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

an advocate are poor proxies for interpretive doctrine, there is nothing in the record to suggest that Judge Alito would somehow restrict remedies currently available under *United Steelworkers* v. *Weber*, or *Johnson* v. *Transportation Agency* any more so than Justice O'Connor would.

Judge Alito essentially argued that rigid quotas are unlawful, and opposition to quotas and expansive racial preferences do not evince a hostility to affirmative action, let alone civil rights in general.

Second, some critics have said that Judge Alito's decision or dissent in *Bray* v. *Marriott* is evidence of his supposed tendency to impose "almost impossible evidentiary burdens on Title VII plaintiffs." But a review of *Bray* shows that Judge Alito's dissent actually steadfastly adheres to Third Circuit precedent, and carefully applies the law to the facts, as the majority opinion seems to dilute the commonplace standard of proof in a Title VII case reducing or converting the burden of production on the part of a defendant into a burden of proof.

The third contention unsupported by our examination is that Judge Alito's civil rights record is out of the mainstream. Judge Alito participated in 121 Third Circuit panels that decided cases that may be termed in the traditional sense civil rights cases. Now, one would expect that if someone were out of the mainstream, that by definition he would rarely agree with his colleagues on the Third Circuit, and moreover, you would expect that he would almost never agree with his Democratic colleagues and would vote overwhelmingly with his Republican colleagues. But an examination of Judge Alito's extensive record on the Third Circuit shows that his co-panelists on civil rights cases actually agreed with his written opinions and votes 94 percent of the time, and that is whether or not those panelists were Republican or Democrat, and in fact, produced unanimous decisions 90 percent of the time. Moreover, judges appointed by Democratic Presidents actually agreed with Judge Alito's civil rights positions at a slightly higher rate than his Republican colleagues by a margin of 96 percent to 92 percent. In fact, judges appointed by Democratic Presidents Johnson, Carter and Clinton agreed with Judge Alito's civil rights position at the same or slightly higher rate than judges appointed by President Reagan or either President Bush.

Obviously, in order to fairly assess Judge Alito's civil rights cases, you have to look at the actual facts and applicable law in each case, but it cannot be credibly stated that Judge Alito is hostile to civil rights, out of the mainstream, or extreme, without leveling the same charges against every other judge on the court, whether Republican or Democrat.

I respectfully submit that Judge Alito's 24-year record on matters pertaining to civil rights demonstrates a firm and unwavering commitment to equal protection under the law, and he has a comprehensive and precise understanding of our civil rights laws that will make him an outstanding addition to the Supreme Court.

Thank you, Mr. Chairman.

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

Chairman SPECTER. Thank you very much, Commissioner Kirsanow.

Our next witness is Professor Samuel Issacharoff, Reiss Professor of Constitutional Law at New York University School of Law, an author of several books focusing on voting rights and civil procedure. He had taught at the Texas Law School. Bachelor's degree from Binghampton University in 1973 and law degree from Yale in 1983.

Thank you for joining us, Professor, and we look forward to your testimony.

**STATEMENT OF SAMUEL ISSACHAROFF, REISS PROFESSOR OF CONSTITUTIONAL LAW, NEW YORK UNIVERSITY, NEW YORK, NEW YORK**

Mr. ISSACHAROFF. Thank you, Mr. Chairman, Senator Leahy, members of the Committee. I want to direct my remarks to the question of the reapportionment cases and the significance of the Court's role in overseeing the basic fairness and integrity of our political process.

I raise this issue because the reapportionment cases stand for something beyond simply the doctrine of one person/one vote. They also stand for the role that the Court has to play in making sure that the political process does not turn in on itself and does not close out those who are not able to effectively marshal their votes, their power, their support under the rules that govern the political process.

It is significant because no Justice of the Supreme Court over the past 35 years has hesitated to assume the responsibility so well articulated by the Supreme Court in the famous *Carolene Products* footnote. Justice Stone, in 1938, on behalf of the Court, recognized a special need for exacting judicial review in the case of laws, and these were his words, "that restrict those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." The reapportionment cases of the 1960s, the cases that appear to have so deeply concerned Judge Alito as a young man, were the realization of the *Carolene Products* insight.

In the 40 years that have passed since the reapportionment cases, the Supreme Court has bravely entered into the political thicket. Sometimes the Court's role is simply what appears to be routine, such as access to the ballot and the polling place, sometimes it is the truly extraordinary as with *Bush* v. *Gore*. The result of these interventions, although obviously not without controversy, is a political system that is more open and more participatory that at any time in our history.

It is difficult to imagine in this day and age any serious objection to the rights identified in these cases. In *Reynolds* v. *Sims*, for example, Chief Justice Warren wrote that "Full and effective participation by all citizens in State Government requires that each citizen have an equally effective voice in the election of members of his State legislature."

But it is also well to recall the facts presented in these cases. The willful failure to reapportion had transformed American legislative districts into grossly unrepresentative institutions in which voters of the growing cities and suburbs found themselves unable