

O'Connor did in *Hamdi*, see a clear role for the courts in protecting our constitutional balance and hence our civil liberties? Judge Alito's statements about Executive power raise legitimate and serious questions that should be explored.

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

Chairman SPECTER. Thank you very much, Ms. Nolan.

Our next witness is Professor Charles Fried, of the Harvard Law School, an expert in the areas of constitutional, legal and moral philosophy. From 1985 to 1989, he was Solicitor General of the United States, and from 1995 through 1999 he was an Associate Justice of the Supreme Judicial Court of Massachusetts. He holds a bachelor's degree from Princeton, a doctor of law from Columbia, and both a bachelor's and master's from Oxford University. Professor Fried, in his capacity as Solicitor General, was Judge Alito's superior when Judge Alito worked in that office.

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

STATEMENT OF CHARLES FRIED, FORMER SOLICITOR GENERAL OF THE UNITED STATES, AND BENEFICIAL PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. FRIED. Thank you, Chairman Specter, and I thank the members of the Committee for inviting me.

I think what I can most usefully do is cast some light on Judge Alito's—and if I slip into “Sam,” please forgive me, because we were a small and very colleguely and friendly office—Judge Alito's work in that office.

The Reagan administration, no doubt, had a point of view about the law, just as did the FDR administration in 1933 or the JFK administration in 1961. That is not unusual. That is what elections are about. Part of that view encompassed the notion that the lower courts had gone too far in limiting the ability of law enforcement; that the lower courts had moved too far away from an appropriate view of affirmative action, as expressed by Justice Powell in *Bakke*, toward quotas. And I suppose emblematic of the notion that courts sometimes just make things up was the notion that *Roe v. Wade* was incorrectly decided, a notion which, may I say, was shared by people across the political spectrum—Professor Paul Freund; Archibald Cox expressed that view as late as 1985; and Dean Ely.

Now, the first job of the staff of the Solicitor General's office was to make sure that when the Solicitor General presented the Solicitor General's client's position to the Supreme Court, this was done in a professional, correct and respectful way.

That office had career lawyers, some of whom stretched back to the time of Lyndon Johnson. I myself appointed as deputies people who I knew to be Democrats, liberal Democrats. None of that bothered me or bothered them because we were a professional office and they understood that their work was professional work. That is exactly how Judge Alito viewed his work.

If I look at the two examples that have been much featured in these discussions, his memo to me in the *Thornburgh* case on *Roe v. Wade*—it is said that he argued that *Roe v. Wade* should be over-

ruled. He did not. You need only read that memo because he said in that memo that we should not argue that *Roe v. Wade* should be overruled. I didn't follow that advice, but that was what the advice was.

Similarly, it said that he argued for the absolute immunity of the Attorney General in connection with wiretaps. He did not. What he said was I don't question that immunity, but we should not propose that argument; we should not make that argument to the Court.

Now, in 1985 he wanted a job in the administration, and at that point he took on a different role and he spoke in a different tone of voice. I think that is perfectly understandable and appropriate. And when, 15 years later, he became a judge—when, 15 years ago, he became a judge, he once again assumed a different role. His whole career shows that he understands the difference between a professional lawyer, an advocate, and a judge. And no more eloquent testimony of that understanding can be had than the wonderful testimony of his colleagues, Democrat and Republican, liberal and conservative, who served with him for those 15 years.

I believe that it is perfectly appropriate for this panel, for this Committee, to have probed Judge Alito's disposition. Everybody has a disposition. He is in the mainstream. He tends toward the right bank of the mainstream, I agree. When this Senate approved two wonderful judges to be Justices, Justice Breyer and Justice Ginsburg, it was perfectly plain that they tended toward the left bank of the mainstream and they were confirmed, and properly so. I believe Judge Alito should be as well.

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

Chairman SPECTER. Thank you very much, Professor Fried.

Our next witness is Professor Laurence Tribe, Loeb University Professor at Harvard University and Professor of Constitutional Law at the Harvard Law School. Professor Tribe has argued before the U.S. Supreme Court over 33 times, served as a law clerk to Justice Potter Stewart, and received his bachelor's degree from Harvard College, *summa cum laude*, in 1962, and his law degree also from Harvard, *magna cum laude*, in 1966.

Professor Tribe, the floor is yours.

STATEMENT OF LAURENCE H. TRIBE, CARL M. LOEB UNIVERSITY PROFESSOR AND PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. TRIBE. Thank you, Mr. Chairman. It is a great honor to be here on this very important occasion.

I am not here to endorse the nomination of Judge Alito, as I did with my most recent testimony before this Committee on a Supreme Court nomination with Justice Kennedy. I am not here to oppose his nomination, as I did several months before that time with Robert Bork. And I am not here to lecture the Committee on its responsibilities or its role. I don't think that is my role.

I think the only useful function that I can perform is to ensure to the limited extent I can that Senators not cast their votes with, to borrow an image from a Kubrick movie, their eyes wide shut.