ruled. He did not. You need only read that memo because he said in that memo that we should not argue that *Roe* v. *Wade* should be overruled. I didn't follow that advice, but that was what the advice was.

Similarly, it said that he argued for the absolute immunity of the Attorney General in connection with wiretaps. He did not. What he said was I don't question that immunity, but we should not propose that argument; we should not make that argument to the Court.

Now, in 1985 he wanted a job in the administration, and at that point he took on a different role and he spoke in a different tone of voice. I think that is perfectly understandable and appropriate. And when, 15 years later, he became a judge—when, 15 years ago, he became a judge, he once again assumed a different role. His whole career shows that he understands the different between a professional lawyer, an advocate, and a judge. And no more eloquent testimony of that understanding can be had than the wonderful testimony of his colleagues, Democrat and Republican, liberal and conservative, who served with him for those 15 years.

I believe that it is perfectly appropriate for this panel, for this Committee, to have probed Judge Alito's disposition. Everybody has a disposition. He is in the mainstream. He tends toward the right bank of the mainstream, I agree. When this Senate approved two wonderful judges to be Justices, Justice Breyer and Justice Ginsburg, it was perfectly plain that they tended toward the left bank of the mainstream and they were confirmed, and properly so. I believe Judge Alito should be as well.

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

Chairman SPECTER. Thank you very much, Professor Fried.

Our next witness is Professor Laurence Tribe, Loeb University Professor at Harvard University and Professor of Constitutional Law at the Harvard Law School. Professor Tribe has argued before the U.S. Supreme Court over 33 times, served as a law clerk to Justice Potter Stewart, and received his bachelor's degree from Harvard College, summa cum laude, in 1962, and his law degree also from Harvard, magna cum laude, in 1966.

Professor Tribe, the floor is yours.

STATEMENT OF LAURENCE H. TRIBE, CARL M. LOEB UNIVERSITY PROFESSOR AND PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. TRIBE. Thank you, Mr. Chairman. It is a great honor to be here on this very important occasion.

I am not here to endorse the nomination of Judge Alito, as I did with my most recent testimony before this Committee on a Supreme Court nomination with Justice Kennedy. I am not here to oppose his nomination, as I did several months before that time with Robert Bork. And I am not here to lecture the Committee on its responsibilities or its role. I don't think that is my role.

I think the only useful function that I can perform is to ensure to the limited extent I can that Senators not cast their votes with, to borrow an image from a Kubrick movie, their eyes wide shut.

It is quite clear that there are two central concerns in the country and in the Senate with respect to this nomination, and they do not relate, honestly, to what a truly admirable, collegial, modest, thoughtful and brilliant fellow Sam Alito is. And I don't mean to call him "Sam." I don't really know him the way that my colleague, Charles, does.

They relate to whether Justice Alito might, by casting a decisive fifth vote on many cases, narrow the scope of personal liberty, especially for women, and broaden the scope of Presidential power at a time when we see dramatically the dangers of an unfettered Executive by weakening the ability of both Congress and the courts to restrict Presidential assertions of authority.

A word first about liberty. It is certainly true that in the Solicitor General's office the memorandum that Judge Alito wrote for the Solicitor General did not urge that the Court be confronted frontally, overrule *Roe*. But he made it clear even then that the strategy he thought wise to pursue was a step-by-step process toward the ultimate goal of overruling *Roe*.

That is the only prospect on the table. I assure you that if the Supreme Court actually overrules *Roe*, I will have thousands of students to tell that I predicted the wrong thing. That is not the danger. They won't say *Roe* v. *Wade* is hereby overruled. What they will do—and I am saying "will" because I am assuming that confirmation will occur. Maybe it won't, but with the vote of Judge Alito as Justice Alito, the Court will cut back on *Roe* v. *Wade* step by step, not just to the point where, as the moderate American center has it, abortion is cautiously restricted, but to the point where the fundamental underlying right to liberty becomes a hollow shell.

It is the liberty interest which occurs not only in *Roe*, but in the right to die and in many cases that we can't predict over the next century, and certainly over the 30 years that Justice Alito would serve—it is that underlying liberty which is at stake. And it is crucial to know that Judge Alito dramatically misstated the current state of the law, and I say that with deference and respect, but it was clear.

When pushed on whether he still believed, as he said, not in his role as a Government lawyer but in his personal capacity that he believed the Constitution does not protect a right to abortion—when he was asked, do you still believe that, he said, well, I would approach it by starting with *Casey*. *Casey*, in 1992, he said, began and ended with precedent, *stare decisis*. *Casey* simply followed *Roe*. And he thereby avoided the issue.

That is not true. *Casey* split the baby in half; that is, *Casey* said there are two fundamental questions here. One, does the woman have a fundamental liberty at stake when she is pregnant and wants to make a decision? And No. 2, assuming she does, at what point does the state's interest in the fetus trump the woman's liberty?

On the liberty issue, the Court did not rely on *stare decisis* and *Roe*. The moderate Justices who wrote the joint opinion, Justices O'Connor and Kennedy and Souter, said that on the underlying issue of liberty, we agree clearly the woman's liberty is important, special, not just like the right to fix prices, because if we didn't think that and if we had a case where a teenage girl was being

forced to have an abortion, her liberty wouldn't be special either. And therefore we must conclude, without relying on *Roe*, this is a liberty deserving of special protection.

Never in the descriptions that you heard from Judge Alito with respect to the issues in *Roe* did he confront the question, does he too believe that that liberty is special or does he, as did Robert Bork and as do many, believe that there is no special liberty. Simply because the woman happens to have a fetus inside her, her interest is no greater than my interest in learning how to play tennis.

So it seems to me clear that the indications we have of Judge Alito's belief are that he does not have a conviction that that liberty is special, and he is unwilling not only to commit to treating this as a so-called super precedent; he is not even willing to indicate to this Committee that he believes that the Court has a special role in protecting intimate personal liberties.

Now, with respect to consolidating the powers of the President, I want to associate myself completely with the remarks of Beth Nolan. It is very clear that with respect to the unitary Executive theory that is being espoused that what you saw in the instance of Judge Alito's testimony was not a forthright description of what he said he believed—

Chairman SPECTER. Professor Tribe, you are a minute-and-a-half over. If you could summarize, I would appreciate it.

Mr. TRIBE. I am sorry. I will certainly summarize.

When he spoke in November of 2000, after *Morrison* was decided, he outlined a strategy for consolidating the power of the President, notwithstanding *Morrison*. And I think it is easy to explain, but I won't try to do it over time. The distinction he tried to draw between the President's control of functions within his power and the scope of Executive power is a completely phony distinction.

Chairman SPECTER. Professor Tribe, did you say you were not testifying against Judge Alito?

Mr. TRIBE. I am not recommending any action. I am recommending that everybody, because I think it is foolish—nobody really cares what I think.

Chairman SPECTER. Aside from your recommendation, are you saying you are not testifying against Judge Alito?

Mr. TRIBE. I am not testifying for or against Judge Alito. I am explaining why I am very troubled by his views. Obviously, it follows from that that I would be hard-pressed to recommend his confirmation.

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

Chairman SPECTER. The clock needs to start at 5 minutes even for the Chairman and for everybody. I had already started the 5-minute round, but we will proceed. And as we all know, after the panel testifies, each Senator has 5 minutes of questioning.

Professor Fried, you testified in the confirmation hearing of Chief Justice Roberts that you thought *Roe* was wrong decided, but you also thought that *Roe* should not be overruled. And that is based on the reliance and upon the precedents and upon *stare decisis*.

You have worked closely with Judge Alito. I know you have followed his career. What is your sense as to how Judge Alito will ap-

proach the *Roe* issue if it should come before the Court for reversal or being sustained in the context of your understanding of his approach to *stare decisis*?

Mr. FRIED. Well, I think it is a version, but only a version of what my colleague and friend, Larry Tribe, has said. I think he will not—and Larry agrees with that—move toward a frontal overruling, just as he has been urged and others have urged should happen. That is my belief, and I could be quite wrong. I could be quite wrong about that, but that is my belief.

Now, the idea that he would chip away at it—I am not sure I know what that means. When the *Casey* decision came down and Justice O'Connor—and it is clearly Justice O'Connor—moved from the very strict, almost abortion-on-demand standards of *Roe* toward the undue burden standard, a cry went up from the community which I think Professor Tribe is associated with that this was a disaster. But, in fact, it was a reasonable thing to do.

And we do not know what the future holds, but I don't expect him to do things which would be other than in the reasonable tradition of *Casey*, which I agree with Professor Tribe is a much better decision and a much better-founded decision than *Roe*.

Chairman SPECTER. Ms. Nolan, the critical issue which the Congress is going to be looking at and this Committee is going to hold a hearing on is the President's power on eavesdropping without a warrant, in contravention of the specific provisions of the Foreign Intelligence Surveillance Act.

During the Clinton administration, Deputy Attorney General Jaime Gorelick testified—I see you nodding; you know she testified that the President had inherent authority to conduct those warrantless searches.

What have you seen—aside from the generalizations of unitary power, anything specific in the record of Judge Alito that he has a view on that critical issue?

Ms. NOLAN. First of all, I just want to be clear that Deputy Attorney General Gorelick's testimony was about inherent authority in the absence of a statutory provision. It was physical searches not covered by FISA, so just to clarify that.

Chairman SPECTER. Well, she testified during the Clinton administration, which was long after FISA was adopted.

Ms. NOLAN. Yes, but it didn't cover physical searches and that was the question at that time. It was part of the Ames case. And, in fact, the administration brought to Congress a request that FISA be amended to cover physical searches.

Chairman SPECTER. OK, on to Judge Alito.

Ms. NOLAN. I am not aware of anything in Judge Alito's record with regard to that.

Chairman SPECTER. Professor Chemerinsky, do you think—you comment on the issue as to Judge Alito as to whether he would be a rubber stamp or not for Executive power. Do you think he would be a rubber stamp.

Mr. CHEMERINSKY. Everything that I could find in his record points to tremendous deference to Executive authority.

Chairman SPECTER. Well, tremendous deference is a little different from being a rubber stamp.

Mr. CHEMERINSKY. I think the key question that this Committee has to face is will this be a Justice who on these issues that we are talking about come before the Court will be willing to enforce checks and balances. In light of his entire career before going on the bench being in the executive branch, in light of his writings when he was in the Solicitor General's office, the speeches that he has given and the opinions he has written on the Third Circuit, I don't find anything to indicate that he will be enforcing checks and balances.

Chairman SPECTER. So you think he would be a rubber stamp?

Mr. CHEMERINSKY. I think the record here does speak for itself. I think if we can't find anything that points to that he will enforce checks and balances—

Chairman SPECTER. I have to interrupt you. I want to ask a question of Professor Kronman and Professor Demleitner. There has been a lot of talk about Judge Alito and whether he is deferential to the powerful and to the government.

You, Professor Demleitner, were his clerk. You know him pretty well. You know him, Professor Kronman, for several decades. I would like you to address your sense of him on that issue.

We will start with you, Professor Demleitner.

Ms. DEMLEITNER. I have never seen anything while I clerked for him or in subsequent years that led me to believe that he had an agenda or any kind of plan to favor particular groups over others. He really, in my experience, looks at each case individually, and I am sure he was surprised when he saw the statistics adding up how often he voted for a corporation or for an individual.

Quite to the contrary, I think his opening statement was a very powerful one in which he addressed his own background, and I think he indicates that he would not be inclined to favor big government or big corporate interests over individual interests.

Chairman SPECTER. Professor Kronman?

Mr. KRONMAN. I would agree with that. I have no reason to think that Judge Alito begins with a strong dispositional inclination to always favor governmental power over individual rights. He does, I think, have an inclination to be respectful of those in positions of institutional authority who have wrestled with questions that come before his court and to take seriously the thought they have given to those questions and to weigh them appropriately.

Chairman SPECTER. Thank you very much.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

I am curious, and I listened very carefully, Professor Chemerinsky—did I pronounce that correctly, Chemerinsky?

Mr. CHEMERINSKY. Yes, you did. Thank you.

Senator LEAHY. Thank you. In 2004, in the *Hamdi* case—and I am sure you are very familiar with that—the Supreme Court considered whether due process required that a citizen of this country who is being held as an enemy combatant should be afforded a meaningful opportunity to challenge the factual basis for the detention.

Justice O'Connor's decision for the Court upheld the fundamental principle of judicial review over Executive authority. She said, in effect, that even if you are at war, whether a declared war or a war

on terror or whatever, it is not a blank check for the President when it comes to the rights of the Nation's citizens.

Now, the unitary Executive theory which Judge Alito espoused in remarks just as recently as 5 years ago was championed in dissent by Justice Thomas in *Hamdi*, saying that the war powers of the President couldn't be balanced away by the Court.

Well, I am going to ask you this and then I will ask Ms. Nolan the same question. What are the implications for the rights of Americans to be free from governmental intrusion were Justice Thomas's views to prevail rather than Justice O'Connor's?

Mr. CHEMERINSKY. It is an enormously important question. *Hamdi* was a tremendous victory for all American citizens because, as you say, the Supreme Court said that before an American citizen can be held as an enemy combatant, there must be due process—notice of the charges, an opportunity to be heard, representation by counsel.

There was only one dissent directly to that and that was Justice Thomas, who advances the unitary Executive theory as the reason why the President should be able to hold individuals without due process. You asked, well, what might be the implications of this?

Well, the question would be can the President engage in electronic eavesdropping, in violation of the Foreign Intelligence Surveillance Act? It seems clear what the unitary Executive theory would say about that. Can the President hold an American citizen as an enemy combatant without a warrant for arrest, a grand jury indictment, or a jury trial? I can think of nothing more antithetical to the Constitution, but the unitary Executive theory would seem to say yes.

Senator LEAHY. Ms. Nolan, what would you say about that? The professor added this question of wiretapping outside the Foreign Intelligence Surveillance Act. If you could go to my original question, but also tell me what would you have given as advice to the President of the United States if he said, "I am going to bypass FISA, and I am just going to go wiretap on my own innate authority."

Ms. NOLAN. Well, here, I am going to show my credentials as the lawyer to the President and say that I am not exactly sure because we don't know the full contours of the program. So I want to be clear that it is possible that the President could bring something to me that would make me say under these circumstances of emergency powers—

Senator LEAHY. Let's go by what you have seen in the press.

Ms. NOLAN. By what I have seen, I would say you have to follow FISA or you have to go to Congress and get it amended.

Senator LEAHY. And do you agree with Professor Chemerinsky that as to the theory of the unitary Executive, we would be in a much different world if that theory had prevailed in the Supreme Court, rather than Justice O'Connor's view in *Hamdi*?

Ms. NOLAN. Absolutely, and I think the electronic surveillance is a perfect example of this theory going to the next step, which it is based on this unitary Executive theory and the commander-in-chief power. But the theater of war now is the entire world, including the United States, and the end of the war may be never when we are talking about the war on terror. And so we are not talking

about limited emergency Presidential powers in a very short period of time.

Senator LEAHY. We are talking about powers being used for the rest of my lifetime and your lifetime.

Ms. NOLAN. That is correct.

Senator LEAHY. And if I might, because the time is limited—and I would like to pursue that because I think you are absolutely right. If we say it is a war on terror, nations have faced terrorist threats throughout their history. Look at Europe, look at other countries. Do we set aside our Constitution on the claim that we may face these threats?

Professor Tribe, you and I have talked about a number of issues over the years, and I appreciate all the help you have given both me and this Committee. Last month, we passed a McCain amendment that prohibited inhumane, degrading treatment of detainees by U.S. personnel under all circumstances, which was originally strongly, strongly opposed by the administration; the White House's polling and published polling showed that their opposition was not a sustainable position.

They worked out a deal with Senator McCain, and the President, with great fanfare, signed the McCain amendment into law, but, of course, then very quietly issued a statement, in effect, construing what the law was and exempting or carving out an exemption for the Executive.

Now, let's say there was a violation brought before the courts on the McCain amendment prohibiting cruel, inhumane and degrading conduct, and it came before a court. What weight would a court give the President's signing statement? Would the court give equal weight to the statute overwhelming passed by Congress, signed into law by the President? Would they give equal weight to that as they would to this signing statement by the President which carved out exceptions to the law?

Mr. TRIBE. Senator, under current law, a clear majority of the Supreme Court and most circuit courts would say that although in cases of ambiguity the understanding of the President of the law's meaning at the time it is signed might be a factor to consider, when, as in this case, the law was clear, or as clear as one can be in talking about gradations of methods of interrogation, the McCain law, the statute and the Levin-Graham compromise, or whichever way it was sequenced, is the law.

And the statement made by the President of the United States on December 30 of 2005 that this will be enforced by the President only in accord with his power over the unitary Executive, a phrase that is constantly used by this administration, and when that was understood to mean that he will decide in his unfettered discretion when the method of interrogation crosses the McCain line and is cruel and inhumane, that will be given no weight.

But there is no way, consistent with his expressed beliefs, that a Justice Alito could go along with that view; that is, under his view, which would be, I think, quite similar to the view of Justice Thomas dissenting in *Hamdi*, it is up to the President to decide how he will, through his subordinates in the unitary Executive branch, carry out his authority as commander in chief, especially given the authorization for the use of military force.

And it is interesting that when asked by Senator Durbin about the role of the unitary Executive theory in *Hamdi*, which goes directly to the question whether American citizens could be detained indefinitely or made subject to eavesdropping under the broad authority of the authorization for the use of military force notwithstanding FISA, he said, well, I am not sure that Justice Thomas referred to the unitary Executive theory. Well, in fact, he did. Just read his opinion.

He relies heavily on and names—he says because the unitary Executive must have discretion to decide how to carry out the war, it is his views that will prevail. But it would not be on the theory that the President's understanding of the law trumps Congress's intent. It would rather be on the theory that the President has unfettered power to control the entire executive branch within the reach of his authority.

Now, let me, if I might, just say why this distinction between scope, the reach of his authority, and control is not a coherent one. Yes, it is true that the unitary Executive theory would not suddenly add to the executive branch a distinct lump of law-making powers. For example, the power that Truman exercised in the steel crisis; the President couldn't suddenly, under the unitary Executive theory, gain the power of eminent domain.

But the President does have the power to disregard Acts of Congress that would impinge on his carrying out of an executive function. And under the views that were expressed by Judge Alito in his testimony and the views that were really the underpinning of the unitary Executive theory when it was cooked up on a creative storm in the Office of Legal Counsel in the period when Judge Alito was there, the underpinnings included the notion that the President has inherent power over foreign affairs, war-making and the executive.

Chairman SPECTER. Professor Tribe, we are way over time on this section. If you could wrap up that answer—

Mr. TRIBE. It is wrapped up.

Chairman SPECTER.—I want to be deferential to Senator Leahy, who has a followup. This is not a precedent now.

Senator LEAHY. No, no, no, that is OK. Actually, my followup was going to go into this subject, so I was interested in the answer.

Chairman SPECTER. OK, if you are sure.

Senator Hatch.

Senator LEAHY. Thank you. Thank you very much, Professor Tribe.

Senator HATCH. Well, I have to apologize to this brilliant panel because I was not here. I was down at the Blair House with the Chancellor of Germany that I needed to do, and I have respect for all of you. I just have one question. Maybe, Professor Fried, you could assist me with this.

Could you please—you know, we have had some difference of opinion as to what settled law is in this body. A common question to ask is do you believe *Roe* v. *Wade* is settled law or any number of other opinions as well.

Professor Fried, could you explain the difference between settled law and settled precedent? Because, as I heard both of the—as I heard both now-Chief Justice Roberts and Sam Alito, Judge Alito,

they basically both said that they believe that *Roe* v. *Wade* and a number of other cases are settled precedents.

Now, I think what I would like you to do is could you please explain the terms "settled law" and "settled precedent" so that we all understand it once and for all, and whether the two witnesses, now-Chief Justice Roberts when he was Judge Roberts and Judge Alito, whether they were consistent in their answers on that particular issue.

Mr. FRIED. I am afraid I am unable to say what the difference between settled law and settled precedent is. I think that came out during the very excellent questioning by Senator Feinstein, and Judge Alito's answers, I think, were admirable.

Chief Justice Roberts answered Senator Feinstein and came up with the statement of settled law, settled precedent. I don't think that there was an attempt to make some distinction between those two concepts. But what he was suggesting is that this is something that is so well understood that it would be really extremely disruptive and unfortunately disruptive to overrule it.

Now, Judge Alito—I am sorry. This was taken by members of this body and in the press as an absolute commitment how Judge Roberts would vote. I don't believe he meant it as that. And Judge Alito, to his credit, when he was asked that question, was so scrupulous about giving a commitment, which he absolutely must not do, and which I don't think any member of this panel would want him to do, to make a commitment, that he avoided a formulation which had come to be made the equivalent of commitment, of an oath that I shall never do that. No judge, no person who aspires to be on a court, should ever make a commitment about how he or she will vote. I think you all agree with that. And I think Judge Alito, though it is causing trouble for him and will cause trouble for him, was unwilling to enter that territory because of his very admirable scrupulousness.

Senator HATCH. Well, thank you, Mr. Chairman. I just wanted to clarify that, and I think that does clarify that, because that is the way I interpreted it as well. But thank you for answering that.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman.

To come back to this unitary Executive, Judge Alito was asked frequently about his view about this and also about its impact upon the administrative agencies. And he responded during the course of the hearings that the *Humphrey's Executor* and *Morrison* cases upheld the powers of Congress to create the independent agencies and tried to leave it at that.

Of course, what is enormously interesting was his statement that his dissent in the *Morrison* case, where he took exception to *Morrison*, he says, "But perhaps the *Morrison* decision can be read in a way that heeds if not the constitutional text that I mentioned, at least the objectives for setting up a unitary Executive that could lead to a fairly strong degree of Presidential control over the work of the administrative agencies in the areas of policymaking."

So this is his view. We would appreciate an understanding what the law is. I think Professor Tribe indicated what he thought would be the decision. But this is his view.

And then in his work at the Justice Department at OLC on signing statements—and I will include the appropriate paragraph, but let me just in the issue of time mention his statement here. "Since the President's approval is just as important as that of the House or Senate, it seems to follow that the President's understanding of the bill should be just as important as that of Congress." That is rather, at least for me, and I think for most legislators, a bizarre concept. I thought we were the legislative branch.

But then he continues: "From the perspective of the executive branch, the issue of the interpretive signing statements would have two chief advantages: first, it would increase the power of the Executive to shape the law"—"increase the power of the Executive to shape the law; and, second, by forcing some rethinking by courts, scholars, and litigants, it may help to curb the prevalent abuses of legislative history."

The question is, Are we talking about someone that has a different understanding of the balance between the Executive and the Congress and the judiciary in terms of the makings of law? It seems to me that this is an attempt to tip the—to change that balance and tip it more towards the Executive at a time when we have certainly the challenges that are out here before the country to make it fairer, more equitable, to deal with the problems and challenges that we are facing in the country in terms of opportunity. Professor Tribe?

Mr. TRIBE. Well, I think I would underscore one aspect of what you were quoting, Senator Kennedy. Those statements that were made by Judge Alito about how he understands and how he believes one could shape the relationship among the branches of Government after *Morrison*, which was the decision upholding the validity of the independent counsel law and the decision rejecting Congress's—sort of rejecting the attack on Congress's role with respect to the Executive.

When Judge Alito made those statements, he was not working for the Government. He was not speaking in some other role. He was a judge. He had been a judge of the United States Court of Appeals for the Third Circuit for about 10 years. The statement was made on November 17, 2000, to a gathering of the Federalist Society, obviously a group exercising considerable influence with what was then the likely new administration. That was 10 days after the votes were counted in the election of 2000. It was 10 days after now-President Bush had declared victory even though the recounts were going on.

So he was speaking to the decisionmakers who would perhaps decide—he was already discussed as a possible nominee to the Supreme Court—who would decide whether he would remain on the Third Circuit. And he was saying to that group, "I still believe in what we were arguing back in 1986 at OLC." He talks about the "Gospel according to OLC." He says, "I still believe in that gospel." He is speaking as a judge, and he says, "Under that gospel, we have a way of giving the President more power."

I cannot imagine more direct evidence—

Senator KENNEDY. I am sorry to interrupt you, but I have very brief time. Just how would that change the relationship between the Executive and Congress?

Mr. TRIBE. Well, it would make it much harder for Congress to say you cannot interfere with the SEC in the following way, you cannot override the directives of the Fed. Even the independence of the Federal Reserve Board, which could be distinguished on grounds that historically monetary control was outside the Executive power, but that is shaky ground when you believe in the full unitary Executive. In theory, it could take over the conduct of all of the agencies because there are only three branches of Government, and they belong in the Executive.

Senator KENNEDY. My time is up, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kennedy.

The Committee is going to break very briefly for the memorial service for David Rosenbaum, which is being held at 10:30 in this building. A number of members of the Committee have expressed an interest in going there. I do not intend to stay for the full ceremony. I will be back. Others may stay longer. But I just wanted to point that out, and we will be breaking at about 10:20 or so.

Now, Senator Sessions?

Senator LEAHY. Mr. Chairman, could I just ask unanimous consent to place in the records several news articles regarding this whole issue?

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

Senator Sessions?

Senator SESSIONS. Professor Demleitner, I found your comments insightful, and from your perspective, as you said, a left-leaning Democrat, an ACLU member, and who worked at the Criminal Justice Clinic while you were at Yale. And you told the story about being with Judge Alito as his clerk, and you saw something that concerned you in an opinion, and you asked him about it and he took the transcript home that night to read it. Would you share briefly how that came about and what that meant to you as a young law clerk?

Ms. DEMLEITNER. Of course. I would be happy to. Thank you for asking, Senator.

I think it was in the fall of my clerkship, and as you said correctly, I had worked in the prison clinic at Yale, and obviously it was representing prison inmates, and so I had a very pro-defense outlook, which I think I still have today. And so clerking for a former Federal prosecutor was somewhat—I guess I was somewhat apprehensive about that. But from the very first day on, I think Judge Alito made it very clear that he wanted to hear all kinds of arguments, and I was, I think, generally inclined to argue to him that he should vote to reverse convictions.

There was one particular case that I remember very distinctly. It was a bribery case, and I had read the record, I had read the lower court transcript, and I thought there was some reason why he should vote to reverse. And, you know, I think a lot of other judges would have said, No, I don't see it, and just left it at that.

He took the entire lower court record home, took my memo home, and the next morning, when he came back, it was very clear he had spent quite a bit of time with it. He had read it. He had digested it. He sat me down and explained to me why I was wrong. He was right.

But I was so impressed with it because he didn't just laugh, you know, this is one of Nora's other theories to set someone free, but he really took it seriously. And he did this with every single case.

So I actually wanted to respectfully disagree with Professor Tribe on this issue because I think collegiality, brilliance, listening to others, which Professor Kronman had talked about, are very important on a court that consists of only nine members, because I think it shows he will be open minded, he will listen. He always listens, and I think that is very important, and he can be moved. I mean I remember writing memos to him and discussing cases with him where I saw this is his position, and he came out of oral argument and came out of the bench meeting with the judges afterwards, and he had changed his mind. So he has not said he is nondoctrinaire, and I think that is important to know about him.

Senator SESSIONS. That is consistent with what his colleagues on the bench have said, that is for sure. You mentioned the *Rybar* case. I agree with you on that, and in fact, in that case he ruled for the little guy against the prosecutors and the Government, who wanted to put the man in jail. He threw out the conviction. People have forgotten that in the course of the discussions.

Ms. Nolan, I remember you served as legal counsel in the opportunities that we had to chat, and you point out that you believe it is essential to defend the power of the President to undertake his constitutional assigned responsibilities, whether considering the exercise of his powers under the Appointments Clause or under the Commander-in-Chief Clause. You had to do that in that position in Department of Justice. You note that: In my view the executive branch is right to resist inappropriate incursions on its power from the legislative and judicial branches, and we should thus expect that executive branch lawyers will strongly defend Executive powers.

Just briefly, before we get into some of my questions, Congress is never reluctant to expand its power, and oftentimes to diminish Executive power, and it is a constant tension there, is it not, from your perspective? You served on the President Clinton—

Ms. NOLAN. There is definitely a tension. I do think Congress is sometimes reluctant, but there is definitely a tension.

Senator SESSIONS. Professor Fried, most of us, I think, are not familiar with this idea of unitary Executive. I have heard it complained for many years—and I assume this is the genesis of it—that these ABC agencies, these alphabetical entities that are quasi a part of the executive branch, but nobody controls them, is somehow contrary to our three branches of Government concept, and you have served in the Department of Justice, you have been Solicitor General, you are now a professor of law. Could you share with us the tensions that might exist and how we might think about these issues?

Mr. FRIED. I would be glad to, but only if the Chairman will give me the time.

Chairman SPECTER. Professor Fried, to the extent you can, would you make it brief?

Mr. FRIED. I have a talent for making things brief.

[Laughter.]

Mr. FRIED. Yes. First of all, *Morrison* v. *Olson*, the independent counsel case, was the crucial case on the unitary Executive. It was my bitter experience to have argued that case and lost it 7–1. I always tell my class that if that had come up later and had been styled "Clinton against Starr", I would have won it, because by then it became perfectly obvious what an abomination that Independent Counsel Law was, how it had been misused, and how it tore the fabric of our constitutional system.

I think what has been said about the unitary Executive in these hearings is very misleading. The unitary Executive says nothing at all, nothing about whether the President must obey the law. It talks about the President's power to control the executive branch. That is the subject. And in this, the unitary Executive theory is not an invention of the Reagan Justice Department or the Office of Legal Counsel, it was propounded in the first administration of Franklin Delano Roosevelt, who objected to the powers of the Controller General, who tried to fire a Federal trade commissioner, and who referred to himself as the general manager of the executive branch. That is the origin of the notion in FDR's administration.

Chairman SPECTER. Thank you very much, Professor Fried, and thank you, Senator Sessions.

I had asked you to be brief because Senator Feinstein wants to question before our break, and that is imminent.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much. I would like to quickly go down the line and ask each witness which present or past justice do you think Judge Alito will most be like, please? If you do not, Dr. Chemerinsky, we will come back. Do you have a view?

Mr. CHEMERINSKY. Sure. Your Honor, having read over 200 opinions written by Judge Alito, I think ideologically he is closest on the current Court to Justice Scalia, which, of course, is exactly what President Bush said he wanted in appointing a Justice to the Court.

Mr. KRONMAN. I would name Justice John Harlan, who Judge Alito identified as one of his four heroes on the Supreme Court.

Ms. NOLAN. I think it is likely to be Justice Scalia, although I think he may be more aggressive on Executive power than Justice Scalia has been in all areas.

Mr. FRIED. It is certainly not Justice Scalia, because he has not sworn allegiance to any of the theology which Justice Scalia has propounded, never on any occasion. I think it is Robert Jackson.

Mr. TRIBE. I only wish it were Jackson or Harlan. I think he would be—I do not know that I accept the question as being sort of directly—

Senator FEINSTEIN. You do not have to answer if you do not have—

Mr. TRIBE. I would not mind answering. I think he is somewhere—

[Laughter.]

Mr. TRIBE [continuing]. Between Scalia and Thomas, and I could explain the differences, but I do not think he is anything like Jackson or Harlan.

Senator FEINSTEIN. Thank you.

Mr. Fried, I listened to your testimony on Justice Roberts with great interest. In a dialog you had with Senator Specter, I want to quote what you said. You said, talking about *Roe*, "It is not only that it's been reaffirmed as to abortion, but that it has ramified, it has struck roots, so it has been cited and used in the *Lawrence* case . . . in some of the opinions in the right-to-die cases, in the *Troxel* case, which is the grandparent visiting right case. So it is not only that it is there and it is a big tree, but it has ramified and exfoliated, and it would be an enormous disruption. So you not only get branches, you get leaves."

And then you went on to say, "Since I do not know Judge Roberts except most casually, and I certainly have never discussed it, if you want a prediction from me, I would predict that he would never vote—not never—but he would not vote to overrule it for the reasons that I have given."

Would you make the same prediction about Judge Alito?

Mr. FRIED. I would, and I should say that after Judge Alito left my office, which was late in 1985, I think I have spoken to him three times, and then maybe 15 words. So it is a guess there as it was with Roberts, but, yes, that would be my prediction.

Senator FEINSTEIN. Thank you.

Now, my question of anyone who would care to answer is about the value of a Presidential signing statement. If it is true—and it is—that the legislature passes legislation, makes findings of fact, that legislative intent is generally based on those who formulate the legislation and pass it, does a Presidential signing statement shape the law?

Mr. FRIED. I think that this has been much misunderstood here too. The Presidential Signing Statement Initiative, which I was involved in, I must say, was principally devised to curb the abuses of legislative history and legislative reports in which staff often—and I am afraid we continue to see that—with the assistance of outside groups and lobbyists—different groups, different lobbyists—but with their assistance, plant little stink bombs in the legislative history, which then flower in later litigation.

[Laughter.]

Mr. FRIED. The point of the signing statement was, if you like, a kind of Airwick against those stink bombs.

[Laughter.]

Senator FEINSTEIN. You have aroused the staff.

Mr. TRIBE. There may be a lot of staff-oriented stink bombs, but the power to inject a poison pill in the legislation is what we see in the Signing Statement Initiative. And whatever was the original intent under Charles's tutelage, what has happened under the current administration is totally different. There are something like 100 examples now of references in these signing statements to the unitary Executive, and they are being used, they are being used to give the President the kind of control that not only FDR, but all the way back to George Washington you can find examples of the President saying, "I am the President. This is my Government." But it is a big fallacy to say, as my friend Charles Fried did, that this has nothing to do with the power of Congress. Congress often enacts legislation to structure the executive branch and to limit the power of the President as the head of the branch, to tell the limbs

of that tree that Charles described, and the leaves, exactly what to do.

Chairman SPECTER. Thank you very much, Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Chairman SPECTER. We are going to adjourn for a—

Senator COBURN. Senator Specter, I will defer my questions so that we will not have to have the panel come back, if that would be OK, and I will submit some questions.

Chairman SPECTER. You are entitled to your round.

Senator COBURN. But I think in all courtesy to our distinguished panel, this would release them, and I will be happy to submit some questions for the record.

Chairman SPECTER. All right. We will proceed in that manner at your suggestion.

As I had said earlier, New York Times reporter, David Rosenbaum, a memorial service is being held for him. he was brutally murdered on the streets of Washington very recently. We will recess for just a few moments. I would like the next panel to be ready and the Senators to be ready.

[Recess at 10:05 a.m. to 10:40 a.m.]

Chairman SPECTER. The hearing will resume.

The first witness on our next panel, Panel 5, is Mr. Fred Gray, senior partner at Gray, Langford, Sapp, McGowan, Gray & Nathanson, a veteran civil rights attorney with an extraordinary record of representation. At the age of 24, he represented Ms. Rosa Parks, whose involvement in the historic refusal to give up her seat on the bus to a white man is so well known. That action initiated the Montgomery bus boycott. He was Dr. Martin Luther King, Jr.'s first civil rights lawyer. In 2004, Mr. Gray received the ABA Thurgood Marshall Award for his contributions to civil rights. A graduate of National Christian Institute, Alabama State University, and Case Western Reserve. Thank you for joining us, Mr. Gray.

I haven't had an indication from Senator Leahy about whom they would like to give extra time to, but my sense is that you would be on the list, so we are going to set the clock at 10 minutes for you. You may proceed.

STATEMENT OF FRED D. GRAY, SENIOR PARTNER, GRAY, LANGFORD, SAPP, MCGOWAN, GRAY & NATHANSON, TUSKEGEE, ALABAMA

Mr. GRAY. Thank you very much, Mr. Chairman.

Chairman SPECTER. By way of explanation, the judges talked longer yesterday, and I thought it appropriate not to interrupt them, and I want to give the extra time to this panel. If Senator Leahy comes in and cuts you off, Mr. Gray, just remember I gave you 10 minutes.

[Laughter.]

Mr. GRAY. Thank you very much, Mr. Chairman. And to my Senator, Senator Sessions, who represents us well in the Senate, to the other members of the Committee, of course, I am Fred Gray. I live in Tuskegee, Alabama, with offices there and in Montgomery. I appreciate this Committee inviting me to appear. I consider it an honor.