

and only in very special circumstances, and I am convinced that if Judge Alito is confirmed as an Associate Justice of the Supreme Court, he will continue to honor *stare decisis* as he did as a law clerk and as he has done as a member of our court. He will sit among those jurists whose qualities of fairness and of principles are the loadstar of the judiciary. In my opinion, Sam is as well qualified as the most qualified Justices currently sitting on the Supreme Court.

A word about Sam's demeanor is in order. Sam is and always has been reserved, soft-spoken, and thoughtful. He is also modest, and I would even say self-effacing, and these are the characteristics I think of when I think of Sam's personality. It is rare to find humility such as his in someone of such extraordinary ability.

Over the 30 years I have known Sam, I have seen him grow professionally into the reserved, mature, independent, and apolitical jurist that graces our court today. I regard him as the most qualified member of our court to be considered as an Associate Justice of the Supreme Court. I know that just as Judge Alito has brought and brings grace and luster to the Third Circuit, so too will he bring grace and luster to the U.S. Supreme Court if he is confirmed.

Thank you, members of the Senate Judiciary.

Chairman SPECTER. Thank you very much, Judge Garth, coming from, I have just been advised, from Phoenix, Arizona. Thank you.

[The prepared statement of Judge Garth appears as a submission for the record.]

Chairman SPECTER. Our next witness is Judge John Gibbons, a graduate of Holy Cross in 1947 with a bachelor's, Harvard Law School in 1950. He was nominated to the Third Circuit by President Nixon in 1970, Chief Judge from 1987 to 1990, at which time he resigned to become a professor of law at Seton Hall University. He now is in the practice of law. He has known Judge Alito for more than 20 years, when Judge Alito was a U.S. Attorney and tried cases before Judge Gibbons.

Thank you very much for being with us today, Judge Gibbons, and we look forward to your testimony.

STATEMENT OF JOHN J. GIBBONS, JUDGE (RETIRED), U.S. COURT OF APPEALS, AND DIRECTOR, GIBBONS, DEL DEO, DOLAN, GRIFFINGER AND VECCHIONE, NEWARK, NEW JERSEY

Judge GIBBONS. Mr. Chairman and members of the Judiciary Committee, as you all probably know, or as Senator Specter has just said, I was a member of that court of appeals where Judge Alito is now a member for 20 years, and indeed, it was my retirement from that court 16 years ago that created the vacancy which Judge Alito filled on the court of appeals.

Since his appointment, lawyers in the firm of which I am a member have been regular litigators in the courts of the Third Circuit, not only on behalf of clients who pay us handsomely for such representation, but also frequently for the firm's Gibbons Fellowship Program on behalf of nonpaying clients whose cases have presented those courts with challenging human rights issues. The Gibbons Fellowship Program is certainly a significant part of our practice,

as amply demonstrated by the fact that since 1990, Gibbons Fellows lawsuits have resulted in 115 reported judicial decisions.

This Committee should appreciate that the Court of Appeals for the Third Circuit has been for the 50-plus years that I have followed or participated in its work a centrist legal institution. An important reason why that is so is that many years ago, the court adopted the requirement that all opinions intended for publication must, prior to filing, be circulated by the opinion writer not only to the members of the three-judge panel, but also to the other active judges on the court. The purpose of this internal operating rule was to permit each active judge not only to comment upon the opinion writer's treatment of Third Circuit and Supreme Court precedent, but also to vote to take the case en banc for rehearing by the full court if the judge thought that the opinion was outside the bounds of settled precedents. Thus, the level of interaction among the Third Circuit appellate judges has, for a half-century, been unusually high.

This Committee should also appreciate that appointment to an appellate court where one has life tenure is a transforming experience. I remember a former judicial colleague saying to me once after several years on the bench, "John, what other job in the world is there in which you can look in the mirror while you are shaving and say to yourself, all I have to do today is the right thing according to the law?" A good judge puts aside interests of former clients, interests of organizations they have belonged to, and interests of the political organization that may have been instrumental in one's appointment. I personally experienced that transformation and I witnessed it repeatedly in the judicial colleagues who joined the court after I did.

These two points, the unusual internal cohesion of the Third Circuit Court of Appeals and the transformative experience of serving on a court protected by life tenure, suggests to me that the Committee members, in determining whether or not to vote in favor of confirming Judge Alito, should concentrate not on what he thought or said as a recent Princeton graduate or as a young lawyer seeking advancement as an employee of the Department of Justice, but principally, if not exclusively, on his record as an Article III appellate judge.

If you look, as you should, at that 15-year record as a whole, you cannot in good conscience conclude that Judge Alito will bring to the Supreme Court any attitude other than the one held by the colleague I mentioned who thought important thoughts about judging every morning while he was shaving. He has consistently followed the practice of carefully considering both Supreme Court and Third Circuit precedents. Very few of the opinions he has written for a unanimous panel or for a panel majority have deemed his colleagues among the active judges to vote to take the case en banc. The cases in which he participated that produced dissenting opinions by him, or from him, all, it seems to me, were close cases in which either the law or the evidentiary record were such that equally conscientious judges could quite reasonably disagree about the outcome.

Take, for example, cases presenting challenges to State regulations of abortion, certainly a hot-button topic for many people who

are opposing Judge Alito's confirmation. I found four such cases in which he participated. In three of them, he decided against State regulations that might have put a burden on a woman's choice for an abortion. In the fourth case, about which a lot has been said, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Judge Alito dissented from a majority opinion, holding unconstitutional the Pennsylvania spousal consent provision for an abortion. And it is that dissent which the opponents of his confirmation talk about most frequently. They seem to urge that on the basis of that dissent, Judge Alito is so far out of the mainstream of constitutional law that his confirmation will endanger the constitutional protection of civil rights practically across the board.

In your consideration of that dissent, I suggest that you should take into account these points. First, at the time the circuit considered the Pennsylvania spousal consent statute, the Supreme Court had not yet decided whether States could impose such a requirement, and second, the court of appeals majority invalidated the statute. Had the Supreme Court simply denied certiorari, that invalidation would have remained in place. Instead, at least four Justices voted to grant certiorari. If the issue of the statute's constitutionality was so overwhelmingly clear, why was certiorari granted to endorse the Third Circuit's majority position? Clearly, *Planned Parenthood v. Casey* was, at the time the court of appeals acted, a case over which conscientious judges could reasonably disagree. Otherwise, the Supreme Court would simply have denied certiorari.

Nothing in the Supreme Court's case law dealing with abortion relieves the appellate judges and intermediate appellate courts from the duty of making a conscientious effort to fit the case before them within that case law, and the four abortion cases in which he participated show that that is exactly what Judge Alito has done.

Another opinion that has caught the attention of those clamoring for Judge Alito's scalp is his dissent in *United States v. Rybar*, in which he would have held that the Supreme Court decision in *Lopez* prohibited Congress from regulating mere possession of machine guns. A majority opinion upheld this statute. Unlike *Casey*, the Supreme Court didn't review that case. Thus, the question of the reach of *Lopez* was left open, and when the issue reached the Ninth Circuit in the *United States v. Stewart* in 2003, it adopted Judge Alito's dissenting position. Some opponents of his confirmation have relied on that dissent in suggesting that Judge Alito is perhaps a captive of the right-wing gun lobby. This Committee, after actually reading *Lopez* and *Rybar* and the Ninth Circuit case, I suggest, cannot in good conscience find the dissent to be anything more than a good faith effort to somewhat unenthusiastically apply the perhaps unfortunate Supreme Court precedent of *Lopez*. Indeed, in his *Rybar* dissenting opinion, Judge Alito suggested how Congress could cure the *Lopez* violation.

The extent to which opponents of Judge Alito's confirmation largely ignore his overall 15-year record as a judge suggests, at least to me, that the real target for many of the somewhat vitriolic comments on the nomination is less him than the executive branch administration that nominated him. The Committee members should not think for a moment that I support Judge Alito's nomination because I am a dedicated defender of that administration. On

the contrary, I and my firm have been litigating with that administration for a number of years over its treatment of detainees held at Guantanamo Bay, Cuba, and elsewhere, and we are certainly chagrined at the position that is being taken by the administration with respect to those detainees.

It seems not unlikely that one or more of the detainee cases that we are handling will be before the Supreme Court again. I do not know the views of Judge Alito respecting the issues that may be presented in those cases. I would not ask him, and if I did, he would not tell me. I am confident, however, that as an able legal scholar and a fair-minded justice, he will give the arguments, legal and factual, that may be presented on behalf of our clients careful and thoughtful consideration without any predisposition in favor of the position of the executive branch. That is more than detainees have received from the Congress of the United States, which recently enacted legislation stripping Federal courts of habeas corpus jurisdiction to hear many of the detainees' claims without even holding a Committee hearing.

Justice Alito is a careful, thoughtful, intelligent, fair-minded jurist who will add significantly to the Court's reputation as the necessary expositor of constitutional limits on the political branches of the government. He should be confirmed.

Chairman SPECTER. Thank you very much, Judge Gibbons.

[The prepared statement of Judge Gibbons appears as a submission for the record.]

Chairman SPECTER. Our final witness on the panel is former Third Circuit Judge Tim Lewis, a graduate of Tufts University in 1976, a law degree from Duquesne in 1980. He served as an Assistant United States Attorney before President Bush the Elder appointed him to the Western District Court, and then in 1992, President Bush the Elder nominated him to the Third Circuit. Judge Lewis resigned in 1999 and now is co-chair of the appellate practice group at the Schnader Harrison office. He serves as co-chair of the National Committee on the Right to Counsel, a public service group dedicated to adequate representation of indigents. Judge Lewis and Judge Alito served together on the Third Circuit for 7 years.

We appreciate your being here, Judge Lewis, and the floor is yours.

STATEMENT OF TIMOTHY K. LEWIS, JUDGE (RETIRED), U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, AND COUNSEL, SCHNADER HARRISON SEGAL & LEWIS LLP, WASHINGTON, D.C.

Judge LEWIS. Thank you very much, Senator Specter. Thank you, members of the Committee. It is a pleasure and an honor to be here today.

When Thurgood Marshall announced his intention to resign as a Justice of the U.S. Supreme Court in conference one day, the first person to respond was Chief Justice Rehnquist. Chief Justice Rehnquist's words were, "No, Thurgood, no. Please don't. We need you here."

Shortly thereafter, when Justice Marshall had resigned, he was interviewed, and in the course of that interview was asked about Chief Justice Rehnquist. And during that interview he said, "This