



Statement of Senator Dianne Feinstein on Judiciary Committee Vote on the  
nomination of Judge Samuel Alito to be an  
Associate Justice of the Supreme Court

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*Washington, DC – U.S. Senator Dianne Feinstein (D-Calif.) today described her rationale for voting against the nomination of Judge Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court. The following are the remarks, as delivered, by Senator Feinstein at a business meeting of the Senate Judiciary Committee:*

“Thank you very much, Mr. Chairman.

I want to try to answer Senator Kyl’s question and to an extent, my answer to what Senator DeWine has just said.

Senator Kyl asked the question, I think it was rhetorical, but he said, ‘Why is this committee so divided over Judge Alito?’

And I’d like to say this, the response is: what’s happening within this court, first; secondly, what is happening within this nation; and thirdly, this president has clearly indicated that he wants to take the Court even further to the right than it has been in the last 10 years.

Now, that’s a consequential movement.

It’s a very different day and time than when Justice Ginsburg and Justice Breyer were before this Committee. There was not the polarization within America that is there today and not the defined move to take this Court in a singular direction.

I believe that decisions in this court are not mathematical computations of legal points. Senator DeWine mentioned that this man is credentialed and qualified. I don’t disagree with that. If they were mathematical computations, I’d vote aye.

But the fact of the matter is that legal philosophy and personal views do play a role on the Supreme Court. The recent 6-3 decision on *Gonzales v. Oregon* where the Supreme Court upheld Oregon’s Death with Dignity Act, I think, is a good example.

When Chief Justice Roberts came before the Senate, many of us were interested in his view of the federal court's role in end-of-life decisions.

Judge Roberts told us that he had the view that the federal government should not enter this arena. And when discussing my point that he would not want the government to tell him what to do, he said this, quote: 'The basic understanding is that it's a free country and the right to be left alone is one of our basic rights.'

Now, just last week, he joined the two most conservative members of the Court, Justices Scalia and Thomas, and would have overruled a referendum twice supported by Oregon state voters.

So, now while none of us can predict how someone will vote on the Court, personal views and legal philosophies do play a role. Perhaps not the majority of the time when the question isn't that controversial, but certainly when the question is controversial, personal views and legal philosophies do play a role.

It is my conclusion that Judge Alito would most likely join Justices Thomas and Scalia in the originalist and strict constructionist interpretations of the Constitution.

Those are the interpretations that have been used by the Rehnquist Court in the past decade to overthrow all or portions of thirty laws passed by the Congress of the United States.

I have come to this conclusion based on Judge Alito's record in the Reagan Administration and on the bench.

In 1986, he was a deputy in the Office of Legal Counsel and that's where he recommended that President Reagan veto the Truth in Mileage Act because it 'violat[e]d the principles of Federalism.' His argument was that the federal government should not be involved with the health, safety, and welfare of citizens. And instead, he believed that was better regulated by the state.

Judge Alito's restrictive views of congressional authority also surfaced in his decisions while on the Third Circuit. A prime example was *Rybar*. Senator Graham and I discussed *Rybar* on 'Fox News Sunday,' and we have a very different view of *Rybar*.

In *Rybar*, Judge Alito dissented. And in his dissent, he concluded that Congress did not properly enact this law, which had to do with the intrastate sale of two machine guns bought at a gun show, one one day, one the next day, and sold the following day.

In reaching his decision, he said that the specific finding that the regulation of firearms purchased and sold intrastate was governed by Congress' authority under the Commerce clause. He seemed to ignore past precedents clearly establishing Congressional authority to regulate firearms and previous statutes that had already outlined the obvious impact guns have on interstate commerce.

Now what's the point in all of this? The point in all of this is his decision to dissent in a situation where Congressional authority had been clearly established.

If he were to vote this way on the Court, I believe this means it would be very difficult for us to pass laws to protect families from gun violence, something I care about deeply; to protect workers' safety standards, something I care about deeply; to establish consumer protection laws; and to ensure equal opportunity for all Americans.

This could be severely weakened by the view, the limited view, of the Constitution that the Rehnquist Court has employed in more than thirty cases before where they have invalidated some or part of laws passed by the Congress.

Now, there are two cases currently before the Court that Judge Alito could rule on: one is *Rapanos v United States* and the other is *Carabell v U.S. Army Corps of Engineers*. The issue in both is whether Congress has the authority to regulate non-navigable waterways under the Clean Water Act.

If the Supreme Court were to strike down this provision of the Clean Water Act, the federal government would lose its primary tool to protect wetlands.

That's one example of how important this nomination is. And every indication that Judge Alito has given is that he would use this restrictive interpretation of the Constitution.

Now the comments about executive power that have been made by my colleagues, I think, are correct. Today, our nation is in a very different place than it was ten years ago. We face profound questions about our constitutional framework of checks and balances.

At the Department of Justice, Judge Alito was part of the effort to press for expanded presidential power. There's no doubt about that. It is clear that he still held those views, in support of a strong executive as late as 2000.

Let me quote him, first, on signing statements, presidential signing statements: 'From the perspective of the Executive Branch, the issuance of interpretative signing statements would have two advantages. It would increase the power of the executive to shape the law.'

*The power of the executive to shape the law.* Do we believe this is correct? Or do we believe that the ability to make the law rests with the Congress and the President can sign it or veto it and indicate his reasons for so doing, but not shape the law to his specific demand?

Then when speaking before the Federalist Society in November 2000, he expressed his support for the "unitary executive" theory. And despite the fact that this theory had been overwhelmingly rejected by the Supreme Court a decade ago, he said, and I quote: 'I still think that this theory best captures the meaning of the Constitution's text and structure.'

Now let me get to my last point. If one is pro-choice in this day and age, with the balance of the Court in question, one can't vote for Judge Alito. It is that simple.

I'm very concerned about the impact he would have on women's rights, including a woman's right to make certain reproductive choices, as limited by state regulations in many cases.

When the issue of *Roe* and precedent came up during the Roberts hearings, he engaged in a conversation with us. Judge Roberts had acknowledged that *Roe* was well-settled. I actually read part of Roberts' transcript and handed a copy to Judge Alito to review. I asked where he differed from Chief Justice Roberts and if he too believed that *Roe* was well-settled.

And Judge Alito's response was, and I quote: 'I think that depends on what one means by the term well settled.'

Now that was just after reading a very explicit and full description that Judge Roberts had made before us. It clearly indicated, in my view at least, that he didn't regard precedent that highly.

I next tried to talk to him about his legal views and what he meant what he said, in response to a question, 'precedent is not an inexorable command.'

Now what's interesting about that is that that's exactly the language Justice Rehnquist used arguing to overturn *Roe*.

So that spoke volumes to me. That said that Judge Alito probably would not uphold *Roe*, given the chance.

And then I listened carefully to the testimony of many legal specialists, including professors in constitutional law. I listened to Professor Tribe. And something he said really struck me.

This is what he said: 'The court will cut back on *Roe v. Wade* step by step, not just to the point where, as the moderate American center has it, abortion is cautiously restricted, but to the point where the fundamental underlying right to liberty becomes a hollow shell.'

And then I began to think about all of the things the fundamental right to liberty in this country encompasses such as: end of life decisions, privacy of medical records, privacy from unwarranted government intrusion.

On February 6 we begin the discussion and hearings on an interpretation of the use of force resolution to countenance something that none of us ever thought it would countenance – a threat to this liberty interest.

And I came to the conclusion that the fundamental right to liberty is at issue with this nominee.

It has nothing to do with his qualifications and his credentials. But it does have something to do with how far we are willing to see this Court move to the right and out of the mainstream of legal thinking in this great country.

And I, for one, really believe that there comes a time when you just have to stand up, particularly when you know that the majority of people think as you do.

And I truly believe that. I really believe the majority of people in America believe that a woman should have certain rights of privacy, modified by the state, but a certain right to privacy. And if you know that this person is not going to respect those rights, but holds to a different theory, then you have to stand up.

And so all of this is in answer to Senator Kyl, because this is a hard vote. But it is a vote that is made with the belief that legal thinking and personal views, especially at times of crisis, at times of conflict, and at times of controversy do mean something. And those of us that don't agree with the view have to stand up and vote no.

And so I am one of those.

Thank you, Mr. Chairman.”

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