

Judge, from what I have seen so far, you do not need much reminding on this score. Your decisions are usually brief and to the point. You write with clarity and common sense, and in most cases you defer to the decisionmaking of those closest to the problem at hand. I do not expect to agree with every case that you decide, but your modest approach to judging seems to bode well for our democracy.

Over the next several days the members of this Committee will question you to find out what kind of Justice you will be. This hearing is really our opportunity to try to answer that question. Our constitutional system is founded on democracy, a world of people, not the unchecked rule of judges. If confirmed, it will be your job to faithfully interpret our Constitution and to defend our democracy case by case. I wish you well.

Thank you.

Chairman SPECTER. Thank you, Senator DeWine.
Senator Feinstein.

**STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR
FROM THE STATE OF CALIFORNIA**

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

Welcome, Judge Alito. I am one that believes your appointment to the Supreme Court is the pivotal appointment, and because you replace Sandra Day O'Connor and because she was the fifth vote on 148 cases, you well could be a very key and decisive vote. So during these hearings, I think it is fair for us to try to determine whether your legal reasoning is within the mainstream of American legal thought and whether you are going to follow the law regardless of your personal views about the law.

Since you have provided personal and legal opinions in the past, I very much hope that you will be straightforward with us, share your thinking, and share your legal reasoning.

I would like to use my time to discuss with you some of my concerns. I have very deep concern about the legacy of the Rehnquist Court and its efforts to restrict congressional authority to enact legislation by adopting a very narrow view of several provisions of the Constitution, including the Commerce Clause and the 14th Amendment. This trend, I believe, if continued, would restrict and could even prevent the Congress from addressing major environmental and social issues of the future.

As I see it, certain of your decisions on the Third Circuit raise questions about whether you would continue to advance the Rehnquist Court's limited view of congressional authority, and I hope to clear that up.

Let me give you one example here, and that is the *Rybar* case. Your dissent argued that Congress lacked the authority to ban the possession and transfer of machine guns based essentially on a technicality. The congressional findings from previous statutes were not explicitly incorporated in the legislation. You took this position even though the Supreme Court had made clear in 1939, the *Miller* case, that Congress did have the authority to ban the possession and transfer of firearms, and even though Congress had passed three Federal statutes that extensively documented the impact that guns and gun violence have on interstate commerce. I am

concerned that your *Rybar* opinion demonstrates a willingness to strike down laws with which you personally may disagree by employing a narrow reading of Congress's constitutional authority to enact legislation.

The subject of Executive power has come up, and indeed it is a very big one. I think we are all concerned about how you approach and decide cases involving expanded Presidential powers. Recently there have been several actions taken by the administration that highlight why the constitutional checks and balances between the branches of Government are so essential. These include the use of torture, whether through an expansive reading of law, or disregarding Geneva Conventions, including the Convention on Torture, whether the President is bound by ratified treaties or not, allowing the detention of American citizens without providing due process—of course, Sandra Day O'Connor was dispositive in the *Hamdi* case—and whether the President can conduct electronic surveillance on Americans without a warrant despite legislation that establishes a court process for all electronic surveillance.

I am also concerned with the impact you could have on women's rights, and specifically, a woman's right to choose. In the 33 years since *Roe* was decided, there have been 38 occasions on which *Roe* has been taken up by the Court. The Court has not only declined to overrule *Roe*, but it has also explicitly reaffirmed its central holding. In our private meeting, when we spoke about *Roe* and precedent, you stated that you could not think of a case that has been reviewed or challenged more than *Roe*. You also stated that you believe that the Constitution does provide a right of privacy and that you have a deep respect for precedent.

However, in 1985, you clearly stated that you believed *Roe* should be overturned and that the Constitution does not protect a woman's right to choose. So despite voting to sustain *Roe* on the Third Circuit, your opinions also raise questions about how you might rule if not bound by precedent, and of course, obviously, I would like to find that out.

I am also concerned about the role the Court will play in protecting individual rights in this and the next century. Historically, the Court has been the forum to which individuals can turn when they believed their constitutional rights were violated. This has been especially noteworthy in the arena of civil rights, and as has been mentioned, in that same 1985 job application, you wrote that while in college you developed a deep interest in constitutional law, and then you said, motivated in part by disagreement with the Warren Court's decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment. Now, of course, it was the Warren Court that brought us *Brown v. Board of Education*, and of course, reapportionment is the bedrock principle of "one man, one vote." So exactly what you mean by this I think is necessary to clear up.

Now, additionally, Justice O'Connor was a deciding vote on a critical affirmative action case involving the University of Michigan, *Grutter v. Bollinger*. So your views here may well be pivotal, so I think the American people deserve to know how you feel, how you think, how you would legally reason affirmative action legislation.

When you served in the Solicitor General's Office during the Reagan administration, you argued in three cases against the constitutionality of affirmative action programs, then once on the Third Circuit, you sided against the individual alleging discrimination in about three-quarters of the cases before you.

We have a lot to learn about what your views are and your legal reasoning, and how you would apply that legal reasoning. I really look forward to the questions, and once again, because this appointment is so important, I hope you really will be straightforward with us, and thereby be really straightforward with the American people.

So thank you, and welcome.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman.

I would like to also extend my congratulations to you, Judge Alito and your family. It is a very special day, a great honor to be nominated to the Supreme Court, the greatest court in the world, in my view, and this will be a good process. The Senate has an obligation to make a vigorous inquiry, and they will do so. I just hope and truly believe that by the end of these hearings your answers will be heard. The charges that I have heard made I know will be rebutted. People will listen and see the answers that you give, and when they do, they will feel great confidence in you as a member of the Supreme Court.

You have a record as a brilliant but modest jurist, one who follows the law, who exercises restraint and does not use the bench as an opportunity to promote any personal or political agenda. This is exactly what I believe the American people want in a Justice to the Supreme Court. It is exactly what President Bush promised to nominate. You represent philosophically that kind of judge who shows restraint, but at the same time you bring extraordinary qualifications and abilities.

As has been said, judges are not politicians. They must decide discrete cases before them based on the law and the facts of that case. They are not policymakers. Every lawyer that has practiced in America knows that. That is what they want in a judge. That is what I understand they believe you are. That is why the ABA has given you their top rating, in my view.

This ideal of American law is the rule of law. It is the American ideal of justice, not to have an agenda, not to allow personal views to impact your decisionmaking, and I am real proud to see that your record indicates that.

I like Judge Roberts's phrase of "modesty." I believe that is your philosophy also. We had the opportunity for a time to serve as United States Attorneys together. You were the top prosecutor in the office in New Jersey, one of the largest in the country. You had the whole State, much larger than my office. I know your reputation as one of ability, but modesty. In fact, I remember distinctly somebody told me, "Don't underestimate Sam Alito. He's a modest kind of guy, but he's probably the smartest guy in the Department