out. We were seeking that position not because we had any kind of an agenda to fill, but solely because each of us hoped to get a very prestigious position.

Now, as it happened in that first meeting, Judge Alito and I ended up being seated together by ourselves when all the other members of the Solicitor General's Office went off to another table and we had what I think is fairly described as at least a little bit of an uncomfortable conversation because we had assumed that we were competing for exactly the same job and had a very interesting exchange of views about our backgrounds and our experiences, he being an existing Assistant U.S. Attorney with an extraordinary amount of experience as an appellate lawyer, I being a former law clerk and, at that time, an assistant professor of law. But we built a great friendship based on that conversation and the fact that we both ended up in the Solicitor General's Office. Well, what struck me is that whether or not the Solicitor General had been Wade McCree or whether, as it turned out, the Solicitor General was Rex Lee, our service to the United States would have been precisely the same.

And the only thing I would say in that regard is that during the three-plus years that I have served with Judge Alito in that office, I had an opportunity to talk with him almost every day, and in that capacity, I learned an enormous amount from him about both his compassion and his intellect and his open-mindedness and his enthusiasm to assist all of the lawyers in that office. He was a great lawyer. He was a tremendous oral advocate. He went on, obviously, to a very distinguished career. While I have my own opinions on what he has accomplished on the Third Circuit, it seems to me I cannot add to the eloquence of what has already been said by the judges of that court and I would simply urge this Committee to confirm him as a Justice. Thank you.

Chairman SPECTER. Thank you very much, Mr. Phillips.

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

Chairman SPECTER. Professor Goodwin Liu is an expert in constitutional law, civil rights, and the Supreme Court at the University of California, Boalt Hall. He is a graduate of Stanford with his bachelor's degree, and master's from Oxford and law degree from Yale Law School in 1998. He served as a law clerk for Supreme Court Justice Ruth Bader Ginsburg during the October 2000 term.

Thank you for coming in today, Professor Liu, and we look forward to your testimony.

STATEMENT OF GOODWIN LIU, ASSISTANT PROFESSOR OF LAW, BOALT HALL SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA, BERKELEY, BERKELEY, CALIFORNIA

Mr. LIU. Thank you, Mr. Chairman. I am very honored to be here today.

I agree with all of my fellow panelists that Samuel Alito has a very talented legal mind. I have read over 50 of his opinions. They are very sharp, analytical, intellectually honest. But if intellect alone were enough, then these hearings would be unnecessary. We care about the judicial philosophy of the nominee, and so to pre-

pare for these hearings, I studied Judge Alito's opinions on individual rights versus government power.

His record is enormous, and Mr. Chairman, as you have said, cherry-picking cases is not very informative. Neither is it very informative to look at the entire run of all cases. What is informative, I think, is a look at the closest, most contested cases, cases where judges on a panel disagreed. These are the cases most like the ones at the Supreme Court. The law is less clear and judges have to show their stripes.

I don't think Judge Alito is an ideologue, but I think it is important to see what the record says. So I looked at several areas where government wields great power: immigration, the Fourth Amendment, criminal prosecution. In these areas, Judge Alito sat on 52 panels that divided between the individual and the government. He voted for the individual only four times, three times joining an en banc majority, one time writing in dissent. In the other 48 cases, he sided with the government. This includes all 13 cases on the Fourth Amendment, all eight cases involving erroneous jury instructions, all four cases involving the death penalty. On 13 occasions, his vote for the government was a dissent from an opinion written or joined by a Republican colleague.

Most of the counter-examples cited in these hearings are not terribly illuminating. The constitutional violations are clear. The holdings were unanimous. In the contested cases, Judge Alito agreed with the government over 90 percent of the time, far more often than other appellate judges in similar cases, even those appointed by Republican Presidents.

Now, these figures are not dispositive. Every case is different, and I am sure Judge Alito got it right many times. But let me give three examples that show his instinct, I think, to defer to government power.

The first is a memo he wrote in 1984 as Assistant to the Solicitor General analyzing a case where police saw a burglary suspect running across the back yard. The suspect reached a fence and an officer called out, "Police, halt." When the suspect tried to climb the fence, the officer shot him in the back of the head, killing him. The suspect, Edward Garner, was an eighth grader with a stolen purse and ten dollars on his body. He was not armed and the officer did not think he was. The sole reason for his killing was to prevent his escape.

Judge Alito's memo, speaking for no one but himself, said, "I think the shooting can be justified as reasonable within the meaning of the Fourth Amendment." In a remarkable passage, he argued that using deadly force to stop a fleeing suspect rests on, and I quote, "the general principle that the state is justified in using whatever force is necessary to enforce its laws." In 1985, the Supreme Court rejected this view.

Second, in a 2004 case, the FBI installed a secret video camera in a suspect's hotel room. This was done without a warrant on the ground that the FBI turned on the camera only when the target allowed an undercover informant into the room. Judge Alito accepted this logic, even though the camera remained in the room day and night. The dissent called the surveillance Orwellian, limited only by the government's self-imposed restraint. Judge Alito

seemed not to grasp that the concept of a warrant puts a judge between the citizen and the police precisely because our privacy is too precious to entrust to law enforcement alone. The NSA program of warrantless eavesdropping is also being defended by assurances of executive self-restraint.

Finally, in 1997, there was a capital case where two Reagan appointees, both former prosecutors, found a misleading jury instruction unconstitutional. Judge Alito said the instruction was ambiguous and inadvisable, but adequate to convict the defendant of first degree murder. He also said the court should not have heard the claim at all because defense lawyers did not argue it in prior appeals. But the State never raised this argument to the inmate's claim. Judge Alito raised it himself. The court chided him for nearly crossing the line between a judge and an advocate.

Civil liberties are sometimes seen as obstacles to law enforcement. But as Justice Frankfurter once said, the safeguards of liberty are often forged in cases involving not very nice people.

Mr. Chairman, liberty is not safe in an America where police can shoot and kill an unarmed boy to stop him from escaping with a stolen purse, where judges occasionally aid prosecutions by raising arguments that the State itself did not raise, and where the FBI can install a camera where you sleep on the promise that they won't turn it on unless they have to.

Mr. Chairman, this isn't the America we know and it isn't the America we aspire to be. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Professor Liu.

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

Chairman SPECTER. Mr. Phillips, how would you evaluate the comments Professor Liu has made?

Mr. PHILLIPS. Well, with respect to the memorandum to the Solicitor General, I think the notion that that is an individual opinion is not a very apt description of at least what I viewed my role when I was an Assistant to the Solicitor General. What we did in that context, and in this particular case, what he was doing, was proposing that an amicus brief be filed on behalf of the United States in support of the State of Tennessee's position. In that process, I mean, it may be that that sentence, and I don't have the context of it to understand it completely, but at that stage, all he is doing is proposing that a brief be filed. It would be interesting to see what the ultimate brief said and whether or not it staked out a position quite as aggressive. But because that is part of the deliberative process that goes on, it is the same deliberative process that goes on with respect to the courts.

I mean, I don't disagree that it makes sense to look at the most contentious cases as a legitimate way to examine that, but again, I don't think you can take—and I do think this is a classic instance of cherry-picking—I don't think you can take out one or two specific examples and say this somehow reflects anything about the body of work of a judge who has been on the bench for 15 years and in the face of the testimony we just heard from colleagues of his who spent literally more than decades with him and whose view is that he comes to each case with an open mind and thoroughly analyzes each one and performs this in a bottom-up, not a top-down process.

Chairman SPECTER. Ms. Axelrod, you know Judge Alito extensively. How would you respond to Professor Liu's testimony?

Ms. AXELROD. Well, I had the same reaction concerning the first case that was mentioned, when he was in a role as an advocate and was trying to come up with the different perspectives that you would bring to a case as an advocate for the government, where your job is to figure out whether or not you are going to be supporting the result below. He was doing his job and he was doing it appropriately.

And the other cases, I think you have to look at the cases more closely than you can in basically a soundbite during a few-minute presentation. You have to look at the arguments that were made on both sides. You have to look at what the standard of review was. You need to see the facts. I am sure that the professor analyzed these cases ably, but I would not be persuaded simply by a short summary of them that the reasoning was unfounded, even if I disagreed with it, which I very well might have, without seeing more.

Chairman SPECTER. Commissioner Kirsanow, what is your evaluation of Judge Alito's record as it applies to civil rights issues with African-Americans?

Mr. KIRSANOW. Well, as I indicated before, it is exemplary. We took a look at several hundred cases, 121 specifically, and we drew a very broad net to encompass the broadest definition of civil rights possible, but we also drew a more narrow net for the more traditional civil rights cases, the Title VII cases where it is more likely that you are going to find an African-American plaintiff.

And what we saw there is, and I referred to *Bray* v. *Marriott*, I think it is emblematic of the kind of approach Judge Alito has. He is very precise. Earlier on, I heard testimony with respect to is he in favor of the little guy or the big guy, and I think I would hearken back to Judge Alito's opening, where he says that no one is either above the law or below the law. I don't think that he is outcome-driven. He is looking at upholding the law, whether or not that redounds to the benefit of the big guy or the little guy, and I think that is the classic example of someone who hues closely to the most profound protections of civil rights.

Chairman SPECTER. Professor Issacharoff, is there any doubt in your mind that Judge Alito will uphold the one man/one vote rule?

Mr. ISSACHAROFF. I don't think there is any doubt that he would uphold one person/one vote as an abstract matter. I think that the broader question that is raised by his earlier comments, and I heard nothing in these hearings that really addressed this, is a deeper one about the role of the court in checking the abuses of incumbent power. So while I don't in any way question that he has, as much as all the rest of us have, internalized the one person/one vote principle, my reservation would be on the willingness to use judicial power to check malfunctions in the political process.

Chairman SPECTER. Professor Gerhardt, you say that the Senate ought to be an active participant in the selection of Supreme Court Justices. To what extent do you think that, with a heavy campaign on the judicial issue, the President has latitude to pick judges as he wants on the political spectrum, and how could the Senate really effectuate your idea?

Mr. GERHARDT. I think the idea I am describing is the system that we have got. I don't mean to suggest a different kind of system, Senator. The President may do exactly as you suggest, pick somebody based on whatever criteria he likes. I am just suggesting that I think it is perfectly consistent with the structure and history of our Constitution for Senators then to provide an independent judgment of his criteria and to assess them on whatever other criteria they think are appropriate.

Chairman SPECTER. The red light went on during your answer—

Mr. GERHARDT. Sorry.

Chairman SPECTER. Senator Leahy?

Senator LEAHY. I think he is referring to himself, Professor. Good to see you again.

I just want to followup on Professor Issacharoff, and I was pleased to meet your son, Lucas, here earlier. That way, his name is in the transcript.

Mr. ISSACHAROFF. Thank you, Senator.

[Laughter.]

Senator LEAHY. We have talked about the 1985 job application of then Sam Alito for a job in Ed Meese's Justice Department. He stated he developed an interest in constitutional law motivated in large part—in large part—by disagreement with the Warren Court decisions, particularly in the area of reapportionment. Now, in the questions he was asked here, he retreated from that unqualified disagreement and said that it was based on certain details of later Warren Court decisions, like the 1969 case, *Kirkpatrick* v. *Preisler*.

Mr. ISSACHAROFF. Yes.

Senator LEAHY. Doesn't it seem incredible that he was telling Mr. Meese in 1985 that in 1969, as a young college student, he was so incensed by the *Kirkpatrick* case, it motivated to study constitutional law?

Mr. ISSACHAROFF. I think the *Kirkpatrick* case had some impact in the Alito household because of the particular role that his father played. But his statement refers to an intellectual excitement based on the writings of Professor Bickel of Yale. Professor Bickel was not concerned with the implementation of one person/one vote. Professor Bickel was concerned, as was Justice Harlan at the time, that the Court should have no business in this area whatsoever, that whatever the political process did, whatever the malfunctions of politics might be, the courts simply were not to be engaged in that process.

That is the idea that was animating Professor Bickel, and one has to assume was animating the young Sam Alito.

Senator LEAHY. And, of course, Justice Harlan was one of his heroes. Had we followed that idea of Harlan's dissent, and others, we wouldn't have had reapportionment around this country, would we?

Mr. ISSACHAROFF. There were—

Senator LEAHY. Unless reapportionment was done politically by those who would reapportion themselves out of office.

Mr. ISSACHAROFF. The history of the United States was that for the 20th century, until we got these cases in the 1960s, incumbent officials simply did not reapportion. They had a constitutional duty, including this body, in the 1920s, the Congress, the Senate of the United States, decided not to reapportion. The Congress simply

said why should we reapportion ourselves out of business, we will just refuse, even though we have a constitutional obligation.

The lesson was that when power decides to close in on itself and pull the ladders up behind it, the courts have to be there. Professor Bickel was deeply disturbed by this, and when I read in 1985 that somebody is saying that, "That is what brought me to constitutional law." it opens questions. I don't have an answer, but certainly I do find it puzzling.

Senator LEAHY. Thank you.

Professor Liu, listening to the two cases you described, the 10-year-old boy shot in the back by an officer who didn't believe he was armed, and in any event, he wasn't coming at the officer, he was leaving, the TV in the hotel room, the bedroom, these things really bother me. And you now have the emerging story that the President may have violated—actually, the Congressional Research Service believes he has—and ordered others to violate the criminal provisions of the Foreign Intelligence Surveillance Act by spying on Americans. Do you think from what you have seen here today that we should take great comfort that a potential Justice Alito would stand up to the President on those kind of issues?

Mr. LIU. Well, Senator—

Senator LEAHY. And I look at how deferential he has been to law enforcement, and I served in law enforcement, as did our Chairman. I have a very soft, warm part in my heart for law enforcement. The only thing in my personal office that has my name on it is my shield from when I was in law enforcement. But doesn't this bother you?

Mr. LIU. Well, Senator Leahy, it does, and I won't venture any predictions as to how he would perform as a Justice. But I would say that what he urged the Committee to do was to believe that he would behave as a Justice as he has behaved as a Third Circuit judge.

Let me say one thing about the memo. This memo that he wrote in 1984 is about 13, 14 pages long. The first 10 pages of the memorandum contain his own personal individual analysis of this case. I urge all members of the Committee to read it if only to discover that he uses the first person throughout the first 10 pages of the memo. Only in the last three pages does he discuss whether or not the United States Government should file an amicus brief on the side of the State of Tennessee. And what is ironic about the last three pages is that he observes that all Federal agencies prohibit precisely this kind of use of deadly force, and that is one of the reasons why he urged against amicus participation in this case, because the U.S. Government would be put into a difficult position to show that it really meant the rule that he would have urged.

Senator LEAHY. Thank you, and, Professor Gerhardt, I am going to send you a letter. I had another question for you, but I found very instructive your quick history lesson, as I have when you have given longer ones. Thank you, sir.

Thank you, Mr. Chairman, and I apologize. I am going to have to leave at this point for a while, but I know you have everything under control.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Kyl?

Senator KYL. Mr. Chairman, let me just thank the witnesses for being here. I just am moved to make one comment, though. I cannot dispute the analysis of individual items here, but I think in law we are all familiar with the best evidence rule. And the best evidence of how Judge Alito would serve on the United States Supreme Court, it seems to me, is not something that might have motivated him to be interested in the law 30-some years ago or something that he even wrote as a young lawyer working in the administration but, rather, his 15 years on the bench, Number one and, second, how his colleagues have viewed his character as well as his judicial performance.

We have had almost 3 days to query him about all manner of issues, and I think to try to, to use the phrase, "cherrypick" a particular comment that was made in a much different kind of context and read into that something more powerful than all of the other best evidence that we have is a real stretch. I will just put it that way.

I, nonetheless, appreciate the effort that all of you have made to be here to enlighten us in these hearings, and I thank you for your testimony.

Chairman SPECTER. Thank you very much, Senator Kyl.

Senator Kennedy?

Senator KENNEDY. Thank you, Mr. Chairman.

I was reminded of an extraordinary observation the other day, and that was that Robert Bork and Ruth Bader Ginsburg agreed 91 percent of the time. It was the 9 percent when they differed which was the major difference. That is something that I think sometimes we lose track of here when we are looking at overall statistics, overall figures. It is the dissents. And it is the close dissents, as Professor Liu has pointed out they are really important on these enormously sensitive issues involving race, involving the disabled, involving women, that so much of a judge's philosophy comes out.

I am interested, Professor, just if you would talk a little bit about the jury selection cases. We have considered the two that Judge Alito was most involved in, one which is pretty boilerplate, I understand, the *Brinson* v. *Vaughn* case, and then the dramatic *Riley* v. *Taylor* case, which is just extraordinary and I think enormously distressful to many. I would be interested if you would just talk about both and give us your assessment.

Mr. LIU. Sure. Well, *Riley* v. *Taylor* has been discussed in these hearings. That was a case that concerned a challenge to racial discrimination in jury selection in the Dover County court. It was shown that over the course of four murder trials within the same year, including the defendants in the case, the prosecution had struck every black potential juror to serve on a capital jury. And the case was originally decided, actually, with Judge Alito in the majority, but it was then en banc'd, and Judge Sloviter ended up with a majority opinion, basically finding that this pattern, in addition to other evidence in the record, showed racial discrimination in the jury.

Judge Alito dissented from that view, and I think the sentence, I think, that is most disturbing is his comparison of that pattern to the right- or left-handedness of Presidents. And he went further

to say that, absent a careful multiple regression analysis—I can barely say it—we can't infer from the statistical pattern any racial discrimination.

Now, the *Brinson* v. *Vaughn* case came along 3 or 4 years later. That was, I believe, a 2005 case in which there was a pattern of 13, I believe, out of 14 black jurors being struck. And Judge Alito wrote a unanimous opinion finding racial discrimination in that case.

What is interesting about that case is that he relies on a prior case of the Third Circuit called *Holloway* v. *Horn*, which relies in turn on *Riley* v. *Taylor*.

Senator KENNEDY. Could you, just in the very short time, in looking through the opinions in these dissents, in areas where Judge Alito took away the effect of a decision of a trial court to have a jury trial, the number of cases that he took away from the trial court, and the number of cases that he took after there had been a jury trial, on appeal where he ruled against the individual on that, effectively overriding or overruling the trial court, a number in both of those areas some rather significant cases. We haven't got a lot of time here, but I think you get what I am driving at in terms of the respect for the trial court and the jury verdict, whether you feel from your own kind of analysis the appropriate kind of respect and tradition for that.

Mr. LIU. Well, I think one area in which there is, to my mind at least, a somewhat disconcerting pattern is in the Fourth Amendment context. You know, much has been said about, for example, the *Doe* v. *Groody* case. What I find puzzling about that case is it is not that there is nothing to Judge Alito's position. I think if you read—

Senator KENNEDY. This is the strip searching of the child.

Mr. LIU. That is right. His opinion actually is, like all of his opinions, incredibly well reasoned, very thoughtful. It is not at all disparaging to the girl or her mother, who was found to be illegally searched. What is interesting to me is that in that case, there is the availability of two competing interpretive principles. One is read the four corners of the warrant for what it says. The other is supplement the four corners of the warrant with underlying material that is questionable, at least, in terms of whether or not it is incorporated.

Given the important dignity at interest in *Doe* v. *Groody*, it just strikes me as puzzling why he would have chosen the second interpretive device rather than the first. And the second one is the one that took the case out of the jury's hands to determine whether or not the search was or was not reasonable.

Senator KENNEDY. This is the one where Judge Chertoff took exception to Judge Alito.

Thank you very much. My time is up.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Sessions?

Senator SESSIONS. Well, on the *Doe* case, Mr. Phillips, *Doe* v. *Groody*, this was a question involving a lawsuit—you, as a Solicitor General, you have had to defend law officers for personal damages, they are being sued. At best, there was an appearance, was it not,

that this affidavit was, in fact, made a part of the warrant because the magistrate judge intended it so and said it?

Mr. PHILLIPS. Senator Sessions, that, I mean, that is, at least in my mind, the complete answer to the Professor's argument, which is this is not—this doesn't have anything to do with two different analytical approaches. It has to do with how do you apply qualified immunity and what deference do you owe to the individual officer who is in a very precarious position, making decisions on the fly. I think if you read the opinion, it is quite, as he said, scholarly, thoughtful, analytical, almost apologetic with respect to the consequences to the individuals involved, but still recognizing at the end of the day that qualified immunity is designed to provide precisely the kind of gate-keeping function that the court exercised there in order to take those kinds of issues away from the jury because that is the only way you can protect the greater societal interests that are implicated.

Senator SESSIONS. So he did a search warrant on a house where dope dealers were there and he followed the instructions of the magistrate. They conducted a search of the young girl in a private chamber by a woman officer without removing all of her clothes, just pulling down her outer garments and a blouse up, apparently, and from the indications of the magistrate, that was permitted. And so the question was, was he acting within the line of scope of his employment and was this officer subject to personal suit for money damages, isn't that correct?

Mr. PHILLIPS. That is absolutely right, Senator.

Senator SESSIONS. Well, I am telling you, police officers have a hard enough time understanding these laws of search and seizure. They are very complicated, and the judges throw out searches all the time when they are not proper. But to sue the officer who is trying to do the right thing, I think Judge Chertoff was in error and I would like to see him back on here. I served as U.S. Attorney with him and I will ask him about that case.

[Laughter.]

Senator SESSIONS. I think Judge Alito was correct. Maybe he was not, but I think he had a good basis for that decision and I am concerned about it.

Mr. Liu, with regard to the *Kithcart* case in your written opinion here, you quote a dissenting opinion from Judge McKee that said that—this is where you criticize Judge Alito for holding that there was not a basis for arresting a black individual who was in a black sports car after some armed robberies that occurred, and so that was the message apparently that went out, and the officers stopped a car and arrested this individual who was black in a black sports car, and the Judge said, that is not enough. That is basically racial profiling, and he left open, as I understand it, the question of whether or not the stop was legitimate. And this judge, correct me if I am wrong, and maybe some of you prosecutors would jump in, but Judge McKee you quote favorably here. He said, "Just as the record fails to establish that Officer Nelson had probable cause to arrest any black male who happened to drive by in a sports car, it also fails to establish reasonable suspicion to justify stopping any and all such cars that happen to contain a black male."

Now, isn't that quite a difference of proof standard between the authority of an officer to arrest someone and the authority of an officer to do an investigative stop? Isn't that clearly a different standard, and wasn't Judge Alito correct to suggest that there is a different standard for the investigative stop than it is to arrest someone?

Mr. LIU. I think that is true, Senator Sessions. There is definitely a difference of standards. One is a reasonable suspicion standard. The other is a probable cause standard.

In this case, I want to be absolutely clear in my testimony. I am not criticizing Judge Alito for his result. I am saying he is correct, but Judge McKee is saying that he didn't go far enough.

Senator SESSIONS. All right. But I—

Mr. LIU. Judge McKee is dissenting to the other side of Judge Alito by saying that by the same logic that racial profiling prohibits the probable cause finding, it also prohibits the reasonable suspicion finding.

Senator SESSIONS. In that, I think the law is clearly to the contrary. I think officers who have that kind of information can at least stop a vehicle. At least, there is certainly far more authority to do that than it is and the standards are different, pretty clearly.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Sessions.

Senator Biden?

Senator BIDEN. Professor Gerhardt, I am just curious. Was that the case you cited about the Hoover administration, was that when Senator Boren went down and said to—it is a good answer, I think—to the Chairman—Senator Boren went down, and when he was given a list of ten people, he looked at the list of the President and he said, "It is a great list, Mr. President, but you have it upside down." and that is how you get the message, because when Presidents actually consult, you do have an impact.

Let me ask you, Professor Gerhardt, and I understand if you don't want to answer it, but where do you think on the spectrum of the present Court, if Judge Alito is confirmed, he will end up?

Mr. GERHARDT. It is—

Senator BIDEN. I know that that is guessing, but what is your best judgment?

Mr. GERHARDT. It is a great question, Senator, and obviously, I think it is one of the central questions in this hearing. I can tell you this much. I know how the President answers that. The President said he wanted to nominate somebody in the mold of Justice Scalia and Justice Thomas, and I think one of the questions in these hearings has been the extent to which, for instance, Judge Alito is going to be perhaps more like those Justices, or perhaps like some other Justices, Justice O'Connor or Justice Harlan, as he suggested.

And so if he is going to fit that mold, then obviously the balance shifts in a number of important cases in a certain direction. But if he is not, then, of course, it is going to be harder to predict.

I might venture at least this much. I think that if he is truly going to be a bottom-up judge, as he suggests, then I think the shift is not going to be that great. In other words, the shift would be more modest. That is the critical thing. The critical thing about

being a bottom-up judge is that that is the essence of modesty. There is very little margin of error when you are a judge and you are a bottom-up judge. But if you turn out to be a top-down judge, there is a greater potential for margin of error, and so if he does turn out to be more like Justice Thomas and Justice Scalia, there is a greater possibility for error.

Senator BIDEN. Well, there would be an awful lot of disappointed folks in Washington and the Nation if he turns out to be like Justice O'Connor. A lot of people will be very upset who are supporting him now.

Let me ask, if I may, anyone who would like to respond on the panel. One of my greatest concerns is, and I must tell you, I have a diminishing regard for the efficacy of hearings on judicial nominees in terms of getting at the truth. I am not in any way implying—

Mr. ISSACHAROFF. Based on the panel?

[Laughter.]

Senator BIDEN. Yes.

[Laughter.]

Senator BIDEN. No, no. I am not in any way implying—across the board, Democratic nominees, Republican nominees. It goes to this issue, in my view, of do the people have a right to know what they are about to put on the bench. And the part that concerned me the most, I must tell you, is the Judge's comments on, or failure to comment on, in at least my view, a clear understanding of what he means by the unitary Executive. It seems very different from what others think unitary Executive means, and scholars that I am aware of, and his discussion about, or failure to respond to what is now a very much animated debate about whether or not the President can wage war without the consent of or authority from the Congress and whether or not, as the administration argues, the War Powers Clause only gives the Congress the power to declare war if it wants to when the President doesn't want to go to war, which is the most extreme reading I have heard other than one occasion in the Bush I administration.

So does anyone here have any doubt that there is a need for the President, absent imminent danger, to get the consent of the Congress before he were to invade Iraq or Syria tomorrow, or does the President have the authority tomorrow, based on his judgment, to invade Iraq and Syria? Does anybody want to venture an opinion on that?

Mr. ISSACHAROFF. I think, Senator Biden, that is the lesson of the steel seizure case, including Judge Alito's invocation of Justice Jackson's opinion in that case, is that the President acts at tremendous constitutional peril when he acts contrary to the express wishes of Congress and acts at significant constitutional peril when he acts absent congressional authority unless there is true military exigency of the moment. I think that that is fairly well established. That has been the history of the relationship between Congress and the Executive. It has been a difficult history, and the question of how much authorization Congress has given is a repeated issue before the courts and has been since the Civil War cases. But I don't think that there is any doubt on this question constitutionally.

Senator BIDEN. Thank you, Mr. Chairman. My time is up.

Chairman SPECTER. Thank you, Senator Biden.

Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman. I guess I would just have to express some reservations at trying to predict how Judge Alito is going to rule on the bench. I can think of famous examples where President George Herbert Walker Bush thought David Souter was going to be of a particular frame of mind or approach on the bench. I guess Richard Nixon probably had some ideas about Harry Blackmun and President Eisenhower had some ideas about Earl Warren. Judicial independence means something, and what it hopefully means is exactly what the Framers intended in terms of providing the flexibility, the freedom, the independence. They have life tenure. We can't cut their salary. Who knows? This is, I guess, a debate only lawyers can love. It is important, but I just don't know how we can answer the question comprehensively.

Professor Issacharoff, it is good to see you again. Of course, I got to know you during your tenure at the University of Texas Law School before you came up north to NYU. There have been some questions about Judge Alito's statements, about his concerns about the Warren Court decisions on reapportionment, and you alluded to that in your testimony. The fact is, our nation has a checkered history, doesn't it, in terms of enfranchising people, making sure that everyone's vote counts roughly the same? Back, I guess, at the beginning of our nation, people had to have property before they could vote. We know that some people couldn't vote at all, African-Americans, and we fought a Civil War and amended the Constitution on that. We know that even today, the Texas congressional redistricting case is pending before the U.S. Supreme Court.

This remains a subject of a lot of interest and a lot of controversy, but I just want to make sure that we are not guilty, those of us on this side of the dais, about overstating or reading too much, I should say, into what Judge Alito has said. He said in college, he was motivated by a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment.

Let us talk about reapportionment, which is, I know, one of your passions and expertise. It wasn't until 1962 when the Supreme Court decided that those issues were justiciable in the first place, wasn't it, in *Baker* v. *Carr*?

Mr. ISSACHAROFF. That is correct, Senator.

Senator CORNYN. And then the principle of one person/one vote was decided in *Reynolds* v. *Sims* in 1964, I believe. Is that the right time?

Mr. ISSACHAROFF. Yes.

Senator CORNYN. The right case?

Mr. ISSACHAROFF. Yes.

Senator CORNYN. And, of course, notwithstanding what some have tried to make out of what Judge Alito said, he has testified here and in other areas that he considers one person/one vote a bedrock of our democracy. You have said everybody believes that, at least every American believes that today, although it was fairly

controversial not that many decades ago, or at least in terms of the court's role.

What he did say, and I want to get your comment on this, is that—and maybe it was because of his father's experience, as you alluded to a little bit—that strict numerical precision in terms of the size of districts, whether they be for city councilmen, whether it be for a State representative, a State Senator or Congressman or whatever, there was sort of the troublesome issue of how do you deal with things like municipal boundaries and communities of interest, lines that ordinarily you would think define those communities of interest in a way that you just don't want to run roughshod over. Is that a legitimate consideration on the way to try to achieve that goal of one person/one vote, or is that just bogus?

Mr. ISSACHAROFF. I think, Senator—and I still have the temptation to refer to you as Justice Cornyn—but Senator, I think that it is absolutely a legitimate concern. I think that one person/one vote turns out to do two things. One, it is emblematic. It is our aspiration that everybody be equal in the political process.

And secondarily, and perhaps more importantly, it serves as a check on what those in power can do to try to preserve themselves in power, and that second feature of it has been difficult and the efforts to ratchet up mathematical exactitude have usually come in cases that were about something completely different. For example, in the New Jersey case in the mid-1980s, *Karcher* v. *Daggett*, the real issue was a partisan gerrymander and everybody understood that and the court didn't know what to do about it, just as it has had trouble with that issue for the decade since, and so it fell back on this extraordinary mathematical exactitude, which, in fact, is completely illusory because the census isn't that precise.

So I agree with you fully. I don't think that that was where the controversy had moved in the late 1960s. I would stay by that statement. But nonetheless, you are absolutely right that this is a legitimate course of concern.

Senator CORNYN. Professor, thank you. My time is up. I appreciate your response to my question. Thank you.

Chairman SPECTER. Thank you, Senator Cornyn.

Senator Coburn?

Senator COBURN. Thank you, Mr. Chairman. I have been listening. I was not here for all of it, but I was paying attention by the video screen in the back room, and just some observations. You know, I live on Capitol Hill with two Democrats and the things that normally asked of them is, how can you live with that guy? And their answer is you don't know his heart. And then I get asked the same thing: how can you live with those two guys? And I say you don't know his heart.

And it strikes me as I look at this panel, the three people who testified favorably for Judge Alito know him and the three people who didn't testify—who testified somewhat negatively about Judge Alito don't know him. They have read some of his cases, not all of his cases. And so it just kind of strikes me that one of the most valuable pieces of information that this Committee has gotten from outside witnesses was the judge panel that came before you, the people that have worked with him for over a decade, worked with him in a closed room. I believe they know his heart. And I believe

anyone in this room—you can take anything that we have written at some time or said at some time and you can make each of us look terrible.

And I only have really one question and that is for Professor Liu. How do you explain the fact that Judge Lewis, who is adamant about Title VII of the Civil Rights Act, his observations about Judge Alito are completely contrary to yours? How do you explain that? Here is a guy that knows him, here is a guy that has very liberal leanings in terms of the political spectrum, here is a guy that is basing his whole legal career on civil rights. And yet he says I know this man and there is no a bit of truth in any bias or any direction that he goes.

How do you explain that?

Mr. LIU. Well, Senator Coburn, I certainly can't dispute Judge Lewis's account or views on Judge Alito. I understand the previous panel to be testifying to the integrity and intellectual honesty of the nominee, none of which I dispute. In fact, I conceded in the very first sentence of my testimony that I find him also to be an intellectually honest person.

My only viewpoint, I guess, that I am offering is not really a viewpoint at all. What I am trying to simply urge is that some attention be paid to his record and that the record speaks for itself. And it doesn't speak to the nominee's intellectual—any negatives regarding the nominee's intellectual honesty. Rather, I think it speaks more to the set of values or instincts or the intangible qualities of judging, I think, that every judge, every human being brings into the world.

It is not that any judge decides to go about any case saying, oh, I come in with this bias or I come in with that bias. I grant that Judge Alito, like every judge, tries to be impartial, but every judge also has a set of instincts, a central tendency, and I think it can be revealed, not definitively, but it can be revealed by looking at patterns across large numbers of cases.

Senator COBURN. And you looked at 50 cases of his. Is that correct?

Mr. LIU. Well, I have actually looked at more, but the cases that I have—

Senator COBURN. How many more?

Mr. LIU. I have probably looked at 60 or 70 cases.

Senator COBURN. Out of 4,000?

Mr. LIU. Out of the 360 that he has written.

Senator COBURN. Written opinions on, but he still has adjudicated over 4,000 cases.

Mr. LIU. Certainly, that is true.

Senator COBURN. All right. Thank you, Mr. Chairman. I yield back.

Chairman SPECTER. Thank you, Senator Coburn.

I had hoped to finish up this evening, but the sense of the proceeding at this point is that it is not a wise thing to do. This panel took an hour and 15 minutes, and projecting with a break, we would be in the ten o'clock range or perhaps even later. That would depend upon how many Senators were here to question, and I think in the morning we may have more questions.

I think it is a fair observation that we are not at our best. We started at nine, so we are in the tenth or eleventh hour. And we have tomorrow to proceed and still meet the schedule that I had announced early. I know that it is a likely inconvenience to some of the people who were on the later panels, although nobody on the latter panels, if we were to finish tonight, would be out of this town tonight anyway. So it is really staying over, and I know that in making your plans to come here, you didn't know whether you would testify on Thursday or Friday and nobody else knew whether you would testify on Thursday or Friday. We tried to follow the Roberts model, but on Roberts we finished up his testimony close to 11 and today we didn't start on the outside witnesses until 2:30.

That is probably more than you want to know, but I like to tell you what is on my mind. I see some of the witnesses on the later panels nodding an affirmative. Nobody seems to be too distressed about calling it a day at 6:36 after starting at 9 a.m. So we will be in tomorrow morning at 9.

Senator KENNEDY. Mr. Chairman, could I enter into the record a letter from the National Association of Women's Lawyers at an appropriate place, and then also a letter from Professor Higginbotham, as well, at an appropriate place in the record?

Chairman SPECTER. Certainly. Without objection, they will be placed in the record at what we conclude to be an appropriate place after consulting with you.

Thank you all very much. That concludes our hearing.

[Whereupon, at 6:36 p.m., the Committee was adjourned, to reconvene at 9 a.m., Friday, January 13, 2006.]