Kate Michelman Testimony

Senate Judiciary Committee

Judge Samuel Alito Confirmation Hearings

January 2006

Mr. Chairman, Senator Leahy, members of the committee: Many of you have known me in my professional capacity over the past twenty years. I want to speak with you today in a capacity that, at this historic and decisive moment, matters far more: as one woman -- a woman very much like the millions whose lives could be indelibly shaped by this nomination.

In 1969, I was a young, stay-at-home mother of three little girls, a practicing Catholic who had accepted the Church's teachings about birth control and abortion. The notion that abortion might be an issue I would face in my own life never occurred to me until the day my husband suddenly abandoned our family. In time, with nothing to live on, we were forced onto welfare. Soon after he left, I discovered I was pregnant. I knew instinctively that another child would turn a crisis into a catastrophe. After a long period of searching -- of balancing my moral and religious values about the newly developing life with my responsibilities to my three young daughters -- I decided to have an abortion. Mr. Chairman, I might add parenthetically that of the countless women I have encountered and known over the course of my career, not one has made a decision about abortion -- either for it against it -- without first contemplating the gravity of that choice.

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Not one needed the tutelage or supervision of the state to understand her own ethical values, much less to be reminded to consult them. And every one of them deserved the respect and protection afforded by Roe v. Wade.

Because this all occurred prior to Roe I was legally prevented from acting privately on my decision. I was compelled to submit to two interrogations before an all-male panel of doctors. They probed every aspect of my private life -- from what kind of sex life my husband and I had to whether I was capable of dressing my children in the morning. Eventually, they gave their permission. I had been admitted to the hospital and was awaiting the procedure when a nurse arrived to tell me that state law imposed yet another humiliating burden. The government required me to obtain my husband's consent. I was forced to leave the hospital, find where he was living and ask him to give me his permission.

Mr. Chairman and Senators, I do not tell this story to ask your sympathy. It was a humiliating experience, but one that also awakened me to a lifetime of activism devoted to ensuring no other woman ever would be required to endure such humiliation. I tell you this story because we stand at the threshold of millions of women -- women doing their very best to do what is right for themselves and their families -- once more facing the dreadful choice between the degradation of the review board and the danger of the back alley. This is neither hyperbole nor hype. It is the simple, demonstrable reality of the situation.

Nor am I here to discuss *Roe v. Wade* alone. As Harry Blackmun wrote and as Samuel Alito himself strategized, it is possible to strip away all the meaningful rights in the original decision without explicitly overturning Roe. Roe v. Wade would be left as

an empty shell and the women of America would be left with no reproductive rights. Predicting how any given judge will decide on any given case is a Washington parlor game that distracts from the central issue. That issue is whether we any longer will recognize limits on the government's authority to reach into the most intimate areas of our private lives. There is nothing in Judge Alito's lengthy record to suggest he recognizes such limits for anyone, and even less so for women -- and there is much in his record that indicates, clearly and beyond the boundaries of reasonable dispute, that he explicitly rejects the idea of privacy as a fundamentally American ideal. A woman's right to choose is a powerful manifestation of privacy -- but it is one among many, and all of them should concern us.

Judge Alito approaches the law with what seems to be a presumption that whatever the government desires to do, to whomever it desires to do it, is valid. There is no sense in his writings or rulings of privacy as a Constitutional right -- indeed, an innately human right with which the dignity of individuals is inextricably bound. In Judge Alito's record, not only are individuals often powerless against the prerogatives of the state, individuals are, more often than not, simply absent altogether. In many ways, what Judge Alito has written is less disturbing than what he omits: any sense of how his opinions and actions bear on real people whose lives are shaped by the decisions he make.

When he ruled that a Pennsylvania law requiring women to notify their husbands before obtaining an abortion was not an "undue burden," there was no sense that a woman like me, in a situation like mine, ever existed or mattered. When he wrote that commonly used methods of birth control, including the Pill, could be reasonably

classified as abortifacients, the women who would be forced by circumstance into pregnancies neither they nor their families could bear were nowhere to be found. His writings are cogent, but also coldly clinical; they are analytical, but also antiseptic. They contain veneration for the state, but place little value on the individual's government exists to serve, protect and respect.

Mr. Chairman, I have been involved in many Supreme Court nominations. But none more important as this one -- or as dangerous. For the contrast between Judge Alito and the Justice he would replace is stark. As the first woman to serve on the Court, Justice O'Connor has brought a unique perspective to the law that is evident in her opinions upholding a woman's right to choose, protecting women from discrimination and defending affirmative action. Quite often, she has been the decisive vote in 5-4 cases whose balance Judge Alito would now tip the other way. And here, Senators, it is important to note that Justice O'Connor is a judicial conservative and she has not always fully protected Constitutional rights and liberties. But she has been the Justice more than any other who has crafted legal approaches that retained some meaningful protections for rights that other Justices sought to deny completely. Judge Alito stands far to her right in every one of these areas and more. Still, the most disturbing difference between these two jurists is not simply the conclusions at which they arrive, but also how they reach them: Justice O'Connor assesses each case with careful attention to what the law means and who it affects, for she knows that is where the essence of justice lies. In Judge Alito's approach to the law, there are no individuals, there is no privacy -- and without them, there can be neither justice nor human dignity.

Let me close on this note: Judge Alito has parried challenges to his record by promising an open mind and a respect for precedent. But women's rights -- not simply in *Roe,* but in other cases as well -- have been incrementally yet radically curtailed while satisfying *stare decisis* by nominally upholding the underlying precedent. More important is whether this assurance offered in the last moment, in such a highly political context, outweighs the totality of his record. It would seem far better to me for Judge Alito simply to reaffirm the highly conservative views he has always espoused so that an open and honest debate may be had. To do so is his right. It is also the right of millions of American women to say that our lives, our privacy, our dignity and fullness as human beings also have a place in this debate -- and to conclude: not this judge, not to replace this justice, not at this critical and fragile time. Thank you.