

In his dissent in *Bray v. Marriott*, Judge Alito argued for imposing an evidentiary burden on victims of discrimination that, according to the majority, would have eviscerated legal protections under Title VII of the Civil Rights Act. In particular, the majority contended that Judge Alito's position would protect employers from liability even in situations where employment discrimination was the result of conscious racial bias.

In conclusion, on the basis of our thorough review of Judge Alito's record, the National Bar Association cannot support the nomination of Judge Alito to the U.S. Supreme Court. For several decades, Judge Alito has championed limitations on civil rights and voting, resulting in curtailed educational and employment opportunities for people of color and women. If his views had prevailed in many cases, our Nation would not be far beyond the regrettable days when opportunities for Americans, like retiring Justice Sandra Day O'Connor and the late Justice Thurgood Marshall, were truncated on the basis of gender and race. Now is not the time for retrenchment. Now is the time for America to step forward into the 21st century and open the doors of mainstream society for the benefit and protection of all Americans.

Again, thank you very much for the opportunity to testify.

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

Chairman SPECTER. Thank you, Mr. Turner.

Our final witness on this panel—and our final witness—is Mr. Theodore Shaw, Director-Counsel and President of the NAACP Legal Defense and Educational Fund here in Washington, D.C.; a graduate of Wesleyan University with honors and from Columbia University Law School, where he was a Charles Evans Hughes Fellow. He has also served in the Office of Civil Rights in the Department of Justice.

Welcome, Mr. Shaw, and you have some of that extra time. The clock is set at 8 minutes.

**STATEMENT OF THEODORE M. SHAW, DIRECTOR-COUNSEL
AND PRESIDENT, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NEW YORK, NEW YORK**

Mr. SHAW. Thank you, Mr. Chairman. In his absence, I would like to thank Senator Leahy and, of course, Senator Kennedy and the other Senators who are members of the Judiciary Committee.

Let me make one small clarification. While we have a Washington, D.C., office, the Legal Defense Fund headquarters are in New York, and I am a New Yorker.

I am acutely aware that I am the last witness on the last panel of these hearings, so I will come right to the point. You have my written testimony, and I would like to request that the NAACP Legal Defense and Educational Fund, Inc.'s report on the nomination of Judge Alito to the position of Associate Justice of the Supreme Court be entered into the record.

Chairman SPECTER. Without objection, it will be made a part of the record.

Mr. SHAW. Thank you, Mr. Chairman.

We at the Legal Defense Fund do not relish opposition to a nominee to the Supreme Court or, for that matter, any court, and our

ordinary posture is to take no position on nominees to the Federal courts. So I am not here with any pleasure.

I am not here to challenge Judge Alito's intellect or his integrity. I am not here to engage in the politics of personal demonization, which takes all of us on a low road that leads us to a place where I think we are all diminished.

Many fine people have testified on both sides of this nomination, people whom I know and respect and admire, and I think it is very important to understand that people of good will may differ on this nomination and the substantive issues that lead them to take positions on this nomination.

I, with all due respect, hasten to add that there is nothing remarkable about colleagues on the Federal bench and former law clerks taking positions in support of this nominee. Collegiality is a very, very important commodity on the bench, and, of course, I think it is quite a heady thing to know someone who is being nominated to the Supreme Court. I don't suggest that that is why they support him. I am saying that they know him personally. But this is not about personality and it is not personal.

We are compelled to testify in opposition to the nomination of Judge Alito to the U.S. Supreme Court based on a standard that the judge himself articulated. I think it is the correct standard. He said, "If you want to know what kind of Justice I would be on the Supreme Court, look at my record on the court of appeals."

That is exactly what we have done, and it is only on that basis that we have arrived at the position that we have taken.

I want to encourage all of the members of the Judiciary Committee to read our report in full. Our review of his record has convinced us that his confirmation to the Supreme Court would cause a substantial shift in the Court's civil rights jurisprudence in a manner that would make it significantly more difficult for civil rights plaintiffs to prevail.

In his 15 years on the bench, Judge Alito has a record in civil rights that is extremely troubling to us. For example, in all that time he has voted for employment discrimination plaintiffs who are African-Americans on the merits of their cases twice. Some might say that that is a reflection of the strength of the cases that are coming before the court these days. We believe it is not, and without going into the detail that other people have gone into already—it would be redundant—I point to, for example, the *Bray* case—and I think it is very instructive—where Judge Alito took a position that appeared to us, at least, to be gratuitous.

The issue there was whether the jury would get an employment discrimination, whether it would go to the jury. And the reason proffered by the employer for the adverse employment decision claimed to be discriminatory, was proven and shown, demonstrated to be pretextual under the law as the majority saw it, and I think logic supports it. An inference can be drawn by a jury that the motivations were in fact discriminatory once the pretext has been exposed.

Judge Alito, it seemed to us, worked hard to arrive at a conclusion that that case should not even go to the jury, and it demonstrates a cramped and narrow reading of Title VII and civil

rights laws, which we believe is symptomatic of his views on civil rights issues in general.

I want to be very clear, because one of the members of this Committee raised the issue of whether anyone was alleging that Judge Alito harbors a bias. I want to be very clear on behalf of the Legal Defense Fund, that we are not saying that he harbors racial bias or that he is a racist. That would, as I indicated before, diminish all of us. Whatever his reason for ruling the way he does in cases, the record is consistently clear, as my colleague and friend, Reginald Turner, has indicated, and as our report has indicated. It is very difficult for African-American plaintiffs in civil rights cases to prevail.

Now, it is not limited to African-American plaintiffs, but those are the individuals whom we represent at the Legal Defense Fund. Certainly, his view of interpretation of civil rights laws extends to gender discrimination, some of the cases which we have highlighted in our report, and it extends to other areas with respect to individual rights.

Now, we believe that his views with respect to reinforcement, which have been here, are deeply troubling. We believe in the area of criminal justice his views are troubling, but I particularly want to point to an area about which we have a deep concern. The analogy with baseball has been very popular—and I want to end on this point—before this Committee and in these nominations. And Judge Alito, at one time, used to like to say about affirmative action that Henry Aaron would not be regarded as the all-time home run king and hero that he is if the fences had been moved in whenever he came to bat. I think that reflects a fundamental misunderstanding about affirmative action. The issue, with respect to civil rights and affirmative action advocates is not about asking that the fences be moved in, it is about asking about an opportunity to take the field, to stand at the plate, it is about an opportunity to play the game. And that is, I think, a fundamental difference in how one views the world with respect to issues of race these days.

I would like to conclude by saying that no one more than those of us at the Legal Defense Fund in this Nation would be happier if in fact our views are misplaced. And I am told, or we are told, we read that he will certainly be confirmed. We think that is before the Senate Judiciary Committee. But no one would be happier if our views are misplaced. We hope that that is right if he is confirmed. But we cannot take a position based upon hope. We have taken a position based upon his record, and we reluctantly and regretfully conclude that we must oppose Judge Alito's nomination to the United States Supreme Court.

Thank you.

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

Chairman SPECTER. Thank you, Mr. Shaw.

And now my 5 minutes of questioning. Mr. White, when you served as Judge Alito's law clerk—and you have identified in your brochure your membership in the NAACP and ACLU—what was your sense of his view of equality of African-Americans, equality of opportunity?

Mr. WHITE. When I served I worked with him on several cases where race issues arose among blacks and whites and other types of race issues. Mr. Shaw, for whom I have the utmost respect, says that it is not about personality, it is not about the person, and I respectfully disagree. Judge Alito, when he was testifying, he said he has an open mind. During my testimony I said that Judge Alito treats everyone the same, and I also mentioned that he looks at every case as a brand new case. My experience was that he did look with an open mind, and that it is not personal. I have to respectfully disagree with that as well. It is kind of personal.

On the street that I live I am the only African-American, and I can walk down the street without being racially profiled. Judge Alito has ruled that racial profiling is incorrect. So that is very personal to me. In my experience, he was very fair and open-minded.

Chairman SPECTER. Thank you, Mr. White.

I want to move to Mr. Turner at this point. Judge Tim Lewis testified yesterday, had been on the Third Circuit with Judge Alito for several years, an African-American. Identified himself as being very strongly pro-choice and very active in civil rights issues, and said that he would never consider supporting Judge Alito if there was any doubt in his mind as to Judge Alito's dedication to civil liberties. Do the views of Judge Lewis, Mr. White, who worked with him closely, have any impact on your thinking?

Mr. TURNER. Well, I would agree with my colleague and dear friend, Ted Shaw, that the folks who have worked with a lawyer or judge very closely in the course of their careers will have developed friendship and camaraderie with that person in ways that would promote good feelings about that person's character, temperament and ability.

Chairman SPECTER. You think a little bias for Judge Alito?

Mr. TURNER. I would not use the word bias. That is a very positive—

Chairman SPECTER. Wait a minute. That is why I used it.

Mr. TURNER. Mr. Chairman—

Chairman SPECTER. Wait a minute. You do not have to use it. [Laughter.]

Mr. TURNER. Thank you, Mr. Chairman. Our view of Judge Alito is based upon his record as a lawyer and as a judge. It is based on his writings during the time that he was a lawyer in the Justice Department, and on the basis of his rulings from the bench, which have presented an ultra-conservative tendency to rule against people of color and women in cases involving discrimination, and to rule in favor of employers and other institutions that have sought to—

Chairman SPECTER. Thank you, Mr. Turner. I have to move on to Congresswoman Wasserman Schultz.

Mr. TURNER. Thank you, Mr. Chairman.

Chairman SPECTER. You know the political process, the election of Presidents and campaign issues, and I am sure your deep interest in this issue has led you to see the other reported prospects for the Supreme Court should Judge Alito be rejected, and you have heard Judge Alito's statements about what he would consider on *stare decisis*. Do you think if Judge Alito is rejected you will get somebody you like better?

Representative WASSERMAN SCHULTZ. I am hopeful—I recognize that the President, obviously, has the right to nominate a conservative. And I am a Democrat, and I recognize that given that the President is a Republican that that is likely what he would do with almost any nominee.

But Americans have the right to expect that he will not nominate an extremist, and I agree with Mr. Shaw and Mr. Turner, it is well expected that colleagues of his—I served in the State Senate. I understand what collegiality is. Colleagues of his, former law clerks, they are going to express—

Chairman SPECTER. Thank you, Congresswoman Wasserman Schultz.

One last question, Ms. Pringle and also Mr. White. Ms. Pringle, two parts. What do you think about as concerns about women's issues? And both Mr. White and Ms. Pringle, there has been concern that Judge Alito may favor the powerful in the Government. You both clerked for him, saw him on specific cases. I would like your evaluation on that. Ms. Pringle?

Ms. PRINGLE. I found that the Judge approached each case without a predisposition toward one party or the other. He does have respect for law enforcement, but I also felt that he had respect for the individual plaintiffs or the individual parties who came before him, and treated them in a fair and open-minded way.

And I also think that—I understand the comments that have been made about personal relationships bearing on a witness's testimony, but I do think that a 15-year record gives an opportunity for every group to find something that they like or dislike.

What I wish is that everyone on the Committee had had the opportunity that I have had to really get to know this person, because I believe that the concerns about his character and his approach to judging would be alleviated by that opportunity to really know and work with this person.

Chairman SPECTER. Mr. White?

Mr. WHITE. Judge Alito's testimony and his record show that he has ruled in favor of the Government, and he has ruled in favor of what has been called the little guy, and from my experience, he always ruled fairly after thorough evaluation of the facts and application of relevant law.

Chairman SPECTER. Thank you. Senator Leahy?

Senator LEAHY. As I just came, I was going to let Senator Kennedy go.

Chairman SPECTER. Senator Kennedy?

Senator KENNEDY. Thank you, Mr. Chairman. I was interested in Mr. Shaw and Mr. Turner's reactions to the significance of Judge Alito's opinion in that *Riley v. Taylor* case, where he analogized statistics on left-handed Presidents and right-handed Presidents to statistical evidence of discrimination in jury selection. You are familiar with this case where they struck three blacks from the jury and a black defendant was sentenced to death. Judge Alito found no cause to reject that, and used this right-hand, left-hand analogy. Are you familiar with that case? And maybe you would comment on that briefly. Has that got a ring to you, and does it within the community? It was such a startling fact situation, certainly for me. I am just wondering your own response, reaction.

Mr. SHAW. Senator Kennedy, the Legal Defense Fund has litigated issues involving discrimination in jury selection almost throughout its existence. In fact, the late Judge Constance Baker Motley, when she was a Legal Defense Fund lawyer, argued *Swain v. Alabama* in the Supreme Court, which set a standard that existed for many years, which was inadequate to protect against discrimination in jury selection. The Legal Defense Fund litigated *Batson v. Kentucky*, which changed that standard.

We believe that Judge Alito's comparison of race discrimination with people who are left- or right-handed really trivializes the significance of race discrimination and the history of race discrimination, and a continuing problem with respect to jury selection.

And within the Third Circuit, Philadelphia itself and the District Attorney's Office recently, has had some terrible problems that have been exposed with respect to intentional discrimination with respect to jury selection.

Senator KENNEDY. I will ask Mr. Turner, but just this last comment to Dr. Gray's comment about the continuing ongoing challenge that we are facing, I think there are many of us in the Congress who just think, "Well, the next thing up is the Voting Rights Act," but that is really the only thing that is out there. I think what has been mentioned by Mr. Shaw and also Mr. Turner and Dr. Gray, is that this is an ongoing, continuing everyday battle in almost every part of the country, including my part of the country.

Mr. TURNER. Yes. Thank you, Senator Kennedy. I agree with you wholeheartedly, and in fact, Justice Sandra Day O'Connor, as I quoted in my remarks, understands that, unfortunately, in this Nation race still matters. Our justice system is not as blind as it aspires to be, as we would all like for it to be, and it is particularly reprehensible for attorneys to use racial bias in the selection of jurors. Jurors are central, critical to our American system of justice. It is through the jury as fact-finder that we commonly seek to find truth in our justice system, and where that process is subverted on the basis of racial discrimination, particularly in a death penalty case, we strike at the very heart of what I know we all believe to be fundamental principles of justice in our society, and we believe Judge Alito's position and his remarks certainly minimize those important principles, if not completely disregard them.

Senator KENNEDY. Just in the brief time left, just one question, and that is how the Supreme Court looks to all of you. You represent different traditions, women, Hispanics, blacks. We want the Supreme Court to be universally respected and their decisions respected, and I think most of us believe that to the extent that it can reflect what our society has become in its diversity, and with all of its dynamism and its creativity, and evolving opportunity. I am just wondering whether any of you have a reaction. I think the Congressman has mentioned—I know we are short in time, but if each of you could just take just half a minute or so to tell us what you think in terms of this nominee versus what we are really hopeful of achieving in terms of a Supreme Court that is going to be reflective of our country and our society. Are you concerned about it? Should it make a difference? Does it make a difference? What do you think? Just go down the line. I know my time is up. This will be my last question, obviously.

Ms. PRINGLE. I personally would like to see more women justices on the Supreme Court, and I hope that is something that we will aspire to as a country, but I am also pleased to see an Italian-American, first generation, lawyer on the Supreme Court as well.

Representative GONZALEZ. And as a Hispanic, of course, it would be important to have a Hispanic on the Supreme Court of Texas, but Senator, at the end of the day, in final analysis, the truth is, give us anybody up there who will give us a fair shake and is not predisposed, and when we have a President who says, "I am going to be nominating individuals more in the mode of Scalia and Thomas," he gives us great cause to pause and ponder and question.

Representative WASSERMAN SCHULTZ. This nomination is particularly important because of who Judge Alito would be replacing. He is replacing the first woman to ever serve on the Supreme Court, and he is replacing someone who has consistently been the key swing vote in very significant cases that matter to women and minorities in this country, and he has very divergent views from Justice O'Connor, and I think that is incredibly important to know.

Senator KENNEDY. Mr. White?

Mr. WHITE. I think it is extremely important to have a Supreme Court that reflects the people for whom it is interpreting the laws. In the absence of an African-American nominee, I think that Judge Alito was an excellent choice.

Mr. TURNER. Thank you, Senator Kennedy. I believe diversity may be America's greatest asset, and when we fail to embrace our Nation's diversity, particularly in an area as important as judicial appointments, we polarize our Nation at a time when unity and tolerance of diversity is critically important to our continued advancement as a great Nation, critical to our national security and our productivity.

Mr. SHAW. Senator Kennedy, I think we are long past the time when a Latino, a Hispanic ought to be on the Supreme Court. I believe diversity on the Supreme Court is important, but I am more concerned about the substance of the Supreme Court. The Court has been divided in race cases for the last 25 years with a narrow 5-4 edge in most cases. Justice O'Connor was the deciding vote in many of those cases. We did not always get her vote, but it was in play. That is what we are concerned about with respect to this nomination.

Senator KENNEDY. Thank you, Mr. Chairman.

Thank all of our panel.

Chairman SPECTER. Senator Leahy?

Senator LEAHY. Mr. Chairman, most of the questions have been asked, so I am not going to ask them again. I have read carefully the statements of each one of you, and I appreciate you being here, and I apologize, as I did to others earlier, about having to leave for the memorial service.

Representative Wasserman Schultz, having you here, I could not resist. I had asked Judge Alito several questions about the very deeply personal matter of Terri Schiavo from your State. I was offended, as many others were, at the number of people in elective office running before the cameras to try to grandstand in what was a terrible family tragedy. We saw them trying to overrule the State

of Florida. I forgot the number of times the State courts in Florida faced this issue.

Representative WASSERMAN SCHULTZ. Twenty.

Senator LEAHY. Twenty. I knew it was a lot. Some Members of Congress were attacking the judges who upheld the State court rulings because it fit their political purposes. The Florida legislatures passed an unconstitutional measure allowing Governor Bush to intervene. Actually a colleague of yours in the other body even issued a congressional subpoena to prevent Terri Schiavo's medical decisions.

I mention this sad and somewhat outrageous conduct of people who know better, but in every single case were attacking the independence of the judiciary. Do you have a sense whether Judge Alito would be one who would value an independent judiciary? I ask this in light of the questions I have asked him on the unitary Executive, and the situation we now see where the President can sort of write sidebars to everything from torture legislation to spying.

Representative WASSERMAN SCHULTZ. I think that that is an extremely important question, and Judge Alito's record is emblematic of the problems with the Terri Schiavo case. His views on privacy are extremely important. In that case you had the Congress insert itself into a family's private tragedy. You had the State legislature give our own Governor the unconstitutional right to overturn a judicial decision. You had, time and again, the Supreme Court rule that this was a matter that should be decided in State court, and decided not to take the case up. And I think it is a very important question. If that case had gone to the Supreme Court and you had the question of whether Congress actually had the right to insert itself into Terri Schiavo's private family tragedy, how would Judge Alito have ruled?

He has very troubling views about the power and the authority of the Executive, and I think that we need to make sure that we zealously guard our legislative authority and make sure that we have a Justice on the Supreme Court that supports the system of checks and balances, and I do not think that Judge Alito's record demonstrates that he does.

Senator LEAHY. Thank you. Thank you very much.

Mr. Chairman, thank you for your patience.

Chairman SPECTER. Thank you. There are two more items that I want to cover, but we will first of all let the panel go.

Thank you very much, Ms. Pringle, Congressman Gonzalez, Congresswoman Wasserman Schultz, Mr. White, Mr. Turner and Mr. Shaw. You have been a very enlightening panel, and I know how deeply all of your views are held. That is one thing we have seen in this hearing. Nobody is casual about Judge Alito. Everybody is very decisive. Emotions run deep.

Two items I want to cover, one in a colloquy with my distinguished ranking member, that is the future schedule on Judge Alito, and then I intend to announce my own decision on my vote now that the hearing is over.

The issue of scheduling has been extraordinarily difficult, as Senator Leahy and I have wrestled with that problem. Preliminarily, let me say that it has been a pleasure to work with Senator Leahy, and I think our collegiality has been demonstrated in many ways,

mostly by all of the pictures taken where we were huddled together so that our voice do not carry too far beyond, and also with a sense of humor. In the bad old days, when I had no hair, the only way that Senator Leahy and I could be told apart was by color of our ties.

[Laughter.]

Senator LEAHY. Of course, you are still wearing the red tie.

Chairman SPECTER. I am glad to have some hair.

But the scheduling issue has been an important one, and it was a difficult issue as to when we would schedule these hearings. The President, as is well known, wanted the matter decided before Christmas, and it seemed to me that was not realistic. We had to do it right and not do it fast. And then the issue came up, OK, not before Christmas, then when? And I wanted to start the hearings the day after New Year's. I wanted to start them on January 2nd. And the Democrats have a right, under our Committee practices, to delay for a week, and it seemed to me that that week could be given from the 2nd to the 9th, and that would be the week's delay. Senator Leahy and I are under—we have a lot to consider. We have Committee members who have views, and we have caucuses which have views.

But at any rate, we came to terms on what I thought was done, and Senator Leahy and I then went up to the radio-TV gallery, and I want to read a bit of the discussion which we had there. I do not do this in a legalistic sense to mind Senator Leahy. I do it to set the parameters as to where we have been and the views that my Committee members have and which I have. This is the transcript.

But at any rate, Senator Leahy and I have worked through it, and said it could be delayed a week in any event by any Senator who wants to hold it over for a week, that we would put that week back at the start on the 9th with the good faith understanding that our intent would be to go to the Executive Committee meeting on the 17th, the day after the Martin Luther King holiday, so that the schedule will be that we will start hearings at noon on the 9th, will have them on Tuesday the 10th, Wednesday the 11th, Thursday the 12th, Friday the 13th, and Saturday the 14th if necessary. Then we will go to the Exec. on the 17th, and here we cannot get everybody bound in writing to waive in advance, but Pat Leahy and Arlen Specter have had no problems, nor have we anybody on the Committee of not fulfilling what we have said we would do as a matter of good faith intent, which would put the Executive Session on the 17th. We finished that with Chief Justice Roberts in the morning.

And then we would go to the 18th, 19th and 20th for floor debate, with a vote on the 20th.

There is more dialog, and Senator Leahy then put in a limitation, quote, "Obviously, this leaves room if something extraordinary comes up that neither, frankly, neither Senator Specter nor I anticipate or expect," close quote. And I did not object to that. Seemed to me that that was a reasonable condition which might change what I had said earlier.

It is my intention to adhere to that schedule and to set the Executive Committee meeting for next Tuesday, the 17th in Dirksen 226, our regular hearing room, at 11 a.m.

Senator Leahy?

Senator LEAHY. Of course, we did this on November 3rd, and the discussion was had by—you are absolutely right, by Senator Frist, who was responding to the—I will not characterize it as pressure, but the direction he had received from the White House to move forward prior to Christmas. You may recall that Senator Frist had first said that the Senate would adjourn for the year in the first week in October, and then under every conceivable circumstance, the week before Thanksgiving, and instead there was a joyful singing of Christmas carols in the halls as we were finishing up just a few days before Christmas.

Had we followed what the White House had told Senator Frist they wanted and gone before Christmas, of course, we could not have even had the hearing. We were having votes every 10 minutes. It would have been chaotic. It would not have been the dignified and thorough kind of hearing we had here.

On January 2nd, of course, was a holiday, we could not come back that day and start the hearings. As I stated at the press conference, it would have meant destroying any of the staff's attempt to have any time over the holidays with their families. They had lost much of the family time during the normal school vacations in August because we had to prepare for the Roberts hearings. This was, of course, the third nominee of the President for this seat.

I would have much preferred, as you know, for a personal reason to have had it the first week during January because of long, long, long standing personal plans for this week, which I canceled, because otherwise it would have meant canceling everybody's time with their families at Christmas.

I had been told that a number of our members are going to be home for Martin Luther King events this weekend, will not be back on time on Tuesday, and so they will exercise their rights. And as you and I discussed privately prior to that press conference, of course, any Senator could exercise their right to put it over, a right that you and I—both of us have served as Chairman—something you and I have always protected.

I understand from something the majority leader said that, again, even though the Court does not come back in until the latter part of February, that the White House has told him they want the debate to begin before the President's State of the Union, even if we had—I do not have a calendar before me—but even if we put this over from next Tuesday to the following Tuesday, there is no reason why then it could not be on the floor on Wednesday, which is still 6 days prior to the State of the Union. Just in case you are wondering.

[Laughter.]

Chairman SPECTER. This is about the first time Senator Leahy and I have not agreed on something, but there has to be a first time for everything.

Senator LEAHY. I agree you are a superb Chairman. We can agree on that I hope.

Chairman SPECTER. The reciprocity of respect, I think, is pretty evident, the way we have conducted these hearings. And I appreciate what Senator Leahy has said about the full and fair—and he used the word dignified—I think they are dignified. There is a

Latin maxim, the exception proves the rule. There might have been 4 minutes in the hearing when it was not dignified, but we worked through that as well. About the only thing the respective parties have been able to agree to on this whole proceeding is that Senator Leahy and I have functioned collegially and have produced a full and fair and dignified hearing.

As far as I am concerned, we are going to proceed on the 17th at 11, and if the right of the—

Senator LEAHY. The right of any Senator.

Chairman SPECTER. Well, if they are held over, they are held over. I had thought we had—I do not fault Senator Leahy. I had thought that the Democratic Caucus knew what we were doing, and they certainly knew about it after we said it, but we will work through this problem like many, many others. This is not a gigantic problem.

Senator LEAHY. I think one of the problems is that—whether this affected it or not, I think the fact that the time that we were going to wrap up the session, the time which is determined by the leadership, by the majority leadership, kept changing, kept changing almost day by day, by day, by day, by day, and it probably has put all the pressure on everything else. I would hope that we could work this out. Maybe you and I can—we have each other on speed dial at home, and Senator Specter has heard many descriptions about my farm house—let us get some of these hearings out of the way, and you and I can sit up there and have dinner and have a good time, but we will talk about this over the weekend.

Chairman SPECTER. Thank you, Senator Leahy.

Let me now move to the final item of the Committee hearing, and that is the announcement of my position. And I intend to vote to support Judge Alito's nomination for Associate Justice to the Supreme Court, and I do not do that as a matter of having a party-line vote or as a matter of party loyalty. If I thought that Judge Alito should not be on the Supreme Court, I would vote no, just as I did with Judge Bork.

My commitment to the President as Chairman of this Committee is to give his nominees prompt hearings and to vote them out of Committee. And I have always believed in that. Before I became Chairman, I believed that there had been too many delays on both sides. Both Democrats and Republicans have delayed hearings on judicial nominees, and that led us to an escalation of events and filibusters and possibility of the constitutional or nuclear option. We have worked through that, and Senator Leahy and I were instrumental in avoiding what could have been a really cataclysmic event in the Senate. And I have always believed in voting people out of Committee.

I recall the days when matters were bottled up in the Committee, and I never agreed with that. And I voted against Judge Bork in Committee, but I voted to send his nomination to the floor. So in fulfilling my commitments to the President and the Republican Caucus to have prompt hearings and to vote people out of Committee, I believed in that before I was Chairman, and I believe in it now. And after fulfilling those duties, whether I vote aye or nay, that is my independent judgment. Under separation of powers, Senators are separate from the executive branch. It would be inap-

propriate to make a commitment on a vote in advance in any way, and I prize that independence very highly.

With respect to Judge Alito's qualifications, I think that they are agreed to, no doubt about the quality of his academic standing at Princeton and Yale or his erudition or his scholarship, working in the Solicitor General's Office and Office of Legal Counsel, then 15 years on the bench. We could not have held these hearings when we did, into January, because there was so much to do. And this Committee has worked very, very hard, and I thank not only the members of the Committee but the staffs. The staffs of this Committee didn't have an August. There was no recess to get ready for Judge Roberts' hearings. We didn't have a December or a November. We haven't had much of a January.

Senator LEAHY. January is not too good so far.

[Laughter.]

Chairman SPECTER. But we wanted to do it right, and I think we have done it right. We have gone very deeply into Judge Alito's background and studied his record.

With respect to the answers which Judge Alito gave, there are going to be differences of views. I thought we had to hear his answers before coming to judgment, and I have urged colleagues on both sides of the aisle not to make up their minds before the hearings are over. There has been an enormous amount of publicity about Judge Alito, as there was about White House Counsel Harriet Miers. And as I have said before, Ms. Miers was run out of town on a rail. The nomination was decided in the radio talk shows, TV talk shows, on the op-ed pages, and not by the Committee, which is what the Constitution says should be done. The Senate should make the decision and it ought to have a hearing in this Committee.

And we kept a level playing field for Judge Alito, and I was frankly a little concerned about the opening statements on both sides—a lot of accusations on one side and a lot of hyperbole on the other. And this is not a court of law, but I wanted Judge Alito to have a chance to explain where he stood and not to come to conclusions from the testimony. It was important to come from him.

I think that his answers in a sense went farther than any in the past because he did not say that he would not respond because the case might come before the Court. He ultimately refused to give judgments as to how he would vote, but when the issue was raised, he discussed the considerations that would be involved on Executive power, a really very important subject, as to whether the resolution for the authorization of use of force comprehends authority to engage in electronic surveillance, and I don't think it does. The Foreign Intelligence Surveillance Act is specific on that point.

But we are going to have a hearing, and we hope to hear from—we expect to hear from the Attorney General on the question of whether there is constitutional authority for the President to override a statute because of his Article II power. Those questions were put to Judge Alito, and he responded with the kinds of considerations which would be involved. And I think he touched all the bases there, but he was not going to say how he was going to rule, nor should he.

When it came to the question of court-stripping and the amendment taking away habeas corpus jurisdiction from the Federal courts on detainees, I think that is an atrocious piece of legislation. I believe it will be declared unconstitutional. But when he was asked about that, he talked about the considerations involved, not how he was going to decide it.

And on congressional power, I think he agreed that the method of reasoning of Supreme Court Justices is not superior to the method of reasoning of Congress, and that there oughtn't be flabby tests, as we talked about Justice Scalia's dissent on the Americans with Disabilities Act.

When it came to *Roe v. Wade*, I think he went about as far as he could go. He started off by saying that he agreed with *Griswold*, a constitutional right of privacy in the Liberty Clause, and that it would apply to single people as well in *Eisenstadt*, and that when he was dealing with *Casey*, the issue of reliance was very important, that he thought it was critical by analogy to what Chief Justice Rehnquist had done in *Miranda*, that it was a critical factor as to whether a decision was embedded in the culture of the community. And I certainly think from my own point of view *Roe* is. And he agreed that it was a living Constitution, subject to change, as Cardozo said in *Palco* with the mores and values of the people.

And we had a lot of discussion as to his views on *Roe v. Wade* and what then-Judge Roberts had said. And from my reading, I don't think there is a dime's worth of difference between what Chief Justice Roberts said and what Judge Alito said about that. Both relied heavily on precedents, but said that they would not make a final commitment, nor should they have made a final commitment.

I think the judicial panel was very instructive, and there had been some precedents for it in the past, although this broke new ground in having as many testify as they did. And the practice after judges hear arguments to go into conference to discuss it is one which is not widely understood by people, and Judge Alito went into conferences. He and Judge Becker had sat on more than a thousand cases. I believe Judge Becker testified they disagreed only 15 times. Judge Becker received the Devitt Award as the Outstanding Federal Jurist a couple of years ago. Of course, I know Judge Becker very well because we went to college and law school together, and he has been a close friend. But he didn't exert any undue influence on me. But he testified that Judge Alito had no agenda and was not an ideologue. And so did Chief Judge Scirica. And, of course, I know the Third Circuit because it is my circuit. I have argued a lot of cases in the Third Circuit and had a hand in the appointment of Judge Scirica to both the district court and the court of appeals, and Judge Barry.

And then I thought the testimony of Judge Timothy Lewis was very influential, and just a word about Judge Lewis. I first heard about him in about 1990 when he was an Assistant U.S. Attorney in Pittsburgh, an African-American. And Senator Heinz and I were very interested in diversifying the court, having an African-American. Hard to find a Republican African-American. Still is pretty hard to find. And when we found one, I wanted him on the district court bench. And I heard about him one morning in Pittsburgh,

saw him that afternoon in the hotel lobby, and talked to Senator Heinz about him the next day. And he was put on the district court, a very fast time, then on the court of appeals in 1992. And I have known him for more than 15 years, and when he says after knowing Judge Alito as he did, sitting with him, and Judge Lewis being dedicated to pro-choice and to civil rights, active on the ACLU and pro-choice, that he wouldn't testify for him if there was a doubt in his mind, I thought that was significant.

We have gone beyond asking some of the witnesses what happens if Judge Alito is rejected. This was an issue in the Presidential campaign on both sides. Senator Kerrey said he would appoint someone who was pro-choice, and I think President Bush said he would not use a litmus test. And I don't use a litmus test myself. But at least from those who have been reported in the press who would be considered, I put that question to Congresswoman Wasserman Schultz and to Ms. Kate Michelman, whom would they expect to find who would give more credence, thoughtfulness, and the precedents in the field.

Well, those are some of my reasons for supporting Judge Alito. I will prepare a written statement, but I thought it important to state my views now that the hearings are over. I know that I have already been asked many times by the press how I am going to vote, and I don't want to be coy and I don't want to hold back. And if the Senate was in session now, I would wait until the Senate was in session to go to the floor to make a statement. But that is how I think it through.

Senator Leahy?

Senator LEAHY. I will just be very brief, Mr. Chairman. I was following with interest what you were saying, also the interest and the history in Pennsylvania—as you know, one of my favorite States. I visit there often, in fact, drive through there the one time a year when I drive to Vermont, usually during the August recess, this time with a trunkload weighted down with all of then-Judge Roberts's writings.

You had mentioned one thing about voting against a Supreme Court Justice in Committee, but then voting to go on the floor. I think that is a good practice. I joined you on that particular nominee. I had at least a couple nominees for the Supreme Court whom I voted against in Committee as I stated what my position was. But I then voted that they go to the floor of the Senate because I thought for a Supreme Court Justice, we ought to all at least follow the Senate procedures where a hundred of us could decide what procedure to follow and have a vote. That is one of the reasons why I felt so frustrated with the 61—you were not Chairman, but the 61 of President Clinton's judicial nominees who were never allowed to have a vote in Committee but were basically pocket-filibustered. I thought it was a bad practice then. I think it is a bad practice, as I said, a lot of the partisanship that you and I have worked very, very hard to lower, that you and I have tried to go back to the type of Senate it was when both of us came here.

I will work with you, of course, on the scheduling of this. I had obviously not realized, one, that we would go so late in the year, but, two, that we would have a number who are not prepared to vote on Tuesday and will just follow the normal rules. But there

will be no problem then in voting the following Tuesday. You have actually picked up a couple days by having the markup on a Tuesday, not a Thursday, voting the following Tuesday, and I guess it would be on the floor then Wednesday and off we go.

Excuse me. This is not emotion. It is a Friday afternoon voice. And as I said, I expect you and I will talk over the weekend. I admire you as a Senator. I admire your work as Chairman. I have often said that of all the Senators, you were my number 2 choice to be Chairman of this Committee.

[Laughter.]

Senator LEAHY. Unfortunately, I don't get my number 1 unless the Democrats are back in the majority.

Chairman SPECTER. Thank you very much, Senator Leahy.

Senator LEAHY. Thank you.

Chairman SPECTER. Thank you very much for a full, fair, and dignified hearing.

And that, ladies and gentlemen, concludes the nomination hearing for Judge Samuel A. Alito, Jr. for the Supreme Court of the United States.

[Whereupon, at 1:34 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]