



Opening Statement of Senator Dianne Feinstein  
on the Nomination of Samuel A. Alito  
to be Associate Justice of the U. S. Supreme Court

January 9, 2006

“I’m one who believes that your appointment is the pivotal appointment, and because you replace Sandra Day O’Connor, and because she was the fifth vote on 148 cases, you well could be a very key and decisive vote.

During these hearings, I think it’s fair for us to try to determine if your legal reasoning is within the mainstream of American legal thought and whether you will follow the law regardless of your personal views about the law. And since you have provided personal and legal opinions in the past, I very much hope that you will be straightforward with us, and share your thinking and legal reasoning with the Committee about individual constitutional rights as well as checks and balances between the branches of government.

I’d like to use my time to discuss some of my concerns.

I have very deep concern about the legacy of the Rehnquist Court and its efforts to restrict Congressional authority to enact legislation by adopting a very narrow view of several provisions of the Constitution, including the Commerce Clause and the 14<sup>th</sup> Amendment. This trend, I believe, if continued, would restrict, and could even prevent, the Congress from addressing major environmental and social issues in the future.

As I see it, certain of your decisions on the 3<sup>rd</sup> Circuit raise questions about whether you would continue to advance the Rehnquist Court’s limited view of Congressional authority – and I hope to clear that up.

Let me give you one example here – and that’s the *Rybar* case. Your dissent argued that Congress lacked the authority to ban the possession and transfer of machine guns, based essentially on a technicality that Congressional findings from previous statutes were not explicitly incorporated in the legislation.

You took this position – even though the Supreme Court had made clear in 1939 – the *Miller* case -- that Congress did have the authority to ban the possession and transfer of firearms, and even though Congress had passed three federal statutes that extensively documented the impact that guns and gun violence have on interstate commerce.

I am concerned that the *Rybar* opinion demonstrates a willingness to strike down laws with which you personally may disagree by employing a narrow reading of Congress's constitutional authority to enact legislation.

Now the subject of executive power has come up, and indeed it is a very big concern. I think we are all concerned about how you will approach and decide cases involving expanded presidential powers.

Recently, there have been several actions taken by this Administration that have highlighted why the constitutional checks and balances between the branches of government are so essential. These include:

- Allowing the use of torture, whether through an expansive reading of what is permitted under federal law or disregarding the Geneva Conventions, including the Convention on Torture;
- Whether the President is bound by ratified treaties;
- Allowing the detention of American citizens without providing due process; and
- Whether the President can conduct electronic surveillance on Americans without a warrant, despite legislation that establishes a court process for all electronic surveillance.

I am also concerned with the impact you could have on women's rights and specifically, a woman's right to choose. In the 33 years since *Roe* was decided, there have been 38 occasions on which *Roe* has been taken up by the Court. The Court has not only declined to overrule *Roe*, but it has also explicitly reaffirmed its central holding.

In our private meeting, when we spoke about *Roe* and precedent, you stated that you could not think of a case that has been reviewed or challenged more than *Roe*. You also stated that you believe the Constitution does provide a right of privacy and that you have a deep respect for precedent.

However, in 1985 you clearly stated that you believed *Roe* should be overturned and that the Constitution does not protect a woman's right to choose. Despite voting to sustain *Roe* while on the Third Circuit, your opinions also raise questions about how you would rule if not bound by precedent. I will be interested to learn about your legal and personal views on *Roe* and the Constitutional right to privacy as you see it today.

Finally, I am concerned about the role the Court will play in protecting individual rights in this and the next century. Historically, the Court has been the forum to which individuals could turn when they believed their constitutional rights were violated.

This has been especially noteworthy in the arena of civil rights. In that same 1985 job application, you wrote that in college you developed a deep interest in constitutional law

‘motivated in large part by disagreement with the Warren Court’s decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment.’ This is especially troubling given that reapportionment stands for the bedrock principle of one man, one vote. Exactly what you mean by this is necessary to clear this up.

Additionally, Justice O’Connor was a deciding vote on a critical affirmative action case involving the University of Michigan --*Grutter v. Bollinger*. So your views here may well be pivotal. So I think the American people deserve to know you feel, how you think, how you would legally reason affirmative action legislation.

When you served in the Solicitor General’s Office during the Reagan Administration you argued in three cases against the constitutionality of affirmative action programs. Then once on the 3<sup>rd</sup> Circuit, you sided against the individual alleging discrimination in about three-quarters of the cases that came before you. So we have a lot to learn about your legal reasoning and how you would apply that legal reasoning.

I really look forward to our discussion on these and other issues through the upcoming rounds of questions.

Because this appointment is so important, I hope you will be straightforward with us, and thereby be straightforward with the American people. So thank you and welcome.”

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