composition of the Court, will cause a substantial shift in the Court's civil rights jurisprudence with devastating effects," the LDF report cautioned.

Judge Alito is scheduled to appear before the Senate Judiciary Committee in early January for confirmation hearings.

LDF Director-Counsel and President Theodore M. Shaw stressed that the organization does not relish opposing a

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nomination to the Supreme Court and does so only when the nominee's record is contrary to the goals of equal justice that are the hallmark of LDF's work.

With the announcement of Justice Sandra Day O'Connor's retirement last summer, LDF called upon President Bush to nominate a successor who is not ideologically rigid and predictable, but who is fair and open-minded, and committed to protecting advances in civil rights. LDF emphasized that Justice O'Connor's successor should not be a mission-driven ideologue but, even if a conservative, should maintain the balance on the Court with respect to civil rights issues.

To analyze Alito's record, LDF reviewed published and unpublished opinions in cases decided by Judge Alito as well as documents released by the White House and the National Archives. Appointed by President George H.W. Bush to the U.S. Court of Appeals for the Third Circuit in 1990, Alito spent his entire legal career at the Department of Justice.

LDF's report also reveals:

- Unquestionably, Justice O'Connor cast pivotal votes in civil rights cases coming before the Supreme Court. While Justice O'Connor did rule against civil rights litigants, at least her vote on important issues such as affirmative action was "always in play." In contrast, a review of Samuel Alito's tenure at the Justice Department reveals that he was directly involved in the Reagan Administration's frontal attacks on affirmative action, arguing against affirmative action in three significant cases before the Court. In his 15 years on the bench, he has ruled against African Americans on this issue.

- Judge Alito's record should be extremely troubling to minority workers, women and others who depend on equal opportunity protections in the workplace. Although he has heard dozens of cases, Judge Alito has almost never ruled in favor of an African-American plaintiff in an employment discrimination case; he has never authored even one opinion favoring an African-American plaintiff on the merits in such a case.

- Judge Alito's criticism of the Warren Court's reapportionment decisions is extremely troubling. These cases "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 his only opportunity on the bench to interpret the Voting Rights Act, Alito voted to uphold an at-large system of electing members to a Delaware school district, perpetuating an electoral system that diluted the voting strength of racial minorities.

- In the criminal justice area, Judge Alito has repeatedly parted ways with his colleagues and failed to heed Supreme Court precedent in important cases regarding race discrimination in jury selection, the right to effective assistance of counsel, and search and seizure issues.

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