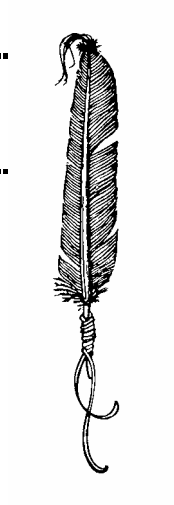

Memorandum

Native American Rights Fund
1712 N Street, NW, Washington, DC 20036
(202)785-4166

To: Tribal Leaders and Tribal Attorneys

From: Richard Guest, Staff Attorney

Date: January 6, 2006

Re: The Nomination of Samuel A. Alito, Jr. to the Supreme Court of the United States - An Indian Law Perspective

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On Monday, January 9, 2006, the Senate Judiciary Committee will begin confirmation hearings for Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States. Alito was nominated by President Bush on October 31, 2005, to replace the retiring Associate Justice Sandra Day O'Connor, shortly after the president's former nominee, Harriet Miers, had withdrawn from consideration. If the hearings run smoothly, Alito could be confirmed by the full Senate and sworn in as a member of the Supreme Court as early as January 20, 2006. However, Democrats are considering a procedural maneuver that could delay a committee vote by at least one week, thus delaying a vote by the full Senate.

Who is Samuel A. Alito, Jr.?

By all accounts, Alito is a conservative jurist who is Ivy League educated and who possesses the necessary legal credentials to serve as a Justice on the Supreme Court. He has received a unanimous well-qualified rating from the American Bar Association, the highest rating given to judicial nominees. Alito obtained his bachelor's degree from Princeton University in 1972 and attended Yale Law School where he served as editor on the Yale Law Journal, graduating in 1975. Alito has gained broad legal experience in the public sector: clerking for the Honorable Leonard I. Garth on the Third Circuit (1976); working as Assistant U.S. Attorney, District of New Jersey (1977-81); serving as Assistant to the U.S. Solicitor General (1981-85) where he argued 12 cases before the Supreme Court; serving as Deputy Assistant Attorney General in the Office of Legal Counsel (1985-87); as U.S. Attorney for the District of New Jersey (1987-90); and appointed by the first President Bush as a judge to the United States Circuit Court of Appeals for the Third Circuit (1990 to present). Unlike Chief Justice Roberts, Alito has no legal experience in the private sector and has not performed any pro bono legal work.

Does Alito have any experience in federal Indian law?

Based on a review of his background, his judicial opinions in the Third Circuit (which handles appeals from Pennsylvania, New Jersey, Delaware and the Virgin Islands) and his writings as an attorney with the U.S. Department of Justice, Alito has had very little exposure to federal

Indian law or experience dealing with legal issues directly affecting Indian country. The only judicial opinion written by Alito involving Indians or Indian tribes is *Blackhawk v. Pennsylvania*, a 2004 case in which Alito ruled in favor of an Indian "holy man" who sought an exemption from a permit fee imposed by state officials for keeping black bears on his property which were used in conducting Native religious ceremonies. In large measure, the *Blackhawk* opinion is more an analysis of the Free Exercise Clause of the First Amendment of the U.S. Constitution and the appropriate standard of review for state laws that burden religiously motivated conduct, than an analysis of any issue arising under federal Indian law.

Tribal leaders and attorneys interested in a comprehensive analysis of opinions written by Alito as a judge on the Third Circuit are encouraged to review the recent reports prepared by the Alliance for Justice available at http://www.supremecourtwatch.org/alitofinal.pdf and the American Civil Liberties Union available at http://www.aclu.org/images/asset_upload_file130_23216.pdf

What is Alito's judicial philosophy?

There is no clear and definitive answer to the question of what kind of Supreme Court Justice Samuel Alito would be if confirmed by the U.S. Senate. His fifteen years as a judge on U.S. Circuit Court of Appeals for the Third Circuit provides a substantial judicial record which confirms that he is a conservative jurist, but fails to provide any substantive guidance with respect to how he will vote as a justice on the Supreme court in relation to cases involving federal Indian law.

There is no question that Alito's judicial philosophy is conservative, but will Alito be a justice "in the mold" of Scalia and Thomas as promised by President Bush? At this time, one can only speculate. In his analysis of dissents written by Alito, University of Chicago law professor Cass Sunstein found that 91% of his dissents "take positions more conservative than his colleagues on the appeals court," favoring large established institutions like corporations and the government. Based on his analysis, Professor Sunstein concludes that "there is a good chance that Alito will be aligned with Justices Scalia and Thomas on matters involving interpretation of the Constitution.

In his article, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values,* David Getches writes:

> The Supreme Court has made radical departures from the established principles of Indian law. The Court ignores precedent, construing statutes, treaties, and the Constitution liberally to reach results that comport with the majority of the Justices attitudes about federalism, minority rights, and protection of mainstream values. In the process, perhaps unintentionally, the Court is remaking Indian law and revising a political relationship between the nation and Indian tribes that was forged by the Framers of the Constitution and perpetuated by every Supreme Court until now.

In responding to a question about judicial activism in the questionnaire provided by the Senate Judiciary Committee, Alito opined that judges must have faith that the cause of justice in the long run is best served if they scrupulously heed the limits of their role rather than transgressing those

limits in an effort to achieve a desired result in a particular case. However, if it turns out that Alito is a justice in the mold of Scalia and Thomas, Indian country will struggle to keep the Court from continuing to reach its result-oriented decisions favoring states rights and mainstream values and find it extremely difficult to persuade the Court to return Indian law to its original moorings as a "fulfillment of the political relationship between the United States and Indian tribes."

Should Indian country support or oppose his nomination?

Indian country should look carefully at the nomination and potential confirmation of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States. He will be replacing Justice O'Connor, a moderate conservative jurist from Arizona who often took issue with her colleagues for their limited view of tribal sovereignty and who often carried the swing vote on Indian law cases.

Although Justice O'Connor's record on the Court is mixed in relation to Indian law cases, she provided the swing vote in *U.S. v. White Mountain Apache Tribe* (2003) (holding that U.S. has an enforceable trust obligation to maintain, protect, and preserve the subject trust property) and filed a sharply worded concurring opinion in *Nevada v. Hicks* (2001) (criticizing the majority opinion as "unmoored from our precedents" and finding that it "undermines the authority of tribes 'to make their own laws and be ruled by them'"). Justice O'Connor provided the swing vote in *Idaho v. U.S.* (2001) (U.S. holds title, in trust for the Tribe, to lands underlying portions of Lake Coeur D'Alene); and wrote the majority opinion in *Minnesota v. Mille Lacs Band of Chippewa Indians* (1999) (5-4 case holding that the Tribe retains their treaty fishing, hunting and gathering rights on off-reservation lands).

However, Justice O'Connor has consistently voted against Indian tribes in reservation diminishment cases, writing the majority opinion in *Hagen v. Utah* (1994) (the restoration of unalloted reservation lands to public domain by Congress evidences intent to diminish reservation status); wrote the opinion for a unanimous court in *South Dakota v. Yankton Sioux Tribe* (1998) (1894 Act evinces Congress' intent to diminish the reservation by providing for total cession and fixed compensation); and voted with the majority in *City of Sherrill v. Oneida Indian Nation of New York* (2005) (holding the doctrine of laches bars the Tribe from "reviving its ancient sovereignty" over the lands at issue).

Alito's views, if any, on these areas of Indian law and others are unknown. But in contrast to Justice O'Connor, the one area that Alito may strongly favor tribal interests is the protection of Native religious rights. Justice O'Connor was the swing vote and wrote the majority opinion in *Lyng v. Northwest Cemetery Protection Association* (1988) (5-3 case holding that the Free Exercise Clause does not prohibit road-building and logging within sacred sites that could have "devastating effects on traditional Native religious practices") and was the swing vote and wrote a concurring opinion in *Employment Division, Oregon Department of Natural Resources v. Smith* (1990) (5-4 case holding that Native American Church practitioners can be prosecuted under state law for ingesting peyote as part of the practice of their religion). As noted above, in *Blackhawk v. Pennsylvania* (2004), Alito ruled in favor of an Indian over the interests of the state in relation to his

ability to freely conduct Native religious ceremonies. Alito's views of the Free Exercise Clause of the U.S. Constitution are well known, generally protecting individuals' free exercise of their religious beliefs from interference by the government.

For Indian country, Alito's background, legal experience and judicial record offer little substance to solicit support for his confirmation, but also provide little basis to oppose his confirmation. NARF, in conjunction with NCAI will monitor the upcoming confirmation hearings closely and evaluate Alito's responses to questions posed by the Senate Judiciary Committee. More than likely, the confirmation of Alito to the Supreme Court will neither prevent the steady erosion of tribal rights nor expedite the undermining of tribal sovereignty by the Court.