



HUMAN  
RIGHTS  
CAMPAIGN

Testimony of Joe Solmonese, President,  
Human Rights Campaign  
On the Nomination of Samuel Alito as Associate Justice of the Supreme Court of the  
United States

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*Before the United States Senate Judiciary Committee*

January 12, 2006

Members of the Committee:

I appreciate the opportunity to offer the Human Rights Campaign's testimony to this Committee. The Human Rights Campaign is the nation's largest bipartisan organization working to advance equality based on sexual orientation and gender identity and expression, to ensure that gay, lesbian, bisexual and transgender ("GLBT") Americans can be open, honest and safe at home, at work and in the community.

You are now considering Samuel Alito to succeed Justice Sandra Day O'Connor, whose tenure on the bench has been marked not only by a common-sense approach to tough issues, but by a clear understanding of the impact that the Court's decisions can have on real people.

America deserves a justice in that model, because although a Supreme Court justice must address complex legal issues requiring a brilliant mind and extraordinary legal experience, he or she also bears the burden of making decisions that will affect real human beings in profound ways—often for decades to come. As the late Justice Felix Frankfurter wrote, "there comes a point where this Court should not be ignorant as judges of what we know as men."<sup>1</sup> Quite simply, a justice must see the human side of the cases before him or her.

The GLBT community has seen the impact that this basic human understanding can have upon the judicial process. Less than three years ago, the Court affirmed that GLBT people cannot be branded criminals because of who we are.<sup>2</sup> Its decision showed a shift

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<sup>1</sup> *Watts v. State of Indiana*, 338 U.S. 49, 52 (1949).

<sup>2</sup> *See Lawrence v. Texas*, 539 U.S. 558 (2003).

WORKING FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUAL RIGHTS

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from *Bowers v. Hardwick*,<sup>3</sup> in which the court focused so intently on the *conduct* at issue that it failed to consider GLBT people as human beings. In *Lawrence*, the Court to which Samuel Alito has been nominated has accepted what most fair-minded Americans know: that GLBT people exist, that we are entitled to constitutional protection, and that laws based on mere disapproval have no place in this country's legal system.

A review of Judge Alito raises serious concerns about whether, when he looks across the bench, he will see the faces of the people whose lives his decisions will affect. The following cases illustrate our concern:

In *Cai Luan Chen v. Ashcroft*,<sup>4</sup> Alito authored an opinion upholding the denial of an asylum petition for the fiancé of a woman who had been granted asylum. The fiancée's application for asylum had been approved because she had been forced to have an abortion 8 months into her pregnancy under China's population-control policies. In such cases, spouses are ordinarily also granted asylum. The woman's fiancé, the petitioner in this case, noted that the couple *would have* married but for the very high minimum age requirements for marriage (25 for men and 23 for women). Neither the applicable statute nor regulations were clear about unmarried partners, but the INS nonetheless concluded that the petitioner was not eligible for asylum.

On appeal, Judge Alito upheld this decision, concluding that the agency's interpretation of its regulations was reasonable. The opinion contrasts the spousal relationship with non-spousal ones, noting "the persecution of one spouse by means of a forced abortion or sterilization causes the other spouse to experience intense sympathetic suffering that rises to the level of persecution."<sup>5</sup> In concluding that the agency's distinction (not required by the statute) between spouses and non-spouses was reasonable, Alito adopted a chillingly clinical approach to the real-world impact of this policy, stating "we may say that BIA 'logically concluded that aliens who are [married] are more likely than aliens not so situated' to be severely injured in the ways noted above when their partners are forced to endure forced abortions or sterilization."<sup>6</sup> The Court of Appeals for the Ninth Circuit later reached the opposite conclusion.<sup>7</sup>

Although Alito claimed, throughout the *Cai Luan* opinion, simply to be adhering to very strict standards of deference to agencies, this opinion conflicts with his application of this standard<sup>8</sup> in a different asylum case involving a married couple (claiming persecution under the forced-abortion policy and as Christians). In a seemingly results-oriented opinion, Alito reversed an agency's interpretation of its regulations and a fact-finder's determination regarding credibility—both of which entail similar extraordinarily high standards of deference.

<sup>3</sup> 478 U.S. 186 (1986).

<sup>4</sup> 381 F.3d 221 (3d Cir. 2004).

<sup>5</sup> *See id.* at 225.

<sup>6</sup> *See id.* at 228.

<sup>7</sup> *See Zheng v. Ashcroft*, 382 F.3d 993 (9th Cir. 2004).

<sup>8</sup> Called the *Chevron* standard after the case that established it. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

<sup>9</sup> *See Gui Cun Liu and Xiu Ding Liu v. Ashcroft*, 372 F.3d 529 (3d Cir. 2004).

In all but one state in this country, there are GLBT people who *would* marry but legally cannot. Consequently, they are denied basic protections that others take for granted—including the right to sponsor a partner for immigration purposes. Alito's asylum cases show a callousness toward the real-world impact of the law, and this is cause for grave concern to the GLBT and all Americans.

Alito's decision to strike down a school district's harassment policy is another example of his failure to comprehend the dangers that face ordinary Americans. Harassment and bullying plague an alarming number of GLBT students. Thirty-three percent of students polled report that GLBT students are subjected to harassing or bullying behavior at school. Nonetheless, in *Saxe v. State College Area School District*<sup>10</sup> Alito struck down a policy that would protect GLBT students, among others, from such harassment. The policy was narrowly tailored to encompass only actions or words that had the intent or effect of impeding a student's education or creating a hostile environment. Nonetheless, when it was challenged by a group of students who claimed that it infringed their right to speak out about the "sinful nature of homosexuality," Alito ruled that it violated the students' First Amendment rights. The Family Research Council, an anti-gay advocacy group, gave Alito its 2001 Golden Gavel Award for this case, an honor that Alito noted in his responses to this Committee's questionnaire.

Because the GLBT community is particularly vulnerable to bias-motivated violence and to employment discrimination, Congress's power to legislate to prevent these social ills is of vital importance to GLBT Americans. In voting to strike down a portion of the Family and Medical Leave Act and to strike down the federal assault weapons ban, Alito took an extremely narrow view of Congress's authority to protect Americans. Congress's power to legislate has a profound impact on real lives—and Judge Alito has a record of disregarding this impact.

Many civil rights groups will come before this committee to discuss Judge Alito's troubling civil rights record in great detail. The Human Rights Campaign stands by its allies in the civil rights community in opposing this nomination. America deserves a justice who will understand the power he or she can exercise over real human beings, respecting and considering the day-to-day impact of judicial decisions on millions of lives.

For all of the reasons set forth in this testimony, we urge you to vote not to confirm Samuel Alito to the Supreme Court of the United States.

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<sup>10</sup> 240 F.3d 200 (3d Cir. 2001).

**DIVIDED THIRD CIRCUIT PANELS**

In the areas of criminal justice and immigration, Judge Alito has participated in 52 cases resulting in a panel that divided on whether to grant relief on an individual's claim of unlawful government power. In these disputed cases, he sided with the individual four times (in **bold** below)—three times joining an *en banc* majority, once writing a dissent. In the other 48 cases, including 13 search and seizures cases and 4 death penalty cases, he sided with the government, dissenting 13 times from opinions written or joined by a Republican appointee. Below are the cases, with the following notations:

† Judge Alito wrote the majority opinion.

\* Judge Alito dissented.

\*\* Judge Alito dissented from an opinion written or joined by a Republican appointee.

**Fourth Amendment search and seizure**

\*\* Doe v. Groody, 361 F.3d 232 (3d Cir. 2004)

† United States v. Lee, 359 F.3d 194 (3d Cir. 2004)

Feldman v. Community College of Allegheny, 85 Fed. Appx. 821 (3d Cir. 2004)

Grazier ex rel. White v. City of Philadelphia, 328 F.3d 120 (3d Cir. 2003)

† United States v. \$92,422.57, 307 F.3d 137 (3d Cir. 2002)

United States v. Nelson, 284 F.3d 472 (3d Cir. 2002)

\*\* United States v. Zimmerman, 277 F.3d 426 (3d Cir. 2002)

Pryer v. C.O. 3 Slavic, 251 F.3d 448 (3d Cir. 2001)

Torres v. McLaughlin, 163 F.3d 169 (3d Cir. 1998)

† Mellott v. Heemer, 161 F.3d 117 (3d Cir. 1998)

United States v. Brown, 159 F.3d 147 (3d Cir. 1998)

\*\* Baker v. Monroe Township, 50 F.3d 1186 (3d Cir. 1995)

† Bolden v. Southeastern Pa. Transp. Authority, 953 F.2d 807 (3d Cir. 1991) (en banc)

**Misleading or erroneous jury instruction**

\*\* United States v. Russell, 134 F.3d 171 (3d Cir. 1998)

\*\* Smith v. Horn, 120 F.3d 400 (3d Cir. 1997) (*capital case*)

\* United States v. Edmonds, 80 F.3d 810 (3d Cir. 1996) (en banc)

† Flamer v. Delaware, 68 F.3d 736 (3d Cir. 1995) (en banc) (*capital case*)

United States v. Zehrbach, 47 F.3d 1252 (3d Cir. 1995) (en banc)

Geschwendt v. Ryan, 967 F.2d 877 (3d Cir. 1992) (en banc)

Rock v. Zimmerman, 959 F.2d 1237 (3d Cir. 1992) (en banc)

\*\* Virgin Islands v. Smith, 949 F.2d 677 (3d Cir. 1991)

Sentencing

- † United States v. Santo, 87 Fed. Appx. 818 (3d Cir. 2004)
- \*\* United States v. Shoupe, 35 F.3d 835 (3d Cir. 1994)
- † United States v. Shoupe, 929 F.2d 116 (3d Cir. 1991)
- United States v. Dixon, 982 F.2d 116 (3d Cir. 1992)
- \* United States v. Bierley, 922 F.2d 1061 (3d Cir. 1990)
- United States v. Askari, 159 F.3d 774 (3d Cir. 1998) (en banc)**

Racial discrimination in jury selection

- \*\* Riley v. Taylor, 277 F.3d 261 (3d Cir. 1997) (en banc) (*capital case*)
- Ramseur v. Beyer, 983 F.2d 1215 (3d Cir. 1992)

Ineffective assistance of counsel

- † Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004), *rev'd*, 125 S. Ct. 2456 (2005) (*capital case*)
- \*\* United States v. Kauffman, 109 F.3d 186 (3d Cir. 1997)

Other criminal issues

- United States v. Pharis, 298 F.3d 228 (3d Cir. 2002) (en banc)**
- † United States v. Gricco, 277 F.3d 339 (3d Cir. 2002)
- United States v. Cepero, 224 F.3d 256 (3d Cir. 2000) (en banc)
- United States v. Universal Rehabilitation Servs., 205 F.3d 657 (3d Cir. 2000) (en banc)
- Coss v. Lackawanna County Dist. Att’y, 204 F.3d 453 (3d Cir. 2000) (en banc)**
- Matteo v. Superintendent, 171 F.3d 877 (3d Cir. 1999) (en banc)
- United States v. Parise, 159 F.3d 790 (3d Cir. 1998)
- † United States v. Lake, 150 F.3d 269 (3d Cir. 1998)
- \*\* United States v. Palma-Ruedas, 121 F.3d 841 (3d Cir. 1997), *rev'd*, 526 U.S. 275 (1999)
- † Government of Virgin Islands in Interest of A.M., 34 F.3d 153 (3d Cir. 1994)
- † United States v. McDade, 28 F.3d 283 (3d Cir. 1994)
- Robinson v. Arvonio, 27 F.3d 877 (3d Cir. 1994)
- Burkett v. Fulcomer, 951 F.2d 1431 (3d Cir. 1991)
- United States v. Soberon, 929 F.3d 935 (3d Cir. 1991)

Deportation and asylum

- † Singh-Kaur v. Ashcroft, 385 F.3d 293 (3d Cir. 2004)
- \* Lee v. Ashcroft, 368 F.3d 218 (3d Cir. 2004)
- \* Dia v. Ashcroft, 353 F.3d 228 (3d Cir. 2003) (en banc)
- \*\* Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999)
- \*\* **United States v. Igonwa, 120 F.3d 437 (3d Cir. 1997)**
- \*\* Chang v. INS, 119 F.3d 1055 (3d Cir. 1997)
- \*\* Tipu v. INS, 20 F.3d 580 (3d Cir. 1994)



HUMAN  
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January 10, 2006

Dear Member of the Senate Judiciary Committee:

On behalf of the Human Rights Campaign ("HRC"), America's largest civil rights organization advocating for the gay, lesbian, bisexual and transgender ("GLBT") community, I write to oppose the nomination of Judge Samuel A. Alito, Jr. to the Supreme Court of the United States. As a community that is particularly vulnerable to discrimination and bias-motivated violence, and that has recently been the target of discriminatory legislation, GLBT Americans, like all Americans who rely on a fair and independent judiciary, are profoundly affected by shifts in the Court's balance. Based upon our review of his record, HRC believes that Judge Alito would shift the Court to the right, departing from Justice O'Connor's moderate, fair-minded approach to civil rights issues.

When his nomination was announced on October 31, HRC expressed concern that Alito's known positions on privacy, separation of church and state, and congressional power were cause for great concern. We were particularly troubled by Judge Alito's opinion striking down a school's anti-harassment policy covering sexual orientation and his defense of a Department of Justice opinion permitting discrimination based on HIV status even if it is based on "irrational" fears.

Evidence about Judge Alito's record has mounted in recent weeks, leading HRC to formally oppose his nomination. For instance, in documents released since his nomination, Judge Alito indicated that he believed that there was no constitutional right to an abortion, and that he was proud of working to overturn *Roe v. Wade*. This is of particular importance to GLBT Americans because the constitutional right to privacy that underlies *Roe* is linked to the liberty rights that enable GLBT Americans to live as equal citizens and not as criminals.

Because religion is often wrongly used as proxy for discrimination against GLBT people, it is critical that the Court preserves the wall of separation of church and state. We are therefore particularly concerned that Alito also disagrees with Warren Court precedents on the Establishment clause.

The circumstances surrounding Alito's appointment and his approval by anti-GLBT activists are further cause to believe that his appointment would threaten hard-won constitutional rights upon which the GLBT community, like all Americans, rely. We therefore urge you to vote against the confirmation of Judge Alito to the Supreme Court of the United States.

Thank you for your consideration. If you have any questions, or need more information, please contact David Stacy at 202.572.8959 or Lara Schwartz at 202.216.1578.

Sincerely,

Joe Solmonese  
President