the decisive vote in 5–4 cases, whose balance Judge Alito would now tip the other way.

Here, Mr. Chairman, it is important to note that Justice O'Connor is a judicial conservative, who has not always fully protected constitutional rights and liberties, but she crafted opinions that retained meaningful protections for rights that other Justices sought to deny completely.

But the most disturbing difference between these two jurists is not simply the conclusions they reach, but also how they reach them. Justice O'Connor considered each case with careful attention to what the law means and who it affects, for she knows that that is the essence of justice. In Judge Alito's approach to the law, there is neither justice, nor regard for women's human dignity.

Judge Alito has parried challenges to his record by promising an open mind and a respect for precedent. We must ask whether this assurance offered only now, can be allowed to outweigh the totality of this man's record. Millions of American women whose lives, privacy and dignity have a place in this debate would have to conclude no.

Thank you.

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

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

Our next witness is Professor Ronald Sullivan, Associate Clinical Professor of Law at Yale. He is a graduate of Morehouse College in 1989, and a law degree from Harvard in 1994. He served for 1 year in Nairobi, Kenya as a visiting attorney for the Law Society of Kenya, and in that capacity was on a committee charged with drafting a new constitution for Kenya.

We very much appreciate your coming in today, Professor Sullivan, and the floor is yours, and the clock will start at 10 minutes.

**STATEMENT OF RONALD S. SULLIVAN, JR., ASSOCIATE CLINICAL PROFESSOR OF LAW, AND SENIOR FELLOW, JAMESTOWN PROJECT, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT**

Mr. SULLIVAN. Thank you very much, Senator Specter, and Senator Leahy in his absence, members of the Committee. Thank you for inviting me to testify at this very important expression of our democracy.

I have been asked to comment on Judge Alito's Fourth Amendment jurisprudence. Two broad themes follow from his record. First, Judge Alito's Fourth Amendment opinions reveal a clear pattern of privileging Government power when it comes into conflict with individual liberty. Indeed, in the 17 opinions that the nominee has authored regarding the Fourth Amendment, in his more than 15 years on the bench, Judge Alito has ruled to suppress evidence only once.

The second broad theme is that Judge Alito is a skilled, legal writer with a sharp analytical mind. Almost none of his opinions appears to be a radical departure from accepted jurisprudential conventions. Rather, his constitutional criminal procedure decisions, read together, demonstrate a pattern that cannot be ignored. In over 50 constitutional criminal procedure cases that I have re-

viewed, Judge Alito ruled in the government's favor over 90 percent of the time. To borrow an old phrase, as the government goes, so goes Judge Alito in a criminal law context.

But the point I make here is more than a mere statistical correlation. I want to make a deeper and more substantive point. Judge Alito's tendency to privilege government power in a criminal context represents a failing in his jurisprudence for the following three reasons.

Number 1: Judge Alito criminal law corpus demonstrates a judicial philosophy that improperly subordinates privacy, dignity and autonomy concerns to the interest of the government.

Number 2: Even when the government undeniably violates the Fourth Amendment, Judge Alito employs legal rules to excuse the government for its misbehavior.

Number 3: Judge Alito shifts from a strict constructionist to an activist jurist at times when the government's interest so dictates.

Let me briefly address each of these propositions in turn, and of course, I give much greater detail in my written statement. First, privacy and dignity concerns. *Groody* v. *Doe* has been discussed all week, and I assure you I shall not be redundant. Let me simply invite the Committee to read my comparison of *Groody* with another one of his cases, *Leveto* v. *Lapina*. In *Groody*, Judge Alito was only able to muster up one clause, not even a full sentence, giving voice to the highest order dignity concerns involved or implicated in the strip search of a 10-year-old girl. Compare this to *Leveto*, a tax evasion case involving the search of a wealthy veterinarian and his spouse, who was wearing a nightgown, where Judge Alito devotes four entire pages of text to express the "indignity" or "stigma" concerns associated with the illegal search. In no other, I repeat, no other Fourth Amendment case that Judge Alito authored, did he spend even a fraction of the time expressing the dignitary objections that he did in *Leveto*. One is forced to wonder whether Judge Alito has a more robust appreciation for the privacy and dignity concerns of the wealthy or the class of individuals typically charged with tax evasion or crimes of that sort.

In the area of what I have characterized as excusing governmental misbehavior, Judge Alito frequently uses the good faith exception or the qualified immunity doctrine to cure an otherwise illegal search. Indeed, in nearly one-third of his Fourth Amendment cases, Judge Alito excuses the government's unconstitutional invasion of our privacy. Now, the insidious effect, the on-the-ground effect of the heavy reliance on the good faith exception or the qualified immunity exception is that the exceptions tend to swallow up the rule. This gives government officials the perverse incentive to knowingly violate the constitutional rights of our citizens because no practical consequences follow.

So Judge Alito's rulings will take the following form. There was no substantive violation of the Fourth Amendment, therefore, conviction affirmed; or, yes, there was a substantive violation of the Fourth Amendment, as in the *Leveto* case, and it was a horrible violation, but even though there was a violation, I am going to interpose a qualified immunity defense, and the government is therefore shielded from civil liability. This form of argument can be seen throughout his jurisprudence.

Now to the strict constructionist argument. Judge Alito was praised by many as being a true conservative jurist, a strict constructionist, and that proposition has been almost assumed, as I have listened to the hearings this week. But that he is a strict constructionist is not true all of the time. A review of his entire criminal law jurisprudence demonstrates that Judge Alito shifts his interpretive style when necessary to rule in accord with the government's interests.

Two of Judge Alito's opinions illustrate my claim, *Sandoval* v. *Reno* and *U.S.* v. *Lake*. In *Sandoval*, Judge Alito employs a literalistic and plain meaning construction of the relevant statute to limit, to limit the scope of a defendant's rights. There is a very technical habeas issue that I will not go into, but essentially Judge Alito said—he cited the captions in the relevance statute in bold letters and all caps twice, and said, "This is all we have to look at. This answers the question to congressional intent." And that is within the norm of judicial reasoning for a strict constructionist. But he uses this interpretive style to limit the scope of a defendant's right.

But in *Lake* he shifts his interpretive style and uses a broad, liberal even, statutory construction to augment the scope of government power. More specifically in *Lake*, Judge Alito found that a car, located the functional equivalent of a city block away from its owner and out of its owner's eyesight, was nonetheless in the "presence of the owner." To do so, Judge Alito relied on a Ninth Circuit, yes, a Ninth Circuit Court of Appeals ruling to articulate a remarkably broad definition of "presence." This sort of shifting jurisprudence begins to look like it is result driven and not restrained in the jurisprudential tradition in which Judge Alito positions himself.

We are living in a moment where the Executive is making extraordinary claims of authority to conduct investigations of U.S. citizens. The delicate balance between liberty and safety that the Framers fought so hard to erect, and that their successor generations fought so hard to maintain, needs our continued vigilance to sustain.

In the United States perhaps no right is regarded as more sacred, more worthy of vigilant protection, than the right of each and every individual to be free from government intrusion without the unquestionable authority of the law. Judge Alito, on my read of his constitutional criminal procedure opinions, shows an inadequate consideration for the important values that underwrite these norms of individual liberty, the very norms upon which this constitutional democracy relies for its sustenance. This Committee and this Committee's decision on whether to consent to Judge Alito's nomination will have a profound impact on how liberty is realized in the United States.

In addition to Judge Alito's constitutional criminal procedure decisions, I have reviewed nearly 415 of Judge Alito's opinions under both the auspices of the Alito Project at Yale, where a number of my colleagues and I reviewed all 415 of his opinions, and under the auspices of the Jamestown Project at Yale, where I serve as a Senior Fellow. While I have not studied in detail all 415 of his opinions—and I should say the opinions that he authored, which I

found to be most instructive—I find this tendency to be consistent with other areas of the law as well.

That said, I would like to thank the Committee for the opportunity to share my remarks with you, and I look forward to answering any questions that the Committee may have.

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

Chairman SPECTER. Thank you very much, Professor Sullivan.

We now turn to Professor Amanda Frost, Assistant Professor of Law at American University's Washington College of Law. She is a graduate of Harvard College, 1993, with a bachelor's degree and a law degree from Harvard Law School in 1997. Her areas of specialization include civil procedure in Federal courts, and is the author of several Law Review articles. As staff attorney for the Public Citizen's Litigation Group, she has litigated cases before the U.S. Supreme Court and Federal Courts of Appeals. She was a consultant for the Shanghai Municipal Government in drafting open government legislation.

Thank you for being with us today, Professor Frost, and we will set the clock at 10 minutes for your testimony.

**STATEMENT OF AMANDA FROST, ASSISTANT PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY, WASHINGTON, D.C.**

Ms. FROST. Thank you. Mr. Chairman, Senator Leahy and members of the Committee, I feel honored to have the opportunity to testify at these important proceedings. My comments today are about reforms that are needed, and the procedures and practices that govern recusal of Federal judges.

Your consideration of Judge Alito may be affected by your views about whether he should have recused himself from certain cases while sitting on the United States Court of Appeals for the Third Circuit. That is why I wanted to discuss with you today certain problematic recusal practices that too often have led Federal judges into situations into which their recusal decisions undermine the public faith in the judiciary.

Because the reputation of the judiciary is affected as much by the appearance as the reality of bias, Congress has enacted a statute, 28 USC section 455, that provides, "Any justice, judge or magistrate judge of the United States, shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." By using this language, Congress sought to ensure that even when a judge is certain that he or she could be impartial, that judge must step aside if members of the public might reasonably disagree.

In essence, the law requires a judge to recuse even in borderline cases in which the possibility of bias or appearance of bias is slight.

I think this is a good standard, but a key problem with the statute is that it contains no procedural mechanisms to govern the recusal decision. It does not say how the parties are to seek recusal, does not say how evidence about a judge's potential biases or conflicts are to be shared with the parties, does not clarify who should make the recusal decision, or whether that person should articulate any reasons for making that decision.