Testimony of

The Honorable John Gibbons

Judge (Retired)
Third Circuit Court of Appeals
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APPEARANCE BEFORE
SENATE JUDICIARY COMMITTEE RE: JUDGE ALITO
JANUARY, 2006

Mr. Chairman and Members of the Judiciary Committee:

I welcome the opportunity to appear here and express my personal view that the Committee should vote in favor of Senate confirmation of Samuel Alito as a member of the United States Supreme Court. As you probably all know, for twenty years I was a member of the Court of which Judge Alito is now a member. Indeed, it was my retirement from that Court sixteen years ago that created the vacancy which Judge Alito filled on the Third Circuit Court of Appeals. Since his appointment, lawyers in the firm of which I am a member have been regular litigators in the Courts of the Third Circuit, not only on behalf of those clients that pay us handsomely for representation, but also frequently through the firm's Gibbons Fellowship Program on behalf of non-paying clients whose cases have presented those Courts with challenging human rights issues. That the Gibbons Fellowship Program is a significant part of our practice is amply demonstrated by the fact that since 1990, Gibbons Fellows lawsuits have resulted in 115 reported judicial decisions.

This Committee should appreciate that the Court of Appeals for the Third Circuit has been, for the fifty-plus years that I have followed or participated in its work, a centrist legal institution. An important reason why that is so is that many years ago, that Court adopted the requirement that all opinions intended for publication must (prior to filing) be circulated by the opinion writer, not only to members of the three-judge panel, but also to the other active judges on the Court. The purpose of this internal operating rule was to permit each active judge not only to comment about the opinion writer's treatment of Third Circuit and Supreme Court precedent, but also to vote to take the case en banc for rehearing by the full court if the judge thought the opinion was outside the bounds of settled precedent. Thus, the level of interaction among the Third Circuit appellate judges has for a half-century been unusually high.

This Committee should also appreciate that appointment to an appellate court where one has life tenure is a transforming experience. I remember a former judicial colleague saying to me once, after several years on the bench, "John, what other job in the world is there in which you can look in the mirror while shaving and say to yourself, all I have to do today is the right thing according to the law." A good judge puts aside interests of former clients, interests of organizations one may have belonged to, and interests of the political organization that may have been instrumental in one's appointment. I personally experienced that transformation, and I witnessed it repeatedly in judicial colleagues who joined the court after I did.

These two points--the unusual internal cohesion in the Third Circuit Court of Appeals, and the transformative experience of serving on a court protected by life tenure--suggest to me that Committee members in determining whether to vote in favor of confirming Judge Alito should concentrate not on what he thought or said as a Princeton undergraduate, or as a young lawyer seeking advancement as an employee of the Department of Justice, but principally, if not exclusively, on his record as an Article III Appellate Judge.

If you look, as you should, at that fifteen-year record as a whole, you cannot in good conscience conclude that Judge Alito will bring to the Supreme Court any attitude other that the one held by my colleague who thought important thoughts about judging every morning while shaving. He has consistently followed the practice of carefully considering both Supreme Court and Third Circuit precedents. Very few of the opinions he has written for a unanimous panel or for a panel majority have moved his colleagues among the active judges to vote to take the case en banc. The cases in which he participated that produced dissenting opinions by him or from him, all, it seems to me, were close cases in which either the law or the evidentiary record were such that equally conscientious judges could quite reasonably disagree about the outcome.

Take, for example, cases presenting challenges to state regulation of abortion; a hot-button topic for many people

and organizations opposing Judge Alito's nomination. There are four in which he participated. In Elizabeth Blackwell Health Center for Women v. Knoll. Judge Alito voted to uphold a ruling by the Pennsylvania Department of Health and Human Services that Pennsylvania could not burden Medicaid funding for abortions in case of rape or incest with difficult verification requirements. He also concurred in Alexander v. Whitman, applying the Supreme Court's abortion caselaw to a challenge to the constitutionality of New Jersey's Wrongful Death and Survival Statute that denied recovery on behalf of stillborn fetuses. In Planned Parenthood of Central New Jersey v. Farmer, Judge Alito voted to invalidate New Jersey's partial-birth abortion statute because the statute could not be reconciled with the Supreme Court's caselaw holding a similar Nebraska statute unconstitutional. Thus, in three of four cases he voted against state-imposed limits on access to abortion.

In the fourth case, Planned Parenthood of Southeastern Pennsylvania v. Casey, Judge Alito dissented from a majority opinion holding unconstitutional Pennsylvania's spousal consent provision for an abortion. It is that dissent upon which opponents of his confirmation seek to focus the Committee's attention. Those opponents stridently urge that the Planned Parenthood v. Casey dissent clearly places Judge Alito so far out of the mainstream of Constitutional law that his confirmation will endanger Constitutional protection of civil rights across the board.

In your consideration of that dissent, I suggest that you should take into account these points: first, at the time the Third Circuit considered the Pennsylvania spousal consent statute, the Supreme Court had not yet decided whether states could impose such a requirement; and second, the Court of Appeals majority invalidated the statute. Had the Supreme Court simply denied certiorari, that invalidation would have remained in place. Instead, at least four justices voted to grant certiorari. If the issue of the statute's Constitutionality was so overwhelmingly clear, why was certiorari granted to endorse the Third Circuit majority position? Clearly Planned Parenthood v. Casey was, at the time the Court of Appeals acted, a case over which conscientious judges could reasonably disagree. Otherwise, the Supreme Court would simply have denied certiorari. Nothing in the Supreme Court's caselaw dealing with abortion relieves appellate judges in intermediate appellate courts from the duty of making a conscientious effort to fit a case before them within that caselaw. The four abortion cases in which he participated show that this is exactly what Judge Alito did.

Another opinion that has caught the attention of those clamoring for Judge Alito's scalp is his dissent in United States v. Rybar, in which he would have held that the Supreme Court decision in United States v. Lopez prohibited Congress from regulating mere possession of a machine gun. The majority opinion upheld the statute. Unlike Casey, the Supreme Court did not review the case. Thus the question of the reach of Lopez was left open, and when the issue reached the Ninth Circuit, in United States v. Stewart (2003), it adopted Judge Alito's dissenting position. Some opponents of his confirmation have relied on that dissent in suggesting that Judge Alito is a captive of the right wing gun lobby. This Committee, after actually reading Lopez, Rybar, and the Ninth Circuit case, cannot in good conscience find the dissent to be anything more than a good-faith effort to somewhat unenthusiastically apply the perhaps unfortunate Supreme Court precedent of Lopez. Indeed, in his Rybar dissenting opinion Judge Alito suggested how Congress could cure the Lopez violation.

The extent to which opponents of Judge Alito's confirmation largely ignore his overall fifteen-year record as a judge suggests, at least to me, that the real target for many of the vitriolic comments on the nomination is less him than the Executive Branch Administration that nominated him. The Committee members should not think that I support Judge Alito's nomination because I am a dedicated defender of that Administration. On the contrary, I and my firm have been litigating with that Administration for a number of years over its treatment of detainees held at Guantanamo Bay, Cuba and elsewhere, and we are chagrined at the positions being taken by the administration with respect to those detainees.

It seems not unlikely that one or more of the detainee cases we are handling will be before the Supreme Court again. I do not know the views Judge Alito holds respecting the issues that may be presented in such cases. I would not ask him, and if I did he would not tell me. I am confident, however, that as an able legal scholar and a fair-minded justice, he will give the arguments, legal and factual, that may be presented on behalf of our clients careful and thorough consideration without any predisposition in favor of the position of the Executive Branch. That is more than the detainees have received from the Congress of the United States, which recently enacted legislation stripping federal courts of habeas corpus jurisdiction to hear many of the detainees' claims without even holding a committee hearing.

Justice Alito is a careful, thoughtful, intelligent, fair-minded jurist who will add significantly to the Court's reputation as the necessary expositor of Constitutional limits on the political branches of the government. He should be confirmed.