Statement of Anthony Kronman, Sterling Professor of Law and Former Dean of Yale Law School, before the Senate Committee on the Judiciary, January 12, 2006.

I met Judge Samuel Alito in the fall of 1972 when we were first year students at the Yale Law School. Of course, he was not Judge Alito then. He was Sam, and it is about the human being I came to know and admire thirty years ago that I want to comment first.

During our three years at Yale, Sam and I took a half-dozen courses together. We worked on the Law Journal and debated in Moot Court. We talked about cases over lunch in the dining hall. I had many opportunities to observe Sam, in class and out, and to form an estimate of his character. His qualities, as I saw them, were these: sharp intelligence; gentleness; modesty and generosity; an instinctive inclination to be fair in the treatment of other people and their ideas; and a deep devotion to the culture and values of the law.

No one who has met Sam even briefly will doubt that he has a first-rate mind. Sam's intelligence was plain to me from the first day of law school. He always grasped the point–whatever it was–with intimidating speed. Sam made me wonder whether I had chosen the right career. But equally striking was the gentleness with which he spoke. Sam might be persuaded he was right but always expressed his views with a modesty that made it clear he knew he might be wrong, and that someone else would show him why. He always listened to what others said–not in the superficial sense of merely waiting for them to finish, but in the deeper and more consequential sense of considering their arguments with generosity and a willingness to modify or abandon his own position–which he often did–if the balance of reason weighed on the other side. Learned Hand once described the spirit of liberty as the spirit "that is not too sure of

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itself." That is an essential virtue both in the law and in the human beings who administer it. It is a quality I saw in Sam from the start.

I saw something else as well. I saw that Sam had faith in the law, that he trusted the fairness of its processes and believed that even the hardest cases can be settled on its terms. Anyone who has studied the law knows that it is not a mechanical system. Questions of law often implicate moral and political judgments. But there is all the difference in the world between those who view the law as an instrument for the advancement of a political program and those whose primary allegiance is to the law–who take their bearings from the law and its requirements and values. Sam belongs to the latter group. When we graduated from law school thirty years ago last spring, I would have said that Sam was one of the best lawyers in our class. I would have described him as a lawyer's lawyer. I knew Sam well but could not have told you whether he was a Democrat (as I was then and am today) or a Republican. What I did know and admired was his faith in the law, the modesty with which he defended his opinions, and the generosity with which he considered those of others.

In the years since, I have seen Sam often and followed his career with admiration. My respect for him as a person has remained unchanged. In the weeks since his nomination, I have made an effort, as have many others, to acquaint myself with his work as a judge and to discover, as best I could, the mind and temperament that lies behind it. I have not read all of Sam's opinions, nor am I an expert in all the areas in which he has written. Indeed, I could claim an expertise in only one or two, and those far removed from the areas of greatest controversy. But I have read enough to have a sense of Sam the judge and it fits my sense of Sam the human being.

The judicial temperament I discern is one marked by cautiousness and deference; by an

inclination to stay as close to settled law as possible; to decline invitations to speak broadly when a narrow decision will do; to move in small steps rather than bold ones; to be mindful of the limits on one's office and its powers; to give weight to the considered judgments of others, in different roles with different duties; to be respectful of the past–that all-affecting attitude we sometimes describe, too narrowly I think, as the rule of stare decisis. These are general qualities that run through the opinions of Judge Alito that I have read, even those with which I disagree. Even where I would have decided the case differently, I have been impressed by the rigor and responsibility of his argument and in no case would I say that his position falls outside the range of fair disagreement or is driven by ideology, or indeed by anything but a discipline born of a deeply felt commitment to the morality of judging.

Let me elaborate on this last point. Judge Alito is a judge's judge. He knows that a judge must pay attention to facts and, so far as is humanly possible, distinguish his personal beliefs from the requirements of law, recognizing that this distinction cannot always be maintained but vigilant against its promiscuous relaxation. He holds no view, so far as I can tell, that is impervious to facts. He sees the law from the inside, as one devoted to its principles and procedures, not from the outside, as activists of all stripes do. There is a name for this attitude. We call it judiciousness, and in calling it that we recognize that it is the attitude appropriate to the special role that judges play and to the immense powers they wield. My confidence that Sam Alito, should he be confirmed, will continue to be as judicious a Justice as he has been a judge is strengthened by my personal knowledge of the man and by my belief that his judicial qualities are rooted in his human ones, the most secure foundation they could have. A Justice of the Supreme Court is at once freer and more constrained than a Court of Appeals judge–freer

because he or she has no superior whose judgments must be obeyed, more constrained because the full weight of our constitutional system falls on his or her shoulders. The responsibility that Sam has shown as a judge and the modesty he has shown as a person give me confidence that he will feel and bear this greater weight with a judiciousness appropriate to his new office.

To what jurisprudential tradition does Judge Alito belong? He has often been described as a conservative and that is not inaccurate so long as we understand what kind of conservative he is. In my view, the tradition of conservatism to which Judge Alito belongs is the tradition championed by my constitutional law professor at Yale, Alexander Bickel. Bickel made prudence the judge's central virtue, and spoke of the importance of deference in deciding cases, of what he called the "passive virtues," especially in the work of the Supreme Court. Bickel himself claimed descent from Edmund Burke, the great eighteenth century writer and statesman who warned against the dangers of abstraction and the loss of a sense of responsible connection to the past. Sam Alito came to the Yale Law School because he admired Bickel's writings. Recently, he has named John Harlan as one of his four Supreme Court heroes. Justice Harlan was a practitioner of the passive virtues that Bickel admired. He embodied the conservatism of caution, modesty and deference that Bickel defended. My guess–my hope–is that Judge Alito will be a Justice in the Bickel-Harlan line, a justice's justice, if I may be permitted to put it that way. It is a guess based on half a lifetime of acquaintance.