

Testimony of

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January 12, 2006

Statement of Nora V. Demleitner
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before the Senate Committee on the Judiciary

Hearing on the Nomination of Samuel A. Alito, Jr. to serve as an Associate Justice on the Supreme Court of the
United States
January, 2006

Mr. Chairman, Senator Leahy and Members of the Committee. Thank you for the opportunity to testify today. My name is Nora Demleitner. I am the Vice Dean for Academic Affairs and Professor of Law at Hofstra University School of Law in New York. I clerked for Judge Alito from 1992 to 1993 and am here today to testify in enthusiastic support of the Judge's nomination to the United States Supreme Court.

Judge Alito has been my role model since the day I began working for him. I consider him one of the most brilliant legal minds of his generation, and a man of great integrity, decency, and character. And I say this as a left-leaning Democrat, a member of the ACLU, a woman, and an immigrant. I am not alone in this view of Judge Alito. I know many others who have clerked for and worked with Judge Alito, and everyone has only positive words about him. Each and every one of us has unfailing respect and regard for him, his character, his wit and his humanity.

All of his clerks, many of whom are politically liberal, have signed on to a letter strongly urging the Senate to confirm Judge Alito as Associate Justice. Why do all of us come out strongly in support of Judge Alito? In the years I have known the Judge he has never decided a case based on a larger legal theory about the Constitution or a conservative worldview but instead has looked at the merits of each individual case.

Let me detail why I believe that Samuel Alito deserves to sit on the highest Court and why his confirmation will not pose a threat to the foundation of this country or to the rights of women, minorities, immigrants, and other vulnerable groups. Judge Alito does not have a political agenda. Two overarching concerns have dominated his rulings: careful consideration and parsing of the lower court record and of prior judicial decisions binding on him. He has not attempted to reverse Third Circuit precedent; and he has tried to follow faithfully the mandates of the U.S. Supreme Court.

Two cases might suffice to explain to you Judge Alito's philosophy. While I clerked for Judge Alito, he had to decide the case of Parastoo Fatin. Ms. Fatin had left Iran for the United States in part to escape the strictures of the regime of Ayatollah Khomeini. She asked for political asylum in the United States but was denied by the immigration court and the Board of Immigration Appeals. Without revealing any confidences, I can tell you that Judge Alito was moved by the personal tragedy of the situation and the moral dilemma Ms. Fatin would face if returned to Iran. She would either be unable to express her personal beliefs as that of a Western feminist opposed to the governing regime, or she would be penalized by the Iranian regime. The problem with Ms. Fatin's case was not only the absence of favorable case law but a thin record, indicating only limited opposition on her part to the Iranian regime.

Even though Judge Alito did not see himself in a position to help Ms. Fatin -- who was, however, able to stay in the United States -- he wrote one of the most progressive opinions on gender-based asylum. His decision was the first to recognize that gender alone could constitute a basis for asylum. This revolution in asylum law has not been widely

recognized, neither has Judge Alito's ability to garner the votes of both of his fellow panelists -- one a Nixon appointee -- for the decision. To me this case and Judge Alito's struggle with his concern for Ms. Fatin's safety and this faithfulness to the law exemplify his humanity, his concern for immigrants, and his outstanding legal mind.

My being able to testify for Judge Alito here today as one of his former clerks indicates that he has supported women, immigrants, and Democrats throughout their legal careers -- and I am just one example.

While *Fatin v. INS*, 12 F.3d 1233 (1993), gets less attention than it deserves, another case, *United States v. Rybar*, 103 F.3d 273 (1996), in which Judge Alito dissented, has gotten substantial press coverage as an example of his conservative judicial philosophy. However, I suggest it could -- and should -- be read differently in light of Judge Alito's overall judicial record. In 1995 the Supreme Court sent shockwaves through the criminal justice system when it held in *United States v. Lopez*, 514 U.S. 549 (1995), that a statute prohibiting the possession of machine guns on school grounds was unconstitutional as written. Justice O'Connor joined the majority in its conclusion. Even though some commentators expected this decision to affect federal criminal law enforcement dramatically, appellate courts read the decision narrowly, and arguably incorrectly, to avoid having to strike down a host of federal criminal statutes. Not so Judge Alito.

Even though the Judge has been labeled as anti-defense, in his dissent in *Rybar* he made it clear that he was willing to follow Supreme Court precedent even though it might lead to the dismissal of a host of criminal indictments. He took pains to note, however, that Congress could remedy the problem with the statute if it entered empirical findings into the record indicating the connection between the possession of machine guns and interstate commerce. While Commerce Clause limitations are frequently considered to be part of the conservative mantra for state's rights, a bipartisan blue-ribbon ABA Task Force has critiqued the increasing federalization of criminal law. It has highlighted the damage the federalization of crime has had on state and federal law-enforcement forces, on criminal defendants, and on society as a whole.

Judge Alito's record indicates that he will read congressional legislation and Supreme Court precedent carefully. Of course, this will not and cannot mean that he will put aside all of his prior experiences. Rather than bemoan his background as a federal prosecutor, this Committee should cherish it, as I came to do when clerking for him.

I came to work for Judge Alito from the liberal environment of the Yale Law School where I had worked in the criminal justice clinic. The clinic, not surprisingly is entirely defense oriented, and I fully identified with that focus. I was apprehensive about working for a former prosecutor.

Nevertheless, in my youthful fervor I tried to persuade Judge Alito to vote to reverse the conviction of many a criminal defendant. This already indicates that he welcomes different points of view; he encourages and does not stifle debate. Even I though was amazed that Judge Alito not only listened but took my arguments seriously. I remember one case in particular in which Judge Alito took much of the trial transcript home to re-read in light of my arguments. The next day he sat down with me to go over the transcript and point out to me why I had read the record incorrectly. He was right but what amazed me the most was that he had taken me -- barely out of law school -- seriously enough to devote part of his evening to my argument. Needless to say, Judge Alito taught me much about law, about legal analysis, and about how to treat others.

Much of my professional interest remains in the criminal area, and in particular in sentencing. In light of recent landmark decisions sentencing issues will be among the major topics facing the Supreme Court in the years to come. While Judge Alito's record on the Third Circuit does not give us much indication about how he will rule in this area, his overall record and his background give us some idea. Judge Alito is a pragmatist and a former federal prosecutor who has seen the pre-guidelines and guidelines regimes as a prosecutor and the guidelines and post-guidelines systems as an appellate judge. He will be able to infuse the Supreme Court's argument with his practical knowledge, a background that should be helpful to the Court. I have no doubt that Judge Alito will be able to entertain fairly and without bias arguments on both sides of criminal justice issues and strike a practical balance, informed but not predetermined by his background.

In light of my personal experience with Judge Alito, I can assure you that you are not voting on an ideologue. Judge Alito has always tried to follow the law and decided cases on their individual merits. He deserves to be confirmed as the Court's next Associate Justice.