

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 certainly chagrined at the position that is being taken by the administration with respect to those detainees.

It seems not unlikely that one or more of the detainee cases that we are handling will be before the Supreme Court again. I do not know the views of Judge Alito respecting the issues that may be presented in those 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 thoughtful consideration without any predisposition in favor of the position of the executive branch. That is more than 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.

Chairman SPECTER. Thank you very much, Judge Gibbons.

[The prepared statement of Judge Gibbons appears as a submission for the record.]

Chairman SPECTER. Our final witness on the panel is former Third Circuit Judge Tim Lewis, a graduate of Tufts University in 1976, a law degree from Duquesne in 1980. He served as an Assistant United States Attorney before President Bush the Elder appointed him to the Western District Court, and then in 1992, President Bush the Elder nominated him to the Third Circuit. Judge Lewis resigned in 1999 and now is co-chair of the appellate practice group at the Schnader Harrison office. He serves as co-chair of the National Committee on the Right to Counsel, a public service group dedicated to adequate representation of indigents. Judge Lewis and Judge Alito served together on the Third Circuit for 7 years.

We appreciate your being here, Judge Lewis, and the floor is yours.

STATEMENT OF TIMOTHY K. LEWIS, JUDGE (RETIRED), U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, AND COUNSEL, SCHNADER HARRISON SEGAL & LEWIS LLP, WASHINGTON, D.C.

Judge LEWIS. Thank you very much, Senator Specter. Thank you, members of the Committee. It is a pleasure and an honor to be here today.

When Thurgood Marshall announced his intention to resign as a Justice of the U.S. Supreme Court in conference one day, the first person to respond was Chief Justice Rehnquist. Chief Justice Rehnquist's words were, "No, Thurgood, no. Please don't. We need you here."

Shortly thereafter, when Justice Marshall had resigned, he was interviewed, and in the course of that interview was asked about Chief Justice Rehnquist. And during that interview he said, "This

is the best Chief that I have ever served under.” and went on to extol Chief Justice Rehnquist’s service on the U.S. Supreme Court.

Now, I was, quite frankly, stunned by both of those observations when I learned them at the time, and it wasn’t until I had served for a period of time as a judge on the United States court of appeals that it all began to make sense to me.

It is no coincidence to anyone who is familiar with my body of work while I served on the United States court of appeals and my body of work since having left the court that I happen to be sitting on the far left of this panel here this afternoon. And yet I am here, and what I have just related about the exchanges between Justice Marshall and Justice Rehnquist and Justice Marshall’s later observation about the Chief Justice helps explain why I am here, because it is true that during the time that I served with Judge Alito, there were times when we did not agree.

I am openly and unapologetically pro-choice and always have been. I am openly—and it is very well known—a committed human rights and civil rights activist and am actively engaged in that process, as my time permits and my law practice permits today and through my law practice at Schnader Harrison Segal & Lewis. I am very much involved in a number of endeavors that one who is familiar with Judge Alito’s background and experience may wonder, well, why are you here today saying positive things about his prospects as a Justice on the Supreme Court? And the reason is that, having worked with him, I came to respect what I think are the most important qualities for anyone who puts on a robe, no matter what court they will serve on, but in particular the U.S. Supreme Court, and first and foremost among these is intellectual honesty.

As Judge Becker and others have alluded to, it is in conference, after we have heard oral argument and are not propped up by law clerks—we are alone as judges discussing the cases—that one really gets to know, gets a sense of the thinking of our colleagues. And I cannot recall one instance during conference or during any other experience that I had with Judge Alito, but in particular during conference, when he exhibited anything remotely resembling an ideological bent. That does not mean that I agreed with him, but he did not come to conference or come to any decision that he made during the time that I worked with him based on what I perceived to be an ideological bent or a result-oriented demeanor or approach. He was intellectually honest, and I would say rigorously so, even with respect to those areas that he and I did not agree.

Second, I have no hesitation in commending his commitment to principle, both in how he went about his work on the Third Circuit, how he came to his decisions. It was through a very difficult process we all would put ourselves through, but in Sam’s case I think that I can say that no one worked harder at coming to what he thought was the right decision than Judge Alito.

And, finally, though we did disagree, it was always respectful, and that is what I came to understand as probably the most important facet of appellate judging. No one—and I mean no one—has a corner on the marketplace of ideas in terms of what is best, what is right. We have different approaches, and it is very important that we maintain different approaches in positioning and in pushing forward our sense of—our jurisprudence. They do not have to

be the same. In fact, I think that it is contrary to the best interests of democratic government for there to be some monolithic approach to judicial decisionmaking on the United States Supreme Court or on any other court.

Sam Alito practiced a form of jurisprudence that I think is best referred to as judicial restraint, judicial deference. It is in many respects a more conservative form of jurisprudence than was my own. And that is fine. That is perfectly fine. And as a matter of fact, I dare say it is important, because through the exchanges we learned from one another and I think were a better court.

I know that this is the case on the Supreme Court, as it is reflected in Chief Justice Rehnquist's observation when Justice Marshall announced his resignation. And I think that it is important that different approaches be respected.

So in the end, I am here as a matter of principle and as a matter of my own commitment to justice, fairness, and my sense that Sam Alito is uniformly qualified in all important respects to serve as a Justice on the United States Supreme Court.

Thank you.

Chairman SPECTER. Thank you very much, Judge Lewis.

This panel, this distinguished panel, has been accorded much more time than we customarily allow because of the very large number of witnesses which we have. But out of deference to your positions and your coming here and your unique knowledge, we have done that.

I would like to ask each of you a great many questions, but I am going to limit myself to 5 minutes. And I would urge that the responses be sound clips. You have not had as much experience at that as we have, but on the networks, a sound clip goes for about 8 seconds and locally about 18 seconds. You don't have to quite do that, but as close as you can. You can start my clock now.

Judge BECKER, the conference is a unique opportunity, as has been explained, to really find out about what your colleagues think. Do you think, is it your judgment that Judge Alito would allow his personal views on a matter to influence his decisions as a Justice?

Judge BECKER. I do not think—I am confident that he would not.

Chairman SPECTER. Judge Garth, you spoke about *stare decisis*. You have been quoted about your views of Judge Alito as to his approach, if confirmed, where the bounds of the Supreme Court Justice on *stare decisis* are not the same as a court of appeals judge. As Judge Gibbons has noted, the issue of a woman's right to choose has become a very central factor in our deliberations. Do you have any insights which you would care to offer as to how Judge Alito would weigh the issue of *stare decisis* on that particular subject?

Judge GARTH. I can only say that I have heard Judge Alito speak as to how he would approach and process any judicial problem, and it would be presumptuous of me to even think of how he would rule on that subject. But I can tell you that when it comes to applying the precedents in our court and of the Supreme Court, he has always been assiduous in the manner in which he has applied them and he has always had good reason and principle.

I can't say more than repeat again that I believe that Judge Alito, when he described to the Committee how he would rule on

a case and what he would do in respect of *stare decisis*, I could not express it better than he did.

Chairman SPECTER. Judge Barry, you have sat with him in these private conferences, known him for a long time, back to the days when you were in—and I had not noted that you were in the U.S. Attorney's Office when he was an assistant. How would you evaluate Judge Alito on his consideration of women's issues?

Judge BARRY. If I had to add anything to my initial testimony, I would have stated more about what Sam and I did together on this wonderful court and how reasonable he was and how he never indicated bias of any kind.

I told you at the outset I have known Judge Alito for almost 30 years. I have the utmost respect for him. I have never heard him say one thing that would give me any reason to believe that he would give other than the most careful consideration to what you have described as women's issues.

Chairman SPECTER. Judge Lewis, I have a question for you, and then I am going to propound a question for the other three judges before my red light goes on. I would like you to be a little more specific in your evaluation on Judge Alito as to how he would handle the civil rights issue. I am not going to wait for you to start to answer because my red light will go on in advance. Then I am going to ask Judge Scirica, Judge Aldisert, and Judge Gibbons to address the subject, which has concerned this Committee in some detail, as to whether there is any tilt in Judge Alito's approach to the powerful, to the Government, as opposed to the average citizens, whom we characterized as "the little guy."

Would you start, Judge Lewis, with your evaluation?

Judge LEWIS. Yes, I will. Thank you, Senator.

Let me begin by saying that if I believed that Sam Alito might be hostile to civil rights as a member of the U.S. Supreme Court, I can guarantee you that I would not be sitting here today. That is the first thing that I want to make clear.

My experience in civil rights cases on the Third Circuit were primarily in the Title VII area with Judge Alito, and there were cases in which we agreed and cases where we disagreed. There was one in particular, the *Piscataway* case, which was, for lack of a better term, a reverse discrimination case that became an en banc matter, where I and a number of my colleagues wound up writing dissenting opinions. But that was a very close and I think very closely contested case having to do with whether or not Title VII contemplated diversity as an interest that an employer could use. And to my disagreement and chagrin, the majority did not agree with Judge Sloviter, Judge McKee, and myself in that case.

But I never felt that Judge Alito or any of my colleagues who were in the majority in that case were in any sense hostile to civil rights interests. This was a legal question, and they came out the way that they did.

In other cases, for example, the *Aman v. Cort Furniture* case, which I authored, Judge Alito was not on the panel, but as I think Judge Gibbons mentioned, all opinions are circulated on the Third Circuit, and so really any opinion that comes out is the opinion of the court. I don't believe in that case, which was another Title VII case that I think furthered the law in some very important re-

spects, defining code words as—racial code words as actionable under Title VII, I believe that Judge Alito went along with that. I was very happy that he did that. And there were others.

My sense of civil rights matters and how a court should approach them jurisprudentially might be a little different. I believe in being a little more aggressive in these areas, but I cannot argue with a more restrained approach. As long as my argument is going to be heard and respected, I know that I have a chance, and I believe that Sam Alito will be the type of Justice who will listen with an open mind and will not have any agenda-driven or result-oriented approach.

Chairman SPECTER. Judge Scirica, would you reply as briefly as you can as to the question I posed?

Judge SCIRICA. In my 15 years with Sam Alito, I have never seen any indication that he would favor that particular interest.

Chairman SPECTER. Judge Aldisert?

Judge ALDISERT. Well, I approach it from a rather personal standpoint. Judge Alito is an American of Italian origin, and until quite recently, Americans of Italian origin were subject to a lot of discrimination. Quotas as to whether to get into professional schools. A little example in my particular case, when you consider all the Americans of Italian origin, from New England, Connecticut, New York, New Jersey, Pennsylvania, along the seaboard, there had never been an American of Italian origin or these millions of Americans of Italian origin—there had never been an American of Italian origin ever appointed to the United States Court of Appeals until President Johnson appointed me in 1968. So I can speak from experience. Things are better now, but I have lived through that.

When you look at Judge Alito, his father came to the United States as an Italian immigrant at a very early age, and I am certain that the idea of protecting the rights of the so-called little guy is in the genes of Samuel A. Alito, Jr.

Chairman SPECTER. Judge Gibbons, as briefly as you can.

Judge GIBBONS. His attitude toward criminal defendants is of some significance for our law firm because we have a very big white-collar criminal defense practice, and my partner, Larry Lustberg, prepared a memo on the subject. He says, although given his prosecutorial background, Judge Alito has been seen by many of the defense bar as pro-government. A thorough review of his record shows that, in fact, he is a fair-minded jurist who pays careful attention to the record below and who takes great pains to apply precedent.

Now, he then goes on in the memo to review the series of cases in which Judge Alito decided against the government on many significant issues, and he concludes, while, like most appellate judges, there are far more decisions affirming than reversing convictions—that is certainly true of every judge who has sat on the court of appeals—Judge Alito's jurisprudence is properly characterized as careful, based on precedent, and particularly attentive to the record. If that record does not support affirmance, he reverses. He also included an admonition to the rest of the department that you had better know the record, because he will.

Chairman SPECTER. Thank you, Judge Gibbons.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and I would like to thank you very much for being here. I think the testimony was very interesting. I listened acutely. I think we would all be very lucky if any one of us had colleagues like you that would come forward and say the things that you all have said.

Let me ask this question. How do you look at the evaluations that have been done, those evaluations that say, well, in the cases looked at, he has judged whatever percent it was, but let us say it is 70 percent—I am just making it up—in favor of corporations, or business, or against the little man. How do you look at that sample and how do you regard that? It has been written about rather extensively, anyone that would like to try to answer it. Judge Becker?

Judge ALDISERT. I would like to try that—

Senator FEINSTEIN. Give it to Judge Becker because I have known him longer.

Judge BECKER. Senator Feinstein, first of all, you have to keep in mind, and I think this is a national—this statistic applies nationwide—I think somewhere between 80 and 85 percent of cases are affirmed. So a lot of this is going to determine who won in the district court or who won in the agency. So those numbers are skewed by that very fact.

The only other thing I would say is I haven't analyzed these statistics but that is nothing I have ever seen. He has voted with me. There was a case not long ago, it was a very thin employment discrimination case in which a woman, well, she never got to a jury in district court. One of my colleagues wanted to affirm. I was on the fence. And Sam wanted to reverse. I said, OK, write it up, and we went along.

I have just never seen any evidence that he is for the big guy against the little guy. But I think if you analyze these, I think you will find most of the statistics come from the fact that the big guy won in the district court and 80 to 85 percent of those cases are affirmed, and most of those, they win out.

Senator FEINSTEIN. Judge?

Judge ALDISERT. I was just about to say the same thing, but my good friend, Judge Becker, your figure was a little skewed there. The percentage of reversals is not 15 percent, it is 8.7 percent, the statistics last year of all cases. In criminal cases, in the figures of 2004, the reversal rate in criminal cases was 5.1 percent.

Judge BECKER. I always defer to a master arbiter.

Judge BARRY. And, of course, it should be added that when we are considering cases on appeal, we are operating on a standard of review. So we are not typically looking at the issues underlying that review.

Senator FEINSTEIN. The underlying situation, right.

Judge BARRY. That is right. We are looking at an abuse of discretion standard. We are looking at, were the facts clearly erroneous? So we are not starting from scratch, typically.

Senator FEINSTEIN. Let me ask you this question. The subject of abortion and *Roe* was raised, and obviously if you have listened to the hearings, you have heard the question going on back and forth. I was very puzzled when I read Chief Justice Roberts's statement

before us on *Roe* and how he answered Senator Specter's questions. The Chief ended up by saying that he felt that *Roe* was well-settled law. I think he even added to that, very well-settled law.

Chairman SPECTER. He said settled beyond that.

Senator FEINSTEIN. All right, settled beyond that. And I asked Judge Alito, and I thought at the very least he was going to agree with Justice Roberts, and he said, well, it all depends upon what settled means. What do you make of that?

Judge BARRY. I respectfully cannot characterize what Judge Alito meant by that and I would much prefer not to have to try.

Senator FEINSTEIN. That is fine. Anybody?

Judge BECKER. I think we are here as fact witnesses more than opinion witnesses, Senator Feinstein. I really would not answer that question.

Senator FEINSTEIN. Very good.

Judge BECKER. I couldn't make a judgment on it.

Senator FEINSTEIN. Very good. Thank you. Thank you very much. Thanks, Mr. Chairman.

Chairman SPECTER. Senator Hatch?

Senator HATCH. I want to express my gratitude to all of you judges, you out there in the West, Judge Garth, for coming here today and helping this Committee. It is pretty apparent that I got quite emotional when my old friend, Judge Aldisert, testified. I really did. I got emotional because I care for you and I watched you for years there and just have a tremendous amount of respect. I have read your books, and you have always sent them to me, and that has meant a lot to me. But you all mean a lot to me.

It is no secret that, with very few exceptions, I love the Federal courts and I love the judges, and there are very few exceptions. There are a few that I think you can name yourselves.

[Laughter.]

Senator HATCH. But by and large, you know, we pass unconstitutional legislation up here all the time and—

[Laughter.]

Senator HATCH.—if it hadn't been for the courts, we would probably not have preserved the Constitution. So I want to give you all credit for that.

But let me just say this. By the way, just to correct the record. What Judge, now Chief Justice Roberts, he and Judge Alito basically said the same thing. They said, well, it is settled as a precedent of the Court, with regard to *Roe v. Wade*. That is exactly what he said, entitled to respect under principles of *stare decisis*. That is basically what Judge Alito said. And Roberts said, and it is settled as a precedent of the Court, yes. Senator Specter asked him some more and then he said, "I think the initial question for a judge confronting an issue in this area, you don't go straight to the *Roe* decision. You begin with *Casey*, which modified the *Roe* framework and reaffirmed its central holding." So these are maybe touchy words, but it is important to get it right.

One of the most prominent issues in this hearing has been how Judge Alito views the role of precedent in deciding cases. Too often, I think, the objective seems not so much to get insight into Judge Alito's general views about precedent, but clues about how he will treat particular precedents.

First, let me make this point about Judge Alito's record regarding circuit precedent. As I understand it, the appeals court can reconsider its own precedents only when all Third Circuit judges sit together en banc, is that correct?

Judge BECKER. That is correct.

Senator HATCH. OK. It is my understanding that in his 15 years on the Third Circuit, Judge Alito has participated in 38 en banc decisions. Now, Judge Alito voted to overturn circuit precedent in just four of those cases. Two of those decisions were unanimous. All judges agreed. That does not look to me like someone who plays fast and loose with precedent.

Let me just ask you, Judge Becker, and if anybody disagrees with what Judge Becker says, I will be happy to have you respond. Let me ask you a question about Judge Alito's handling of certain—and the reason I ask Judge Becker, Judge Becker, as Senator Specter said, is the 101st Senator. He came down here and tried to help this asbestos problem and we all respect him for that.

Let me just say, I know you have participated in more than 1,000 cases, or decisions, rather, with Judge Alito. All of you, of course, can offer your thoughts, as well. Yesterday, during the hearing, one of my Democratic colleagues held up some charts with some quotes from a few cases in which Judge Alito's colleagues criticized how he applied circuit precedent. The picture that was painted was that Judge Alito misapplies precedent when it suits him, suggesting, I suppose, that he might be activist or careless in this regard on the Supreme Court.

Now, I certainly agree that the views of his fellow judges are particularly relevant on this point and having you here is very valuable to us for that reason. Now, asking you all about this here seems more useful than a few selective sentence fragments on a chart. Realizing, Judge Becker, that judges do not always agree on every single point every single time, how would you characterize Judge Alito's overall view or approach to precedent?

Judge BECKER. Respectful of it. I have never seen what was portrayed, where—

Senator HATCH. Judge, here—

Judge BECKER.—I mean, Judge Alito might have disagreed with prior precedent. He followed it unless he felt that it was dicta, in which case it wouldn't be precedent—

Senator HATCH. Right.

Judge BECKER.—or the case was distinguishable. But I have never seen him ignore or disregard precedent.

Senator HATCH. Have any of the rest of you seen that?

Judge SCIRICA. No.

Senator HATCH. Judge Aldisert?

Judge ALDISERT. Judge Hatch—Senator Hatch—

[Laughter.]

Judge ALDISERT. I wanted to answer Senator Feinstein the same way. In my book, "The Judicial Process, Text Materials and Cases," Second Edition, 1996, I have an entire chapter on precedent, and one of those sections is called, "Viability of Precedent, or When Do You Depart." and there is a sophisticated body of law, and I cite cases with Justice Sandra Day O'Connor, Thurgood Marshall, and a few others, and there are also some very important scholarly aca-

democratic articles on it. I think that Judge Alito's expression that it depends is a statement that you have to consider all the factors on all the Supreme Court cases that discuss when do we depart from precedent, and there is a body of law that is in my casebook.

Senator HATCH. Thank you so much, and Mr. Chairman, I want to thank all of these great judges for being here and I want to thank you, Judge Lewis, for taking time to be here in particular. We just really respect you. I love and respect the Third Circuit Court of Appeals.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Leahy?

Senator LEAHY. Mr. Chairman, I realize we have some retired and very distinguished retired judges, but some current judges. Insofar as the current judges, if their case is appealed to the Supreme Court and Judge Alito becomes a member of the Supreme Court, he will have to rule on their appeal, appeals from their decisions, and so I think rather than create a difficulty for them or for Judge Alito, if he is confirmed, I think I will not avail myself to ask questions of this unprecedented panel.

Chairman SPECTER. Thank you very much, Senator Leahy.

Senator Kyl?

Senator KYL. Thank you, Mr. Chairman. I just had a question, and I think, Judge Lewis, it was a comment that you made that raised this question in my mind. There was a point made about the circulation of opinions among all of the judges on the court. When a three-judge panel has tentatively made a decision in a case and circulates an opinion, is that opinion circulated among all of the judges and then do all of the judges have an opportunity to comment on that in some way?

Judge LEWIS. Yes, that is correct, and that is why the opinion is the opinion of the entire court in the end, when it is released. I should let Chief Judge Scirica address the current practice. I have been off the court for some time, but I assume it is done the same way, is it not?

Senator KYL. This is interesting to me, because I practiced before the Ninth Circuit Court of Appeals and that same opportunity, I think, is not as available.

Judge GIBBONS. Senator, that was invented by Judge Biggs in the late 1930s.

Senator KYL. In which—in the Third Circuit, sir?

Judge SCIRICA. The Third Circuit. We circulate all of our precedential opinions to the entire court before they are ever published. That is, before the litigants and before the public sees them. We do not do that with a category that we call not precedential opinions. They are handled by the panel themselves unless there is a dissent, in which case we circulate them, as well. Now, of course, when a litigant loses a case, that litigant has the opportunity to file a petition for rehearing and that goes to the entire court because the litigant usually asks both for a panel rehearing before the original panel and also before the entire court. And so for precedential opinions, it gets sent to the court on two different occasions, one before it is ever published and one after it is published.

Senator KYL. I am curious, what happens if there is a strong opinion by one of the judges on the court who did not sit on the original three-judge panel that is different from the conclusion?

Judge SCIRICA. Any judge on our court on the initial circulation or even on the circulation for the petition for rehearing may write to the entire court or may write to the opinion writer or may write to the panel expressing his or her disagreement. It is one of the wonderful things about an appellate court, because we view the panel decisions that are precedential as opinions of the court more than just the opinion of the panel or the opinion of the author of the case. There is often this wonderful dialog that goes back and forth between the opinion writer or the panel and a judge who may have concerns about what is being decided, and it sometimes can go on for days. Sometimes, the panel will, or the author will say, "I want to think about this. I want to have the opportunity to revisit this issue." And sometimes it takes weeks before the panel comes back with a new opinion, often a revised opinion. This is part of the collegial aspect of the court.

Senator KYL. This should be very reassuring to the litigants—

Judge BARRY. And sometimes we will go en banc before the opinion ever issues.

Judge BECKER. Or often, the panel will change its mind and say, we got it wrong.

Senator KYL. Well, it is very interesting and I appreciated the opportunity to at least mention that. And then I, too, want to thank all of you for your willingness to be here, to take time out, but most especially to speak on behalf of a colleague who I know you all admire a great deal, and I thank you for that very much.

Chairman SPECTER. Thank you, Senator Kyl.

Senator Durbin.

Senator DURBIN. Mr. Chairman, I thank the members of the panel for their public service. I have no questions, and I would like to associate myself with the remarks of Senator Leahy.

Chairman SPECTER. Thank you very much, Senator Durbin.

Senator DeWine.

Senator DEWINE. I have no questions, Mr. Chairman.

Chairman SPECTER. Senator Sessions.

Senator SESSIONS. I would just like to ask the panel, I see one of the articles that stirred up some of this discussion about not being an even-handed judge actually only considered 221 cases in the judge's first 6 years on the bench.

I am sure you, as professionals who have been there, your judgment is better about his style and fairness than some abstract numbers would be.

But I will just ask you, Judge Scirica, maybe—and if others would like to comment, please do—on civil rights cases that I have seen here, of the civil rights cases Judge Alito wrote, the panel agreed with him 90 percent of the time and his opinions were unanimous 90 percent of the time. That doesn't sound like an extreme position to me.

What would you say about that?

Judge SCIRICA. Well, I would agree, and that would comport with my recollection of these cases.

Senator SESSIONS. And I notice the respect Judge Lewis had for Judge Alito. It said when he sat on panels where both the other judges were Democratic appointees, the decision was unanimous in 100 percent of the cases, or whatever those statistics show. And then with regard to the immigration cases, it says that his appeals—the average judge in the country—in average cases, the immigrant wins asylum claims in the court of appeals slightly over 11 percent of the time. But in Judge Alito’s record, he ruled for the immigrant seeking asylum in fully 18 percent of the cases.

Do those numbers, Judge Scirica, strike you as sort of what the—well, the 11 percent, is that about what you would expect?

Judge SCIRICA. Yes, sir.

Senator SESSIONS. And in the cases that he wrote opinions on, the average court of appeals judge ruled for the immigrants 8 percent and he ruled for the immigrants 19 percent. Well, I don’t know that those numbers mean a whole lot, but I do think they tend to rebut some of the numbers that we have seen floating around, because your opinion of him does not reflect a person who shows bias.

In the *Rybar* case, Judge Gibbons—you no longer are on the bench, you could be honest with us right here in Congress—if the Congress had put in an interstate commerce nexus in the statute they passed about machine guns, like they did in ITSMV, interstate transportation of stolen motor vehicles, or interstate transportation of stolen property, kidnapping, or theft from interstate shipment, it would have been upheld, wouldn’t it?

Judge GIBBONS. That is what he said in his dissenting opinion.

Senator SESSIONS. So the truth is that Congress missed the boat?

Judge GIBBONS. Yes, as it did with respect to this recent unfortunate legislation.

Senator SESSIONS. And we could fix it as soon as we passed a law correctly, I would submit.

I would just ask this, Judge Aldisert. I am serious about this question, but I think Judge Roberts agreed with me that if an individual within the heart of Pennsylvania or New Jersey picks up a rock and kills another person, that is not a Federal crime. Is that correct, without an interstate nexus of some kind, that would be prosecutable solely by the State court?

Judge BECKER. Unless he stole the rock out of an interstate shipment.

Judge LEWIS. It could be a violation of Federal civil rights, also.

Judge GARTH. If he killed or the person that he assaulted was a Federal official—the President or Vice President or a Senator.

[Laughter.]

Senator SESSIONS. Well, Judge Lewis said it could be a civil rights violation if it was in a way to deny someone of civil rights.

Judge LEWIS. That is correct.

Senator SESSIONS. Or if it was a Federal official. But, classically, the Federal criminal law has been tied to interstate commerce nexus, hasn’t it, Judge Aldisert?

Judge ALDISERT. Yes.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Sessions.

Senator CORNYN.

Senator CORNYN. Thank you, Mr. Chairman.

I feel like I need to say “may it please the Court.” Thank you all for being here. It is very important, I believe, to have testimony from people that know this nominee. We have heard a lot of wild and crazy, from my perspective, accusations that have been unsubstantiated from people who don’t know this nominee as well as you do.

I want to just try to eliminate one concern that has been expressed, and I have heard a hint of criticism about these judges appearing as witnesses in this hearing, supposing that perhaps there would be some conflict of interest if your decisions would be appealed to the United States Supreme Court and Justice Alito had to sit on it. I haven’t noticed any lack of willingness to disagree with him while you were colleagues on the Third Circuit. That seems highly unlikely.

And for the suggestion that this is somehow unprecedented to have judges, former and current sitting judges testify, Mr. Chairman, I have a list of examples where sitting members of the Federal judiciary have testified during the confirmation proceedings of another Federal judge. And I would ask that that be made a part of the record.

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

Senator CORNYN. Canon 4B of the Code of Conduct for U.S. Judges provides a judge may appear at a public hearing before a legislative body—there are some ellipses there—on matters concerning the law, the legal system and the administration of justice to the extent it would generally be perceived that a judge’s judicial experience provides special expertise in the area.

And I regret, Your Honors, that you somehow get sucked into the contentiousness and some of the unfairness that occurs sometimes, the innuendo that sometimes arises when you are a witness in a contested proceeding. And as you can tell, these hearings have become, and the confirmation process, an adversarial process.

The unfortunate part is, as our Chairman has noted before, it is not controlled by the rules of evidence. It could be based on speculation, hearsay and rumor, whereas we know in a court of law that wouldn’t be admissible. And our procedures are a lot more flexible and open-ended, and certainly there is no standard of review that applies to judges in your distinguished and exalted position as members of the Federal judiciary.

Judge Aldisert, I want to say that I guess I am the only other member of this Committee who has probably read one of your books, but I am certainly familiar with your great work and your writings. And, of course, as has already been noted, Judge Becker is very familiar to the Judiciary Committee.

I want to ask both Judge Gibbons, who is no longer on the bench, and Judge Becker—both of you have talked about the transforming experience of crossing over from being an ordinary lawyer, including a U.S. Attorney, and then putting on the black robe, after you have put your hand on the Bible and taken an oath to uphold the laws and Constitution of the United States, so help me God, and what a different perspective that provides, a different obligation, different responsibilities. And I think Judge Trump Barry noticed

that transformation in this nominee when he crossed over from being a practicing lawyer to becoming a member of the judiciary.

Judge Becker, I wonder if you just might comment. We just have a couple of seconds here, but this morning Senator Biden was asking questions about this nominee's views on *Roe v. Wade*, perhaps as reflected in an application he made for a job in 1985. And it seemed to raise the question of, well, if that is your view today, wouldn't you just feel free to go in and vote to overrule it?

And it struck me because of the difference in a judge's role from that of an advocate. He was applying for a job as part of the Reagan administration. But on one hand, he was talking about, well, maybe you have the power, but what Judge Alito seemed to talk about most was legitimacy of the judicial process and the judgments rendered by courts and why that is such an integral part of the role judges play in our system of government.

Would you please respond to that?

Judge BECKER. Well, I agree with Judge Alito and I think, Senator Cornyn, that you have eloquently described the transforming experience. I know that it is within your life's experience when you took the oath of office to be a justice of the Texas Supreme Court. It just transforms you. You become a different person and your obligation is to the rule of law and you have no interest in a case.

And if I could just segue this into your original point which bears upon what Senator Leahy had to say in terms of whether or not a Justice of the Supreme Court would have to recuse on an opinion I wrote on one of our cases, I have no interest in the case. Recusal is a function of whether or not the party or the lawyer has an interest in the case, but I don't have any interest in any case. None of us have any interest in any case, and this is consistent with what Judge Alito said and your description of that transforming experience.

Senator CORNYN. Mr. Chairman, I would just say Judge Gibbons and Judge Lewis are no longer members of the bench and I am sure have experienced the liberating transformation once you cross back over that Rubicon, perhaps, as well.

Thank you very much.

Chairman SPECTER. Thank you very much, Senator Cornyn.

Senator COBURN.

Senator COBURN. Thank you very much, and I appreciate so much you all taking the time to come here. As a physician, I am starting to learn some of the lingo of the legal profession. It is hard, but I am going to start talking in doctor's terms so the rest of them can't understand.

Judge Barry, I wanted to ask you, and also Judge Lewis, do you think that there is any merit whatsoever to the allegations that were made that Judge Alito is hostile to the rights of women or minorities, and have you seen that in the 30 years—have you seen any indication whatsoever either in his opinions, his personal life, his interpersonal relations with you, or you, Judge Lewis, that there is any indication that there is that type of bias in this man?

Judge BARRY. I have never seen it, and if I had seen it, I would not be here today.

Senator COBURN. Judge Lewis?

Judge LEWIS. I have already said that if I sensed that Sam Alito during the time that I served with him or since then was hostile to civil rights or would be hostile to civil rights as a Justice of the United States Supreme Court, I absolutely would not be here today. I am not interested in saying anything on behalf of someone that I believe would hold views like that or would proceed in that way.

I am basing what I am saying on my years of experience in conference with him, discussing cases and—we have different views and different approaches, but never would I suggest—did it seem to me that he held any hostility to civil rights, which is an area that I hold very dear and is very important to me and remain committed to furthering in this country.

Senator COBURN. Thank you. Well, Mr. Chairman, I don't think you can have a better recommendation than the people that you work with and the people that you spend the greatest amount of time with and the people who see you under stress who make evaluations.

The greatest tragedy, I think, of this hearing is the allegations that have been made that aren't substantiated based on fact, that are substantiated on the basis of the fact that you want to try to destroy somebody's character and undermine their character to make them look a certain way which they are not.

I appreciate you all's very straightforward answer and I thank you for coming, and I yield back my time.

Chairman SPECTER. Thank you very much, Senator Coburn.

The question has been raised as to precedents, and Senator Cornyn has addressed that and it is worth mentioning just a few. Former Chief Justice Burger testified for Judge Bork. District Judge Craig testified for Chief Justice Rehnquist. District Judge Tanner testified for Justice Thomas.

The canons, specifically 4B, of the conduct of U.S. judges make a specific allowance for this kind of a situation, quote, "judicial experience provides special expertise to the area." And it is certainly obvious that the insights which you judges have to Judge Alito's background are unique. When you talk about what goes on in those conferences, you are the only ones who are there and you have much more insight as to the opinions he has written that you have worked with him on.

We have 30 witnesses who are coming in and that has been a traditional part of the process, but I know of no situation where witnesses have more to say which is relevant and weighty. Perhaps weight is the best evidentiary characterization of what you have had to say. A lot of things can be relevant, but especially where you have the issue which has been before this Committee as to Judge Alito's agenda or Judge Alito's approach or Judge Alito's personal views dominating his judicial determinations, this panel is right on the head.

It has been an unusual panel, but that is really not a strike against the practice. It may be a precedent for the future and it, I think, will be a good precedent. But whenever you try something new, there are differing voices, but I think it is an extraordinary contribution which this panel has made to this process.

So, former Chief Judge Becker, Chief Judge Scirica, Judge Barry, Judge Aldisert, Judge Gibbons, Judge Lewis, Judge Garth from Phoenix, Arizona, you lucky fellow, we thank you all very much for coming in.

We are going to take only a 10-minute break now. I didn't have a chance to discuss it with Senator Leahy, but we do not have the situation where Judge Alito is on the stand and he needs a little longer break. We will have fresh witnesses and tired Senators.

Ten minutes. We will resume at 5:20.

[Recess from 5:10 p.m. to 5:20 p.m.]

Chairman SPECTER. We will now proceed with panel three, and our first witness is Edna Axelrod, who has known Judge Alito for nearly 20 years, having worked with him when he was United States Attorney. She is a sole practitioner in South Orange, New Jersey. She served in the U.S. Attorney's Office from 1980 to 1983 and 1985 to 1994 during Judge Alito's tenure as U.S. Attorney. She had an important position as the Chief of the Appeals Division. She is a graduate of Duke's Law School, has a master's degree in Law from Temple, and we welcome you here, Ms. Axelrod.

We are going to have to be mindful of the time because we have four panels and about 23 witnesses.

Senator LEAHY. Are you going to finish tonight?

Chairman SPECTER. Well, I would like to, but it is subject to negotiation with you, Senator Leahy.

Senator LEAHY. Mr. Chairman, could I just ask unanimous consent that a number of letters I have and usual things to put in the record?

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

Thank you, Ms. Axelrod, for being here, and we are starting the clock at 5 minutes.

**STATEMENT OF EDNA BALL AXELROD, ATTORNEY AT LAW,
LAW OFFICES OF EDNA BALL AXELROD, SOUTH ORANGE,
NEW JERSEY**

Ms. AXELROD. Thank you. Thank you, Mr. Chairman and members of the Committee. I appreciate the opportunity to appear here today to testify in support of the nomination of Samuel Alito. I am a former Chief of the Appeals Division at the United States Attorney's Office for the District of New Jersey, and for the past 11 years I have practiced as a Federal criminal defense attorney in northern New Jersey. At this point in these proceedings, I am sure there is little need to provide further comment concerning Judge Alito's legal acumen and outstanding accomplishments. However, I hope that the Committee may find it useful to hear the insights and observations of someone who worked closely with Judge Alito during the period of time that he served as United States Attorney for the District of New Jersey.

I first met Judge Alito when I joined the United States Attorney's Office in 1980. At that time, he was laboring in the Appeals Division, and I was in the Frauds Division. As a rookie, I quickly learned that if I ran into a particularly thorny legal or procedural problem, the most knowledgeable and approachable person to consult was Sam Alito. Although he soon left for the Solicitor Gen-