Testimony of Charles Fried
Senate Judiciary Committee
The Confirmation of Judge Samuel Alito
as an Associate Justice of
the Supreme Court of the United States
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In this testimony I shall mainly address what I know of Judge Alito from my work with him in the Office of the Solicitor General from the latter part of 1984 until he left the office at the end of 1985 to become a Deputy Assistant Attorney General in the Office of Legal Counsel. After that time I had little personal contact with him and have not seen him more than once or twice very briefly after he left the Department of Justice.

When I came to the Office of the Solicitor General first as the principal Deputy and shortly afterwards as head of the office the office consisted of some 22 lawyers—sixteen or so assistants and three to five deputies. All but the principal deputy held career civil service posts. The reputation of the office was and continues to be that the lawyers there were as talented, dedicated, and able as any lawyers anywhere. It is often spoken of as the best law office in the nation. Several of the lawyers had been in the office for many years—one deputy coming there, I believe, in the Kennedy administration, another in the Johnson administration. Judge Alito had been in the office for several years when I arrived. His reputation among the other career lawyers was that he was reliable, meticulous, objective, hard-working, a fine writer and an effective oral advocate. (Assistants would generally argue two of three cases a year before the Supreme Court. ) Alito was assigned a particularly difficult case, FCC v. League of Women Voters, on a weekend's notice because of the sudden unavailability of the deputy who was to argue it. The high quality of his performance was a legend in the office. It was important for me as principal deputy and then head of the office to learn the reputation of those on my staff. Alito was highly respected. Nor do I recall anyone bothering to mention that he had any particular political coloration. In preparation for this testimony I have checked my recollection with several alumni of the office from that time and they confirm what I report here.

There has been considerable attention in the press and elsewhere to two memoranda he wrote while he was an assistant in the office: one in the Thornburgh case dealing with various state regulation s of abortion providers, and Mitchell v. Forsyth, dealing with the Attorney General's personal liability for wiretaps found to violate the Constitution. It is important to place these memos in their context. The Solicitor General does not bring a case to the Supreme Court unless some other part of the government-whether a division of the Department of Justice or another agency recommends it. In both these cases, Assistant Attorneys General, presidential appointees, and members of the Attorney General's staff had written formal recommendations that the Solicitor General argue to the Supreme Court: in one that Roe v. Wade be overruled, in the other that the Attorney General be held to be absolutely immune from personal suits for his official actions. In those cases, as in every case coming to the Solicitor General, an assistant is assigned the job of analyzing the case and recommending to the Solicitor General a course of action. It fell to Alito to write those memos.

In both cases Alito recommended against taking the position that more senior, politically appointed officials were urging the Solicitor General to take before the Court. In the abortion case, not only the head of the Civil Division but other high and politically highly connected officials were urging that I, as the head of the office at the time, ask the Court to overrule Roe v. Wade. The bottom line of Alito's memo was that I should not do that. Alito did preface that ultimate conclusion by saying that the decisions in the courts below were highly irregular on technical, procedural grounds (a position with which Justice O'Connor in dissent agreed) and that Roe might well be modified--as it has been--in some modest ways over the years. Indeed, the 1992 Casey decision did authorize a number of regulations that the Court found did not impose an "undue burden" on a woman's right to choose to have an abortion.

It is also worth noting that my predecessor, Rex Lee, had been criticized within the Administration for not opposing Roe head on, even though it was a more-or-less official position in the Department that the case had been wrongly decided. Alito's memo may reasonably be taken to express the belief that Roe had been wrongly decided. At the time that was hardly a radical position or outside the mainstream. In the same year that Alito wrote his memo Archibald Cox had repeated his published view that Roe had been wrongly decided. This was also the position of

Professor Paul Freund of Harvard and Dean Ely of the Stanford Law School.

One of the criticisms of Lee was that he was too ready to follow the advice of career lawyers on his staff who were hostile to the Reagan Administration agenda-especially on Roe-and used technical or tactical arguments to undermine it. It is hardly surprising, then, that Alito took pains to deny any personal hostility to the project he was recommending should once again be postponed. His making that point in the memo would have made my life easier vis-a-vis other senior members of the Department had I taken his advice. In the event, I did not follow Alito's advice and did ask that Roe be reconsidered and overruled, because I thought the Administration had the right to have its position put before the Court in a forthright but professionally correct way. Alito in his memo correctly predicted that the Court would react with hostility to such an argument. (My recent reading of the Blackmun papers in the Library of Congress showed me just how hostile that reaction had been.) When it came time to write the brief, I collaborated with Albert Lauber. Lauber wrote the part of the brief dealing with the technical failings in the decisions below and I wrote the part asking the Roe be overruled. It would have been normal for Alito to discuss the brief with Lauber. In our small, collegial office it was normal for the author of the underlying memo to look over the shoulder of the brief writer.

Alito's memo regarding the immunity of the Attorney General from personal liability where a wiretap he authorized is later found to have been illegal was if anything an even clearer example of a career lawyer doing his job correctly and dispassionately. (It should be emphasized that the case had nothing to do with the Attorney General's authority to allow such a wiretap. It was the premise of the case that the eavesdropping was illegal.) The Solicitor General in that case represented not only the Department of Justice but the Attorney General personally, whom the court below had ruled must pay damages out of his own pocket for ordering a wiretap found to be illegal. It is not surprising that the office of the Attorney General had asked the Solicitor General (at that time, Rex Lee) to urge his absolute immunity from personal liability in such a suit. Unlike the wiretap controversy today, the argument was not that a wiretap was constitutional just because the Attorney General had authorized it. Once again it was Alito's job to analyze and recommend and he recommended that the Solicitor General not even ask the Supreme Court to recognize such absolute immunity. It is hardly

surprising that Alito, like many lawyers delivering bad news to a client, expressed sympathy for the client's position. But the bottom line was just what Alito's higher-ups did not want to hear. And here too the Solicitor General did not take Alito's advice and once again Alito was proven right. (I believe the position that the Attorney was not personally, but only institutionally liable in such cases had been taken in the Carter Justice Department as well.)

I also remember working closely with Alito on the amicus brief in Wygant v. Jackson Board of Education, in which we argued that a school board may not fire a white teacher with greater seniority in order to maintain a particular ratio of minority teachers to minority teachers. It was our position that Justice Powell's controlling opinion in the Bakke case established the principle that a government agency's imposing a disadvantage on a person solely because of that person's race, while not categorically forbidden, had to survive what in constitutional law is called strict scrutiny. That position has since been reaffirmed many times, most notably in opinions written by Justice O'Connor in the Croson and Adarand cases. In the Wygant case the Court agreed with our position. Justice White, in a concurring opinion wrote:

> This policy requires laying off nonminority teachers solely on the basis of their race, including teachers with seniority, and retaining other teachers solely because they are black, even though some of them are in probationary status. None of the interests asserted by the Board, singly or together, justify this racially discriminatory layoff policy and save it from the strictures of the Equal protection Clause.

I mention this case because I know that there has been some attention paid to Judge Alito's application for the position of Deputy in the Office of Legal Counsel—a document of which I knew nothing until its disclosure in connection with these proceedings—in which he writes that he is proud of his contribution to cases in which the "Department has argued in the Supreme Court that racial and ethnic quotas should not be allowed . . ." I think very few judges, legislators or lawyers of whatever persuasion defend racial quotas. Certainly the Supreme Court has consistently condemned them. In the recent Michigan affirmative action cases, Grutter and Gratz, the reason that the University Michigan Law School's affirmative action program passed muster (Grutter) and the

undergraduate program (Gratz) was struck down by a 6-3 vote was that the former did not involve a quota and the latter did. In this instance Judge Alito's views are not only in the mainstream but in the very middle of the current. Indeed it is anyone who would defend quotas who is out of the mainstream.

Finally, although I have not made a study of Judge Alito's opinions while a Judge on the Third Circuit, I will comment on two of them, because others have. In Doe v. Groody Judge Alito dissented from an opinion holding that a search of a woman and her young daughter violated the Fourth Amendment. This opinion has been dramatized and caricatured as a display of cruel insensitivity to the dignity of the subjects of the search. An actual reading of the case shows what a mischaracterization that is. The search is described as a "strip search." In that case, after an extensive investigation, state narcotics agents executing a warrant to search premises for amphetamines found the wife and daughter of the owner of the house present in the house at the time and directed a female officer to search them for the illegal drugs. Here is a description of that search from the majority opinion.

> ...the female officer removed Jane and Mary Doe to an upstairs bathroom. They were instructed to empty their pockets and lift their shirts. The female officer patted their pockets. She then told Jane and Mary Doe to drop their pants and turn around. No contraband was found. With the search completed, both Jane and Mary were returned to the ground floor . . .

The only issue in the case was whether the search warrant was broad enough to allow a search of persons on the premises other than the designated owner. The only point that divided the majority and Judge Alito in dissent was whether the words in the sworn affidavit requesting the warrant which did specifically request permission to search any person on the premises carried over to the more general words in the warrant itself. Had the warrant tracked the affidavit there would have been no issue at all about the legality of the search. This case seems to me no more momentous than Judge Roberts's (as he then was) decision declining to find unconstitutional the arrest of a young girl caught eating a french fried potato in a Washington subway station.

The other dissenting opinion which has attracted some comment is the one in which Judge Alito concluded that the Supreme Court's then recent decision in the Lopez case, invalidating the federal Gun Free School Zone Act cast a constitutional shadow on the federal machine gun statute, when there is no requirement of an allegation that the gun had been acquired or traveled in interstate commerce. This case seems to me very similar to Judge Roberts's opinion expressing doubt about the constitutionality of the Endangered Species Act as applied to a "hapless" Arroyo toad. In both cases the judges had to guess about the exact scope of the Supreme Court's rather sweeping but cryptic language in Lopez. Some critics see in Judge Alito's guess in the machine gun case an ominous hostility to national power; that is distinctly odd, as the same critics fault Judge Alito for being too expansive in his views of national power, especially in respect to law enforcement. And in general, it is implausible to imagine that a former United States Attorney from New Jersey would harbor some predilection for restricting the government's power to prosecute offenses involving the gangsters' weapon of choice. No, he was just conscientiously doing his job, which is to apply "without fear or favor" the law as set down by the Supreme Court. And that is the hallmark of his work throughout his legal career.

Everything I have heard or read about Judge Alito confirms my initial experience and that of my colleagues in the Office of the Solicitor General, that Alito is a modest man, scrupulous in his treatment of the law, respectful of precedent, and supremely capable of expressing his conclusions in straightforward, understandable terms. He is, no doubt, a man of conservative disposition. But he is no doctrinaire. Nowhere is there a whiff that he is in the grips of some theory, originalism or any other. He is a man before whom I or any other lawyer should be entirely easy to present a case, confident that he will give a fair hearing. His opinions will add to the predictability, stability and clarity of the law. I hope he will be confirmed.