

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

Chairman SPECTER. Thank you very much, Professor.

We now turn to Professor Erwin Chemerinsky, the Alston & Bird Professor of Law and Political Science at Duke. Prior to coming to Duke in 2004, he had been for 21 years at the University of Southern California Law School, where he was the Irmas Professor of Public Interest Law. He is a graduate of Northwestern University with a bachelor's degree, and a law degree from Harvard. Last year, he was named by Legal Affairs as one of the top 20 legal thinkers in America.

Thank you for coming in today, Professor, and the floor is yours.

STATEMENT OF ERWIN CHEMERINSKY, ALSTON & BIRD PROFESSOR OF LAW AND POLITICAL SCIENCE, DUKE UNIVERSITY LAW SCHOOL, DURHAM, NORTH CAROLINA

Mr. CHEMERINSKY. Thank you, Mr. Chairman, Senator Leahy, distinguished Senators. It is truly an honor and a privilege to testify at these historic hearings.

It is impossible to overstate the importance of this nomination to the future of constitutional law. In recent years, the Supreme Court was often referred to as the O'Connor Court because Sandra Day O'Connor so often has been in the majority in 5–4 decisions in crucial areas: protecting reproductive freedom, enforcing the separation of church and state, limiting Presidential power, and advancing racial justice. Replacing her has the possibility of dramatic changes in so many areas of constitutional law.

A crucial question for this Committee is what will be the effect of Samuel Alito on the Supreme Court. I want to focus on one area, Executive power. I choose this area because no area of constitutional law is likely to be more important in years ahead than this.

As you know, in recent years the Bush administration has made unprecedented claims of expansive Presidential power, such as the claim of authority to detain American citizens as enemy combatants without meeting the Constitution's requirements for warrant, grand jury, or trial by jury; the claim of authority to torture human beings, in violation of international law; the claim of authority to eavesdrop on conversations of Americans without complying with the Fourth Amendment or the Foreign Intelligence Surveillance Act; the claim of authority to hold American citizens indefinitely and citizens of other countries indefinitely as enemy combatants.

Now, my goal here isn't to discuss the merits of any of these issues; instead, to point to the fact that separation of powers is likely to be an enormously important issue in the years ahead. And, of course, there is no need to remind this body of the crucial role that checks and balances and separation of powers play in our constitutional structure.

Some of the most important Supreme Court cases in history have been those where the Court has said no to assertions of Presidential power, such as in *Youngstown Sheet and Tube v. Sawyer* in striking down President Truman's seizure of the steel mills, and *United States v. Nixon* in saying that President Nixon had to reveal the Watergate tapes.

A key question for this Committee is whether Samuel Alito will continue this tradition of enforcing checks and balances or whether he will be a rubber stamp for Presidential power. I have carefully read the writings, the speeches and the decisions of Samuel Alito in this area and they all point in one direction—a very troubling pattern of great deference to Executive authority.

I have closely followed the hearings this week and I know you are familiar with the examples. To mention just a few, in 1984 while in the Solicitor General's office, Samuel Alito wrote a memo saying that he believed that the Attorney General should have absolute immunity to civil suits for money damages of engaging in illegal wiretapping, a position the Supreme Court rejected in language that seems so appropriate now in saying there was too great a danger of violation of rights from executive officials who, in their zeal to protect national security, would go too far.

The next year, he said there should be increased use of Presidential signing statements. He said, quote, "The President should have the last word as to the meaning of statutes," which would mean an increase in Executive power.

As you know, in a number of writings and speeches, he said he believed in the unitary Executive theory. Now, there was a good deal of discussion this week as to what that means. But if you look at the literature of constitutional law, those who believe in a unitary Executive truly want a radical change in American Government. They believe that independent regulatory agencies like the Securities and Exchange Commission or the Federal Communications Commission are unconstitutional. They believe the special prosecutor is unconstitutional. They reject the ability of Congress to limit the Executive.

Now, as a judge on the Third Circuit, Judge Alito has not had the opportunity to review assertions of Presidential power, but there have been many cases where he has considered assertions of law enforcement authority. Over and over again, he comes down on the side of law enforcement.

I think his dissenting opinions are particularly revealing because Judge Becker said he rarely dissents. One case, I think, shows Judge Alito's overall philosophy and it is one discussed yesterday at the end of the day, *Doe v. Groody*. This, of course, was the case where the police strip-searched a mother and her 10-year-old daughter who were suspected of no crime.

As Carter Phillips said yesterday, this was an issue of qualified immunity. That means did the officers violate clearly established law that a reasonable officer—should the officer have known that it violates the Constitution? Senators, any police officer, any judge should know that strip-searching a 10-year-old girl who is suspected of nothing violated the Constitution. Senators, this is one of so many cases where Judge Alito deferred to law enforcement.

I am here for a simple reason. I believe that at this point in time it is too dangerous to have a person like Samuel Alito, with his writings and records on Executive power, on the U.S. Supreme Court.

Thank you.

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

Chairman SPECTER. Thank you very much, Professor.

We now turn to Professor Anthony Kronman. After teaching at the University of Chicago Law School and Minnesota Law School, Professor Kronman came to Yale, where he has been on the faculty for 16 years and was the dean of the law school from 1994 to the year 2004, and is the Sterling Professor of Law at Yale.

He has his undergraduate degree from Williams in 1968, with highest honors, a Ph.D. in philosophy, and a law degree from Yale in 1975, when he was a classmate of Judge Alito.

Thank you for being with us today, Professor, and the floor is yours.

STATEMENT OF ANTHONY KRONMAN, STERLING PROFESSOR OF LAW AND FORMER DEAN, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT

Mr. KRONMAN. Thank you, Mr. Chairman, Senator Leahy, other members of the Committee. I am grateful for the opportunity to appear this morning and offer my testimony.

I have known Sam Alito for 33 years, since we met in the fall of 1972 as members of the entering class at the Yale Law School. Over the next 3 years, we took nearly a third of our law school courses together. We worked on the law journal together. We debated in the moot court program. I had a chance to observe Sam Alito at close range and to form an estimate of his character.

Sam was hard-working and ferociously bright. No one, I think, would challenge that, but that wasn't the first thing that impressed me about Sam. What impressed me first and most emphatically was his generosity and gentleness. When Sam spoke in class or out, others listened. But when others spoke, Sam listened, and not just in the superficial sense of waiting politely until they had finished, but in the deeper and more consequential sense of straining to grasp the good sense of their position and to see it in its most attractive light.

Sam always spoke with modesty, but even when he was defending a position that he believed clearly to be right, did so with the knowledge that he might be wrong. Learned Hand once described the spirit of liberty as the spirit "that is not too sure of itself." That is a phrase that has always had a special meaning for me and it well describes the quality in Sam that I noticed from the start.

I noticed something else and admired something else as well, and that was Sam's faith in the law. Sam believed in the integrity of the law and in the essential fairness of its processes. Anyone who has studied the law knows that it is not a mechanical system. It requires moral judgments at many points.

But there is all the difference in the world between a person who approaches the law from the outside and views it as an instrument for the advancement of some program of one kind or another and a person who approaches it from the inside and whose fundamental, leading allegiance is to the law itself.

Sam falls clearly in that second category. He had, so far as I could tell, no political agenda of any kind. I would have described him in law school as a lawyer's lawyer, and if you had asked me on the day we graduated whether he was a Democrat, as I was then and am today, or a Republican, I couldn't have told you.