

proaches each case in an open-minded way, seeking to apply the law fairly.

The appointment of Sandra Day O'Connor to the Supreme Court in 1981 was an event of special importance to me. At the time I thought that the most significant fact was that she was a woman, the first woman on the Court, and, of course, that was truly ground-breaking. But in time I have come to appreciate that, more than her gender, it is her extraordinary mixture of character and intellect that has most profited our country. As a person of both great character and great intellect, Samuel Alito would be a worthy successor to Justice O'Connor, and I hope that he will be speedily confirmed.

Thank you very much.

[The prepared statement of Ms. Axelrod appears as a submission for the record.]

Chairman SPECTER. Thank you, Ms. Axelrod.

Our next witness is Professor Michael Gerhardt, distinguished professor of constitutional law at North Carolina School of Law. Professor Gerhardt is the author of a number of books on constitutional law, served as special consultant to the White House on the nomination of Justice Stephen Breyer. He received his bachelor's degree from Yale in 1978, master's from the London School of Economics, and law degree from the University of Chicago in 1982.

Thank you for joining us, Professor Gerhardt, and the floor is yours for 5 minutes.

STATEMENT OF MICHAEL J. GERHARDT, SAMUEL ASHE DISTINGUISHED PROFESSOR OF CONSTITUTIONAL LAW, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL LAW SCHOOL, CHAPEL HILL, NORTH CAROLINA

Mr. GERHARDT. Thank you very much, Mr. Chairman, Senator Leahy, and other distinguished members of the Committee.

For almost 20 years, I have had the honor of teaching constitutional law. For almost as long, I have studied the process of Supreme Court selection in some detail and have had the privilege and opportunity to write about it at some length. And I come to you today with the hope that whatever expertise I have developed in that process may be of some use to you.

In this statement, I want to just make three brief observations as extensions of my written statement, which you already have.

First, the Constitution allows every Senator to make a decision about a Supreme Court nomination based on whatever factors he or she considers to be pertinent, including judicial philosophy. The Constitution, I believe, does not require absolute deference to a President when it comes to making Supreme Court nominations, nor, for that matter, does it require hostility. The Constitution allows you, I think, to do what you see fit. It allows you to engage in a robust dialog about the qualifications for service on the Supreme Court.

With that in mind, I just want to give you one brief example of what I am talking about what the Constitution allows just to illustrate, I think, the robustness of the process that we shouldn't be ashamed of but, in fact, should be prepared to embrace.

Much has been said about the fact that Judge Alito has had the most judicial experience of any nomination made to the Supreme Court in almost 70 years, but nobody mentions who that other nominee was. The other nominee that preceded him was Benjamin Cardozo, and Cardozo, as we probably all know, was not President Hoover's first choice. It wasn't even President Hoover's second choice. In fact, he was the choice of the Senate. And the Senators came to the President and said, in effect—in fact, members of this Committee came to the President and said, in effect, that this is the person we want, here are the criteria we think are important. President Hoover was not obliged in any way, shape, or form to accept that, but he did. And I simply make that observation to underscore the fact that there is an opportunity for exchange between the Presidency and the Senate with respect to a Supreme Court nomination, and we should be prepared and as open as possible in talking about the qualifications for service. And, again, if each of you believes to some extent judicial philosophy is appropriate, it is important to say so and to act accordingly.

Second, you know better than I the important function of this Committee as a gatekeeper. You are in the position, at least the initial position, of being able to sort of filter out the views and personnel you don't want to see reflected on the Supreme Court, or you are in the position of determining what views and personnel you do want to have on the Supreme Court. The Supreme Court is largely a function of choices made by the President and the Senate. The Senate and the President help to make the Supreme Court what it is. And I think that that dual partnership is something we ought to keep in mind because in making determinations and judgments about a Supreme Court nomination, the Senate has an extremely important role to play. And the more vigorously you perform that role, I think the more credit it does to you, and the more we can be assured that whatever choice gets made about the people that serve on the Court, we can have confidence that they can be there, that they can trust the—that they are worthy of the trust you have given them to exercise the awesome power of judicial review over the constitutionality of not just your actions, but the actions of other branches.

Third, I must confess—and I regret this—an error in my written statement. I discuss in this written statement the importance of assessing whether or not Judge Alito was a bottom-up or top-down judge. A bottom-up judge is somebody who decides incrementally, one at a time, and has a great deal of respect for precedent. A top-down judge is somebody who tends to infer principles directly from the Constitution and then impose them from the top down. And in the course of trying to figure out whether Judge Alito was bottom-up or top-down, I made a mistake in not identifying Justice Harlan as one of the Justices he most admires. I just want to sort of correct that error. The reverence for Justice Harlan is almost universal. He is certainly one of the Justices I most admire.

But the admiration for Justice Harlan does raise a question, and the question is this: How, if at all, does Judge Alito's reverence for Justice Harlan make him the same kind of judge or a different kind of judge than other Justices who also have admired Justice

Harlan, including Justice Kennedy and Justice Souter? Is he the same kind of judge as they are, or is he a different kind of judge?

Reverence for Justice Harlan is obviously pertinent, it is important, but it may only tell us so much. And I think it is useful and very important for you not to shy away from asking the tough questions. You have asked the tough questions. I think it does you credit. I think that is what this process is all about, and I am privileged to be a part of it.

Thank you.

[The prepared statement of Mr. Gerhardt appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Gerhardt.

Our next witness is Commissioner Peter Kirsanow, U.S. Commission on Civil Rights, Partner with the law firm of Benesch Friedlander. He is also on the board of directors of the Center for New Black Leadership, and on the advisory board for the National Center for Public Policy Research. His bachelor's degree is from Cornell, law degree from Cleveland State with honors.

Commissioner Kirsanow has reviewed Judge Alito's civil rights record and will testify as to his conclusions in that area.

STATEMENT OF PETER N. KIRSANOW, U.S. COMMISSION ON CIVIL RIGHTS, AND PARTNER, BENESCH FRIEDLANDER COPLAN & ARONOFF, LLP, CLEVELAND, OHIO

Mr. KIRSANOW. Thank you, Mr. Chairman, Senator Leahy, members of the Committee.

The U.S. Commission on Civil Rights was established pursuant to the 1957 Civil Rights Act, among other things, to act as a national clearinghouse for matters pertaining to discrimination and denials of equal protection. And in furtherance of the clearinghouse responsibility and with the help of my assistant, I have reviewed the civil rights cases in which Judge Alito has participated on the Third Circuit, as well as his record as an advocate before the Supreme Court in the context of prevailing civil rights jurisprudence.

Our examination reveals that Judge Alito's approach to civil rights is consistent with the generally accepted textual interpretation of the relevant constitutional and statutory provisions, as well as governing precedent. His civil rights opinions evince appreciable degrees of judicial precision, modesty, restraint and discipline, and in short, his civil rights record is exemplary, legally sound, intellectually honest and with an appreciation and understanding of the historical bases undergirding our civil rights laws.

Our examination also reveals that several aspects of Judge Alito's civil rights record have been mischaracterized, some of the criticisms misplaced. Just three brief examples.

First, some have contended that Judge Alito has a regressive or anti-civil rights view of affirmative action, one that is to the right of Justice O'Connor. This contention is based on three affirmative action cases in which Judge Alito participated on brief, while he was with the Solicitor General's Office in the Reagan administration. These three cases are *Wygant v. Jackson Board of Education*, *Sheet Metal Workers v. EEOC*, and *Firefighters v. Cleveland*, all of which involved expansive racial preferences as remedies for discrimination. Notwithstanding the fact that positions espoused as