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CONFIRMATION HEARING ON THE NOMINATION OF SAMUEL A. ALITO, JR. TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JANUARY 9–13, 2006

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NOMINATION OF SAMUEL A. ALITO, JR., OF NEW JERSEY, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

MONDAY, JANUARY 9, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 12 p.m., in room 216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Grassley, Kyl, DeWine, Sessions, Graham, Cornyn, Brownback, Coburn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin.

Chairman SPECTER. Good afternoon, ladies and gentlemen. The Senate Judiciary Committee will now proceed to the confirmation hearing of Judge Samuel Alito, Jr. for the Supreme Court of the United States. A few matters of administration or housekeeping, and then we will proceed to the opening statements.

Today we will hear first from Judge Alito—the introduction of his family. Judge, the floor is yours to introduce your family.

Judge ALTIO. Thank you very much, Mr. Chairman. Let me introduce my wife, Martha, who is here today; and my sister, Rosemary, who is a lawyer in New Jersey and a tough trial lawyer. I am glad that she took time from her schedule to come to the hearing today. My daughter, Laura, who is a senior at James Caldwell High School in West Caldwell, New Jersey; and if a father can be permitted to brag for a second, a really great swimmer who led her high school team to win the county championship last week. My son, Phillip, who is a second-year student at the University of Virginia. And when I had my confirmation hearing for the Court of Appeals, Phillip was 3 years old. And when I was called up to the chair, he took it upon himself to run up and sit next to me in case any hard questions came up.

[Laughter.]

Judge ALTIO. I don't know whether he is going to try the same thing tomorrow, but probably I could use the help.

I am glad that my in-laws are able to be here today: my father-in-law, Gene Bomgardner, who is a retired Air Force NCO; and my mother-in-law, Barbara Bomgardner, who is a retired Air Force librarian. And my cousins Andrew and Aldomar Kiriev from Gwynedd Valley, Pennsylvania, are also here.

My mother, who turned 91 a couple of weeks ago, unfortunately is not able to be here today, but I am sure she is watching at home.

Thank you very much, Mr. Chairman.

Chairman SPECTER. Well, thank you, Judge Alito. You have a beautiful family, and we are delighted to have them with us on the confirmation proceedings.

We will have 10-minute rounds of opening statements, each Senator 10 minutes. We will then turn to the presenters, those who will be presenting Judge Alito formally to the Committee. And then we will administer the oath to Judge Alito, and we will hear his testimony.

We will begin tomorrow morning at 9:30 for the opening round of questions. Each Senator will have 30 minutes on the opening round, and we have a second round scheduled of 20 minutes for each Senator. And then we will see how we will proceed.

Our practice is to adhere to the time limits, and we do that for a number of reasons. One of them is that Senators come and go, and if we maintain the schedule, which is known to everybody, they know when to return for their next round of questions. We will take 15-minute breaks at a convenient time, and, again, we will hold the breaks to 15 minutes.

I have worked closely with Senator Leahy on scheduling matters and all other matters, and this is the model that we used for the confirmation of Chief Justice Roberts. It is our intention to conclude the hearings this week, and as Senator Leahy and I worked out, the arrangement is to have a markup on Tuesday, January the 17th, subject to something extraordinary happening.

Now let me yield to the distinguished Ranking Member, Senator Leahy.

Senator LEAHY. Well, Mr. Chairman, I don't want to hold up your opening statement, or the others. I do appreciate people being here. As the hearing for Chief Justice John Roberts showed, there will be real questions asked. I would hope Senators on both sides of the aisle would do that. I think it is important. We are talking about a position representing 295 million Americans.

On the schedule, I will work with the senior Senator from Pennsylvania, the Chairman. I understand one of our leaders once said that getting Senators to all move in order is like having bullfrogs in a wheelbarrow. But we will continue to work towards that, and I think the most important thing is we have a good, solid hearing this week.

Mr. Chairman, you have been totally fair in your procedures for this, as always.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Thank you very much, Senator Leahy. And now we begin the opening statements.

No Senator's vote, except for the declaration of war or the authorization for the use of force, is more important than the confirmation of a nominee to the Supreme Court for a lifetime appointment. Judge Alito comes to this proceeding with extensive experience as a Government lawyer, as a prosecutor, and as a judge. He has written some 361 opinions. He has voted in more than 4,800

cases. And it is possible to select a few of his cases to place him at any and every position on the judicial spectrum. By selecting the right cases, he could look like a flaming liberal or he could look like an arch-conservative.

This hearing will give Judge Alito the full opportunity to address the concerns of 280 million Americans on probing questions which will be put to him by 18 Senators representing their diverse constituencies. I have reserved my own vote on this nomination until the hearing is concluded. I am committed as Chairman to a full, fair, and dignified hearing. Hearings for a Supreme Court nominee should not have a political tilt for either Republicans or Democrats. They should be in substance and in perception for all Americans.

There is no firmly established rule as to how much a nominee must say to be confirmed. While I personally consider it inappropriate to ask the nominee how he would vote on a specific matter likely to come before the Court, Senators may ask whatever they choose, and the nominee is similarly free to respond as he chooses. It has been my experience that the hearings are really, in effect, a subtle minuet, with the nominee answering as many questions as he thinks necessary in order to be confirmed.

Last year, when President Bush had two vacancies to fill, there was concern expressed that there might be an ideological change in the Court. The preliminary indications from Chief Justice Roberts's performance on the Court and his Judiciary Committee testimony on modesty, stability, and not jolting the system all suggest that he will not move the Court in a different direction. If that holds true, Judge Alito, if confirmed, may not be the swing vote regardless of what position Judge Alito takes on the political spectrum.

Perhaps the dominant issue in these hearings is the widespread concern about Judge Alito's position on a woman's right to choose. This has arisen in part because of a 1985 statement made by Judge Alito that the Constitution does not provide for the right to an abortion. It has arisen in part because of his advocacy in the Solicitor General's office seeking to limit or overrule *Roe* and from the dissenting portion of his opinion in *Casey* v. *Planned Parenthood* in the Third Circuit.

This hearing will give Judge Alito the public forum to address the issue as he has with Senators in private meetings, that his personal views and prior advocacy will not determine his judicial decisions, but instead he will weigh factors such as *stare decisis*, that is, what are the precedents; that he will weigh women's and men's reliance on *Roe* and he will consider too whether *Roe* is "embedded in the culture of our Nation."

The history of the Court is full of surprises on the issue. The major case upholding *Roe* was *Casey* v. *Planned Parenthood*, where the landmark opinion was written jointly by three Justices, Justice O'Connor, Justice Kennedy and Justice Souter. Before coming to the Court, Justice Souter, Justice Kennedy and Justice O'Connor, had all expressed views against a woman's right to choose. David Souter, as Attorney General of New Hampshire, even opposed changing New Hampshire's law prohibiting abortion even after the Supreme Court of the United States had declared it unconstitutional. At the time of Justice Souter's confirmation hearing, there

was a stop Souter rally of the National Organization for Women a few blocks from where we currently are holding this hearing, displaying in red a banner "Stop Souter or Women Will Die," "Stop Souter Rally, a Mass Lobbying Day," somewhat similar to this morning's press where banners are paraded in front of the Supreme Court "Save Roe" and a brochure circulated again by NOW, "Save Women's Lives, Vote No on Alito."

The history of this issue has been one full of surprises. This hearing comes at a time of great national concern about the balance between civil rights and the President's national security authority. The President's constitutional powers as commander in chief to conduct electronic surveillance appear to conflict with what Congress has said in the Foreign Intelligence Surveillance Act. This conflict involves very major considerations raised by Justice Jackson's historic concurrence in the *Youngstown Steel* seizure cases, where Justice Jackson wrote, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right, and all that Congress can delegate. When the President acts in absence of a congressional grant of authority, he can rely only upon his own independent powers. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb." And as Justice Jackson noted, "What is at stake is the equilibrium established in our constitutional system."

Another major area of concern is congressional power, and in recent decisions the Supreme Court of the United States has declared Acts of Congress unconstitutional, really denigrating the role of Congress. In declaring unconstitutional legislation designed to protect women against violence, the Supreme Court did so notwithstanding a voluminous record in support of that legislation, but because of Congress's "method of reasoning," rather insulting to suggest that there is some superior method of reasoning in the Court.

When the Supreme Court handled two cases recently on the Americans with Disabilities Act, they upheld the Act as it applied to discrimination as to access, and declared it unconstitutional as it applied to discrimination in employment. They did so by applying a test of what is called "congruent and proportionate," which candidly stated, no one can figure out. In dissent, Justice Scalia called it a flabby test, where the Court set itself up as the taskmaster to see if Congress had done its homework, and Justice Scalia said that it was an invitation to judicial arbitrariness by policy driven decisionmaking, and this hearing, I know, will involve consideration as to Judge Alito's views on congressional power.

There is reason to believe that our Senate confirmation hearings may be having an effect on Supreme Court nominees on their later judicial duties. Years after their hearings, Supreme Court Justices talk to me about our dialogs at these hearings. This process has now evolved to a point where nominees meet most of the Senators. In this process, nominees get an earful. While no promises are extracted, statements are made by nominees which may well influence their judicial decisions. Chief Justice Roberts, for example, will have a tough time giving a jolt to the system after preaching modesty and stability. There is, I think, a heavy sense of drama

as these hearings begin. This is the quintessential example of separation of powers under our constitutional process, as the President nominates, the Senate confirms or rejects, and the successful nominee ascends to the bench. While it may be a bit presumptuous, I believe the Framers, if they were here, would be proud and pleased to see how well their Constitution is being applied.

My red light just went on, and I now yield to my distinguished colleague, Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman.

Good afternoon, Judge and Mrs. Alito, and the others.

Following up on what the Chairman was saying, the challenge for Judge Alito in the course of these hearings is to demonstrate that he is going to protect the rights and liberties of all Americans, and in doing that, serve as an effective check on Government overreaching. I have said that the President did not help his cause by withdrawing his earlier nomination of Harriet Miers in the face of criticism from a narrow faction of his own party who were concerned about how she might vote.

Supreme Court nominations should not be conducted through a series of winks and nods designed to reassure a small faction of our population, while leaving the American people in the dark. And no President, I think we would all agree, should be allowed to pack the courts, and especially the Supreme Court, with nominees selected to enshrine Presidential claims of Government power. The checks and balances that should be provided by the courts, Congress and the Constitution are too important to be sacrificed to a narrow partisan agenda.

This hearing is the opportunity for the American people to learn what Samuel Alito thinks about their fundamental constitutional rights and whether he—you, Judge—will protect their liberty, their privacy and their autonomy from Government intrusion.

The Supreme Court belongs to all Americans, not just to the person occupying the White House, and not just to a narrow faction of either political party, because the Supreme Court is our ultimate check and balance. Independence of the Court and its members is crucial to our democracy and our way of life, and the Senate should never be allowed to be a rubber stamp. Neither should the Supreme Court. So I will ask the Judge to demonstrate his independence from the interests of the President nominating him. This is a nomination to a lifetime seat on the Nation's highest Court. It is a seat that has often represented the decisive vote on constitutional issues, so we have to make an informed decision. That means knowing more about Samuel Alito's work in the Government and knowing more about his views.

I will, as the Judge knows, ask about the disturbing application he wrote to become a political appointee in the Meese Justice Department. In that application he professed concern with the fundamental principle of "one person, one vote," a principle of the equality that is the bedrock of our laws. This hearing is the only opportunity that the American people and their representatives have to consider the suitability of the nominee to serve as a final arbiter

on the meaning of the Constitution and its laws. Has he demonstrated commitment to the fundamental rights of all Americans? Would he allow the Government to intrude on Americans' personal privacy and freedoms?

In a time when this administration seems intent on accumulating unchecked power, Judge Alito's views on Executive power are especially important. It is important to know whether he would serve with judicial independence or as a surrogate for the President nominating him. So this public conversation, this hearing over the next few days is extremely important. It is the people's Constitution and the people's right that we are all charged with protecting and preserving. In this hearing we embark on the constitutional process, one that was designed to protect these rights and has served this country so very well for more than two centuries.

I am reminded of a photograph, Mr. Chairman, that hangs in the National Constitution Center in Philadelphia. It shows the first women ever to serve on the Supreme Court of the United States taking the oath of office in 1981. How Justice Sandra Day O'Connor serves is as a model Supreme Court Justice, widely recognized as a jurist with practical values and a sense of the consequences of the legal decisions being made by the Supreme Court. I regret that some on the extreme right have been so critical of Justice O'Connor, and that they adamantly oppose the naming of a successor who shares her judicial philosophy and qualities. Their criticism actually reflects poorly upon them. It does nothing to tarnish the record of the first woman to serve as Associate Justice of the Supreme Court of the United States. She is a Justice whose graciousness and sense of duty fuels her continued service, even agreeing to serve more than 6 months after her retirement date, and I know both you and I commend her for that.

The Court that serves America should reflect America. This nomination was an opportunity, of course, for the President to make a nomination based on diversity. He did not, even though there is no dearth of highly qualified Hispanics and African-Americans, other individuals who could well have served as unifying nominees while adding to diversity. But that, of course, is the President's choice, Judge, not yours. But I look forward to a time when the membership of the Supreme Court is more reflective of the country it serves.

As the Senate begins its consideration of President Bush's nominee, his third to this seat, to Justice O'Connor's seat, we do so mindful of her critical role in the Supreme Court. Her legacy is one of fairness, and when I decide how to vote it is because I want to see that legacy preserved. Justice O'Connor has been a guardian of the protections the Constitution provides the American people. She has come to provide balance and a check on Government intrusion into our personal privacy and freedoms. In the *Hamdi* decision she rejected the Bush administration's claim that they could indefinitely detain a United States citizen. She upheld the fundamental principle of judicial review over the exercise of Government power, and she wrote—and this is one we should all remember—she wrote that even war is not a blank check for the President when it comes to the rights of the Nation's citizens. She held that even this President is not above the law, and of course, no President, Democratic

or Republican, no President is above the law, as neither are you, nor I, nor anyone in this room.

Her judgment has also been critical in protecting our environmental rights. She joined in 5–4 majorities affirming reproductive freedom, and religious freedom, and the Voting Rights Act. I mention each of these cases because they show how important a single Supreme Court Justice is, and it is crucial that we determine what kind of Justice Samuel Alito would be if confirmed. Of course, Judge, my question will be, will you be an independent jurist?

It is as the elected representatives of the American people, all of the people, nearly 300 million people, that we in the Senate are charged with the responsibility to examine whether to entrust their precious rights and liberties to this nominee. The Constitution is their document. It guarantees their rights from the heavy hand of Government intrusion, and individual liberties, to freedom of speech, to religion, to equal treatment, to due process and to privacy. Actually, this hearing, this is their process. The Federal Judiciary is unlike the other branches of Government. Once confirmed, a Federal Judge serves for life, and there is no court above the Supreme Court. The American people deserve a Supreme Court Justice who can demonstrate that he or she will not be beholden to the President, but only to the law.

Last October, the President succumbed to partisan pressure from the extreme right of his party by withdrawing Harriet Miers. By withdrawing her nomination and substituting this one, the President has allowed his choice to be vetoed by an extreme faction within his party before even a hearing or a vote. Frankly, that was an eye-opening experience to me. It gives the impression there are those who do not want an independent Federal Judiciary. They demand judges who will guarantee the results that they want, and that is why the questions will be asked so specifically of you, Judge.

The nomination is being considered against the backdrop of another recent revelation, that the President has, outside the law, been conducting secret and warrantless spying on Americans for more than 4 years. This is a time when the protections of America's liberties are directly at risk, as are the checks and balances that serve to constrain abuses of power for more than 200 years. The Supreme Court is relied upon by all of us to protect our fundamental rights.

I have not decided how I will vote in this nomination, and like the Chairman, I will base my determination on the whole record at the conclusion of these hearings, just as I did in connection with the nomination of John Roberts to be Chief Justice. At the conclusion of those hearings I determined to vote for him.

The stakes for the American people could not be higher. At this critical moment, Senate Democrats serving on this Committee will perform our constitutional advice and consent responsibility with heightened vigilance. I would urge all Senators, Republicans and Democrats and Independents, to join with us in serious consideration. The appointment of the next Supreme Court Justice must be made in the people's interest and in the Nation's interest, not in the interest of any partisan faction.

Mr. Chairman, Thank you very much.

Chairman SPECTER. Thank you very much, Senator Leahy.
Senator Hatch.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman.

I welcome you, Judge Alito, your family members, friends and others who are accompanying you.

This hearing is part of an ongoing evaluation of Judge Samuel Alito's nomination to replace Justice Sandra Day O'Connor as Associate Justice of the Supreme Court of the United States. It is remarkable that after a nearly record-long period without a Supreme Court vacancy, we are here considering a second nominee in less than 6 months.

Mr. Chairman, let me first commend you for firmly and fairly handling these hearings. The timetable we are following reflects your efforts to accommodate all sides, and the 70 days since President Bush announced the nomination significantly exceeds the average for other Supreme Court nominees.

The debate over this and other judicial nominations is a debate over the judiciary itself. It is a debate over how much power unelected judges should have in our system of government, how much control judges should have over a written Constitution that belongs to the people. Ending up in the right place in this debate requires starting in the right place. The right place to start is the proper description of what judges are supposed to do, and the rest of the process should reflect this judicial job description.

The process for evaluating Judge Alito's nomination began when President Bush announced it more than 2 months ago. It continued with Judge Alito's meetings with more than two-thirds of the Senators and a vigorous debate in the media among analysts, scholars, and activists. As the Senate completes the evaluation process, we must keep some very important principles in mind and follow a few basic rules.

The first principle is that in this judicial selection process, the Senate and the President have different roles. Under the Constitution, the President, not the Senate, nominates and appoints judges. The Senate has a different role. We must give our advice about whether President Bush should actually appoint Judge Alito by giving or withholding our consent. Abiding by the Constitution's design and our own historical tradition requires that after Judge Alito's nomination reaches the Senate floor, we vigorously debate it and then vote up or down.

The second principle is that in our system of Government the judicial and legislative branches have different roles. As Chief Justice Roberts described it when he was before this Committee last fall, "Judges are not politicians. Judges must decide cases, not champion causes. Judges must settle legal disputes, not pursue agendas. Judges must interpret and apply the law, not make the law." This principle that judges are not politicians lies at the very heart of the judicial job description.

In addition to these two principles, a few basic rules should guide how we complete this confirmation process. First, we must remember that judicial nominees are constrained in what they may dis-

cuss and how they may discuss it. Like Chief Justice Roberts and others before him, Judge Alito is already a Federal judge. He not only will be bound by the canons of judicial ethics as a Supreme Court Justice, he is already bound by these canons as an appeals court judge. Because judges may not issue advisory opinions, judicial nominees may not do so either, especially on issues likely to come before the Court. That rule has always been honored.

Needless to say, those who will demand such advisory opinions in this hearing will do so precisely on those issues that are likely to come before the Court. They have a right to ask those questions. But as the Washington Post editorialized just this morning, however, "he will not—and should not—tell Americans how he will vote on hotly contested issues."

When Judge Ruth Bader Ginsburg was before us in 1993, she said that her standard was to give no hints, no forecasts, no previews, and declined to answer dozens of questions.

The second rule we should follow is to consider each part of Judge Alito's record on its own terms for what each part actually is. He wrote memos when he worked for the Justice Department. He has written judicial opinions while on the appeals court. He wrote answers to the questionnaire from this Committee in 1990 and again last year. He has written articles and given speeches. He has joined certain groups, and each of these is different. Each of these must be considered in its own context, on its own terms, rather than squeezed, twisted, and distorted into something designed instead to support a preconceived position or serve a preplanned agenda.

The third rule we should follow is considering Judge Alito's entire record. Some interest groups focus on—some would say they obsess about—one recusal question, or they cherrypick from the thousands of cases in which Judge Alito participated and the hundreds of opinions he authored or joined. Or they look at the results that ignore the facts and the law in those cases.

Judge Alito comes to us with a record that is long, broad, and deep. He deserves, and our constitutional duty requires, that we consider his entire record.

Finally, and perhaps most important, we must apply a judicial rather than a political standard to the information before us, and we do have a lot of information. The record includes more than 360 opinions of all kinds—majority, concurring, and dissenting—written during his judicial tenure. We have more than 36,000 pages of additional material, including unpublished opinions, legal briefs, articles, speeches, and Department of Justice documents relating to his service in the Office of Legal Counsel and in the Solicitor General's office. We must apply a judicial, not a political, standard to this record. Asking a judicial nominee whose side you will be on in future cases is a political standard. Evaluating Judge Alito's record by asking those whose side he has been on in past cases is, again, a political standard.

Scorecards are common in the political process, but they are inappropriate in the judicial process. The most important tools in the judicial confirmation process are not litmus paper and a calculator. Applying a proper judicial standard to Judge Alito's record means putting aside the scorecards and looking at how he does what

judges are supposed to do, namely, settle legal disputes by applying already established law.

A judicial standard means that a judicial decision can be entirely correct even when the result does not line up with our preferred political positions or cater to certain political interests. When he was here last fall, Chief Justice Roberts compared judges to umpires who apply rules they did not write and cannot change to the competition before them. We do not evaluate an umpire's performance based on which team won the game, but on how that umpire applied the rules inning after inning. We do not hire umpires by showing them the roster for the upcoming season and demanding to know which teams they will favor before those teams even take the field. Similarly, we should evaluate judges and judicial nominees based on the general process for applying the law to any legal disputes, not on the specific result in a particular case or dispute.

The fact that Judge Alito is such a baseball fan gives me even more confidence that he knows the proper role of a judge. I know that there is a pitched battle going on outside the Senate, with dueling press conferences, television ads, e-mail, petition drives, and stacks of reports and press releases. The Senate can rise above that battle if we remember the proper role for the Senate and the proper role for judges. We can rise above that battle if we respect that judicial nominees are limited in what they may discuss. Take each part of Judge Alito's record on its own terms. Consider Judge Alito's entire record and apply a judicial rather than a political standard.

Judge Alito, I know you. I have known you for a long time. You are a good man. You are an exceptional judge as well. I welcome you and your family to this Committee, and I hope that the days ahead will reflect more light than heat. We congratulate you that you are willing to go through this grueling process to represent your country on one of the three separated powers. It means so much to all of us, and I am grateful to personally know you as well as I do.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Hatch.

Senator Kennedy?

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you, Mr. Chairman.

Judge Alito, I join in welcoming you and your family to this Committee. I appreciated the opportunity to visit with you in my office a few weeks ago, and I was particularly impressed by your personal family story of how you were encouraged to do well and contribute to your community. And I also applaud your dedication to public service throughout your lifetime.

Supreme Court nominations are an occasion to pause and reflect on the values that make our Nation strong, just, and fair. And we must determine whether a nominee has a demonstrated commitment to those basic values. Will a nominee embrace and uphold the essential meaning of the four words inscribed above the entrance of the Supreme Court Building, "Equal justice under law."

Justice Louis Powell spoke for all of us when he said, "Equal justice under law is perhaps the most inspiring idea of our society. It is one of the ends for which our entire legal system exists."

As we have seen from Justice O'Connor's example, even one Justice can profoundly alter the meaning of those words for our citizens. Even one Justice can deeply affect the rights and liberties of the American people. Even one Justice can advance or reverse the progress of our journey.

So the question before us in these hearings is this: does Judge Alito's record hold true to the letter and the spirit of equal justice? Is he committed to the core values of our Constitution that are at the heart of our Nation's progress, and can he truly be evenhanded and fair in his decisions?

In a way Judge Alito has faced this issue before as a nominee to the Court of Appeals. I had the privilege of chairing his confirmation hearing in 1990, and at that time he had practiced law for 14 years, but only represented one client, the U.S. Government. I asked whether he believed he could be impartial in deciding cases involving the Government, and in that hearing Judge Alito said on the record that the most important quality for a judge is open-mindedness to the arguments, and he promised the Committee that he would make a very conscious effort to be absolutely impartial. We took him at his word and overwhelmingly confirmed him to the Third Circuit Court of Appeals.

We now have the record of Judge Alito's 15 years on the bench, and the benefit of some of his earlier writings that were not available 15 years ago, and I regret to say that the record troubles me deeply.

In a era where the White House is abusing power, is excusing and authorizing torture and is spying on American citizens, I find Judge Alito's support for an all-powerful executive branch to be genuinely troubling. Under the President's spying program there are no checks and balances. There is no outside review of the legality of this brazen infringement on the civil rights and liberties of the American people. Undeterred by the public outcry, the President vows to continue spying on American citizens. Ultimately the courts will make the final judgment whether the White House has gone too far. Independent and impartial judges must assess the proper balance between protecting our liberties and protecting our national security.

I am gravely concerned by Judge Alito's clear record of support for vast Presidential authority unchecked by the other two branches of Government. In decision after decision on the bench, he has excused abusive actions by the authorities that intrude on the personal privacy and freedoms of average Americans, and in his writings and speeches he has supported a level of overreaching Presidential power that, frankly, most Americans find disturbing and even frightening.

In fact, it is extraordinary that each of the three individuals this President has nominated for the Supreme Court, Chief Justice Roberts, Harriet Miers and now Judge Alito, has served not only as a lawyer for the executive branch, but as a defendant of the most expansive view of Presidential authority. Perhaps that is why this President nominated them. But as Justice O'Connor stated, even a

state of war is not a blank check for a President to do whatever he wants. The Supreme Court must serve as an independent check on abuses by the executive branch and a protector of our liberties, not a cheerleader for an imperial presidency.

There are other areas of concern. In an era when too many Americans are losing their jobs or working for less, trying to make ends meet, in close cases Judge Alito has ruled the vast majority of the time against the claims of the individual citizens. He has acted instead in favor of Government, large corporations and other powerful interests. In a study by the well-respected expert, Professor Cass Sunstein of the University of Chicago Law School, Judge Alito was found to rule against the individual in 84 percent of his dissents. To put it plainly, average Americans have had a hard time getting a fair shake in his courtroom. In an era when America is still too divided by race and riches, Judge Alito has not written one single opinion on the merits in favor of a person of color alleging race discrimination on the job; in 15 years on the bench, not one.

When I look at that record in light of the 1985 job application to the Reagan Justice Department, it is even more troubling. That document lays out an ideological agenda that highlights his pride in belonging to an alumni group at Princeton that opposed the admission of women and proposed to curb the admission of racial minorities. It proclaims his legal opinion that the Constitution does not protect the right of women to make their own reproductive decisions. It expresses outright hostility to the basic principle of one person, one vote, affirmed by the Supreme Court as essential to ensuring that all Americans have a voice in their Government. This application was not a youthful indiscretion. It was a document prepared by a mature, 35-year-old professional.

Finally, many of us are concerned about conflicting statements that Judge Alito has made in response to questions from this Committee and others. As Chairman Specter has stated, this confirmation largely depends on the credibility of Judge Alito's statements to us, and we have questions. When asked about the ideological statements and specific legal opinions in his 1985 application, Judge Alito has dismissed those statements as just applying for a job.

When he was before this Committee in 1990 applying for a job to the circuit, he promised under oath that he would recuse himself from cases involving Vanguard, the mutual fund company in which he had most of his investments. But as a judge he participated in a Vanguard case anyway, and has offered many conflicting reasons to explain why he broke his word. We need to get to the bottom of this matter to assure ourselves that what Judge Alito says in these hearings will not be just words, but pledges that guide him in the future if he is confirmed.

Judges are appointed by and with the advice and consent of the Senate, and it is our duty to ask questions on great issues that matter to the American people and to speak for them. Many Republican Senators certainly demanded answers from Harriet Miers. We should expect no less from Judge Alito. There is not time for a double standard. If confirmed, Judge Alito could serve on the Court for a generation or more, and the decisions he will make as

Justice will have a direct impact on the lives and liberties of our children, our grandchildren and even our great-grandchildren. We have only one chance to get it right, and a solemn obligation to do so.

Judge Alito, I have serious questions to ask. I congratulate you on your nomination, and I look forward to your answers in these hearings.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I have a much more positive view of Judge Alito.

[Laughter.]

Senator GRASSLEY. I think the record will sustain my view. But first, Judge Alito, I welcome you and your proud family to the Committee, and congratulations on your nomination.

I first want to remind all Americans who might be listening that the Senate has a very important responsibility to confirm only well-qualified individuals who will faithfully interpret the law and the Constitution. Confirmation should be limited to those individuals who will be fair, unbiased, devoted to addressing the facts in the law before them without imposing their own values and political beliefs when deciding cases. Nominees should not be expected to precommit to ruling on certain issues in a certain way, nor should Senators ask nominees to pledge to rule on cases in a particular way.

If we fulfill our responsibility to the Constitution, the Supreme Court will be filled with superior legal minds who will pursue the one agenda that our Founding Fathers intended in writing the Constitution, justice rather than political or personal goals. The Supreme Court will then consists of individuals who meticulously apply the law and the Constitution regardless of whether the results they reach are popular or not. If we do our job right, the Supreme Court will not be made up of men and women who are on the side of the little guy or the big guy, rather the Supreme Court will be made up of men and women who are on the side of the law and the Constitution.

From all accounts, Judge Alito has an impressive and extensive legal and judicial record, certainly one worthy of someone on the Supreme Court. Judge Alito excelled at top-notch schools, member of law review, clerked for a Federal judge. He also held important positions at the Department of Justice, Office of Legal Counsel, the Solicitor General's Office and was U.S. Attorney for New Jersey before being appointed to the Third Circuit.

I want to remind the American people this nominee, Judge Alito, has been confirmed unanimously by the U.S. Senate, not once, but twice. This is a tremendous record of accomplishment in public service equal to any Supreme Court nominee that I have considered in the 25 years I have been on this Committee. Not only that, Judge Alito has a reputation for being an exceptional and honest judge devoted to the rule of law, as well as being a man of integrity.

Judge Alito enjoys the support and respect of people who work with him, practice with him, and therefore, know him best. Example, 54 of Judge Alito's law clerks, Democrats, Republicans and Independents alike, signed a letter to the Committee that stated, "We collectively were involved in thousands of cases and it never once appeared to us that Judge Alito has prejudged a case or ruled based on political ideology." Continuing to quote, "It is our uniform experience that Judge Alito was guided by his profound respect for the Constitution and the limited role of the judicial branch." Those 54 opinions say a lot about Judge Alito and his approach to judicial function. Like Chief Justice Roberts, it appears that Judge Alito tries to act like an umpire, calling the balls and strikes, rather than advocating a particular outcome.

I am also impressed with the very complimentary things that some lawyers have had to say about Judge Alito in the Lawyers Evaluation Section of the Almanac of Federal Judiciary. With respect to his legal ability, lawyers praised him, saying that Judge Alito was "exceptional," "a brilliant jurist." Another lawyer stated that, "to say that he is outstanding is to use understatement. He's the best judge on the circuit, maybe in the country."

With respect to his demeanor and temperament, lawyers found Judge Alito to be measured and judicial while on the bench. One lawyer commented that he is demanding, but always courteous. He may occasionally, quoting, "demonstrate a little bit of impatience with lawyers that aren't quite getting it. This can be directed at either side. It's just a sign that his mind is working more efficiently than yours. He's never discourteous, never abusive." Another lawyer said, "He is pleasant and courteous." Others commented about the impression that Judge Alito is a conservative judge, but certainly not out to impose his own personal agenda while on the bench. One lawyer commented that he "is a conservative, but reaches honest decisions," while another said, "By reputation he's known to be one of the more conservative judges on the court, but he is forthright and fair. He tries to decide cases in front of him in the right way."

The American Bar Association came out just last week with an evaluation of Judge Alito to be a Justice, and they considered things like integrity, judgment, compassion, open-mindedness and freedom from bias and commitment to equal justice under the law. The ABA once again found Judge Alito to be unanimously well qualified. This recommendation should have much weight for my colleagues on the other side, who have time and time again described the rating of the ABA as, quote, "gold standard." Yet, some liberal interest groups have come out in full force and have attempted to paint Judge Alito to be an extremist and to be an activist. They have criticized a nominee who has, from what I see described by these lawyers and fellow judges, a reputation of being a restrained jurist committed to the rule of law and the Constitution, but that is what these outside-the-mainstream groups always do.

They attack individuals who they believe will not implement their agenda before the Supreme Court, so Judge Alito should see criticism as a badge of honor worn by many past and present members of the Court. Yet, I am glad to see the public fully participate

in this process because this is the nature of our system of Government, but I do not like to see facts twisted, untruths fabricated to give the nominee a black eye even before he comes before our Committee.

So, Judge Alito, now you have that opportunity to set everyone straight on your record and your approach to deciding cases. These hearings are also an opportunity, a very good opportunity to remind the public about the proper role of a judge in our system of checks and balances limited Government. Judges are required by our democratic system not to overstep their positions to become policymakers or super legislators. Supreme Court nominees should know, without any doubt, that their job is not to impose their own personal opinions of what is right and wrong, but to say what the law is, rather than what they personally think the law ought to be. Supreme Court nominees should know that this exercise of judicial restraint is a key ingredient of being a good judge, as the Constitution constrains judges every bit as it constrains we legislators, executives and citizens in their actions.

Moreover, Supreme Court nominees should be individuals who not only understand but truly respect the equal roles and responsibilities of different branches of Government and our State Governments. As Alexander Hamilton said in Federalist No. 78, "The courts must decide the sense of the law, and if they should be disposed to exercise will instead of judgment, the consequences would be the substitution of their pleasure to that of the legislative body." Our Framers expected the judicial branch to be the least dangerous branch of Government.

At our meeting in my office in November, I heard Judge Alito place emphasis on the limited role of the courts in our democratic society. He also reiterated this belief in a questionnaire he submitted to this Committee. So I have some idea of how Judge Alito approaches the law and views the role of a judge. I am hopeful that his commitment to judicial restraint and to confining decisions to the law and the Constitution will shine through in this hearing, and I believe it will, and I am hopeful that my colleagues will give Judge Alito a civil, a fair and a dignified process, as well as an up or down vote, because as always, the Constitution sets the standard: the President nominates, the Senate deliberates, and then we are obligated to give our advice and consent in an up or down vote.

Judge Alito, I congratulate you.

Chairman SPECTER. Thank you very much, Senator Grassley.

Senator Biden.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Thank you, Mr. Chairman.

Judge, welcome. Mrs. Alito and your family, welcome. It is an incredible honor to be nominated by a President of the United States to be an Associate Justice of the Supreme Court, and you are to be congratulated.

Judge, this may be one of the most significant, consequential nominations that the Senate will vote on since I have been here in the last three decades. I think history has delivered you, fortunately or unfortunately, to a moment where Supreme Court histo-

rians far into the future are going to look back on this nomination and make a judgment whether or not with your nomination, and if you are confirmed, whether the jurisprudence of the Supreme Court begin to change from the consensus that existed the last 70 years, or whether it continued on the same path it has over the past six or seven decades, and that moment is right now.

Lest we think it is kind of like we all go through this process—and I like the phrase "minuet" that the Chairman used—we all act like there is not an elephant in the room. The truth of the matter is, there is significant debate among judicial scholars today as to whether or not we have gone off on the wrong path with regard to Supreme Court decisions. There is a very significant dispute that has existed in 5–4 decisions over the past two decades in a Court that is very closely divided on the critical, central issues of the day.

Just to make it clear, I am puzzled by some of the things you have said, and I am sure you are going to get a chance to tell me what you meant by some of the things you wrote and said, but when in your job application you talked about being proud, as you should be, to be proud of your subscription to and adhering to notions put forward in the National Review that you are a proud member of the Federalist Society, the National Conservative Political Action Committee, the American Spectator is something you look to, et cetera. These are all really very bright folks. They all have a very decided opinion on the issues of the day—very decided. And those very organizations I have named think, for example, we misread the Fifth Amendment and have been misreading it for the past three decades. Those same groups argue that, in fact, there is no right of privacy in the Constitution, et cetera. So people are not making this up. In a sense, it is not about you. You find yourself in the middle of one of the most significant national debates in modern constitutional history because you have been nominated to replace a woman, in addition, who has been the deciding vote on a significant number of these cases. Since 1995 there have been 193 5–4 decisions, and Justice O'Connor 77 percent of the time has been the deciding vote. And for 70 years, there has been a consensus among scholars and the American people on a reading of the Constitution that protects the right of privacy, the autonomy of individuals, while at the same time empowering the Federal Government to protect the less powerful. Only recently has the debate come that States rights are being trumped in a fundamental way, a reading of the 10th Amendment and 11th Amendment. That is a legitimate debate. Totally legitimate. But anybody who pretends that how you read the 10th and 11th Amendment does not have a fundamental impact on the things we care about is kidding themselves. They are either uninformed or they are kidding themselves.

So, Judge, there is a genuine struggle going on well beyond you, well beyond the Congress, in America about how to read the Constitution. And I believe at its core we have a Constitution, as our Supreme Court's first great Justice Marshall said in 1819, and I quote, "intended to endure for the ages to come and consequently to be adapted to the various crises of human affairs." That is the crux of the debate we are having now, whether it is an adaptable Constitution. A lot of my friends make very powerful and con-

vincing arguments—and they may be right—that, no, no, no, no, no, it is not adaptable, it is not adaptable. And since our country's founding, we have tried to keep Government's heavy hand out of our personal lives while ensuring that we do the most important thing, which is to protect those who cannot protect themselves. And the debate raging today is about whether we will continue along that path and whether our courts will continue to be one of the places where society puts the little guy—and I know this is not something you are supposed to say—the little guy on the same footing with the big guy. The one place David is equal to Goliath is in the Supreme Court.

It is also important to note that you are slated to replace the first woman ever nominated to the Supreme Court. We can pretend that is not the fact, but it is. And through no fault of your own, we are cutting the number of women in half on the Court. And now, as I said, that is not your fault, but I think it means that we have to take, at least speaking for myself, a closer look at your stands on issues that are important to women. And, moreover, Justice O'Connor brought critical qualities to the High Court that not everybody thinks are qualities—I happen to think they are—her pragmatism and her statecraft. Not that I have always agreed with what she said, far from it, but Justice O'Connor has been properly lauded in my view as a judge who approached her duties with open-mindedness and with a sensitivity to the effects her decisions would have on everyday, ordinary people. She, unlike Judge Bork, did not think that being on the Court would be "an intellectual feast," to quote Judge Bork. Justice O'Connor also brought balance to our highest Court. Most recently, as has been repeated many times, she cautioned about war does not give a blank check. Her decisions reflect, in my view, that our societies work very hard to improve the workaday world, to open doors to workers confronted by powerful employers and for women facing harassment and stereotypes.

Now, I acknowledge this is a very tough job a judge has in determining whether or not there is an openness that is required under the Constitution. But I also acknowledge that prejudice runs very deep in our society, and in the real world, discrimination rears its ugly head in the shadows where it is very difficult to root it out. But Justice O'Connor was not afraid to go into the shadows.

The Constitution provides for one democratic moment, Judge, before a lifetime of judicial independence when the people of the United States are entitled to know as much as we can about the person that we are about to entrust with safeguarding our future and the future of our kids. And, Judge, simply put, that is this moment, the one democratic moment in a lifetime of absolute judicial independence. And that is what these hearings are about, in my view.

In the coming days, we want to know about what you believe, Judge, how you view the Constitution, how you envision the role of the Federal courts, what kind of Justice you would seek to become. As I said, this one democratic moment when the people, through their elected representatives, get to ask questions of a President's choice for the highest Court. And I hope you will be forthcoming.

I cannot imagine, notwithstanding what many of my colleagues, whom I have great respect for, believe, I can't imagine the Founders, when they sat down and wrote the document and got to the Appointments Clause and said, You know what? The American people are entitled to know before we make him President, before we make her Senator, before we make him Congressman, what they believe on the major issues of the day. But judges, Supreme Court nominees, as long as they are smart and honest and decent, it really does not matter what they think. We do not have to know. I can't fathom—can't fathom—that that was the intent of the Founders. They intended the American people to know what their nominees thought.

And I might add—and I will end with this—we just had two Supreme Court Justices before our caucus just as they were before, I think, the Republican Caucus. They ventured opinions on everything. On everything, things that are going to come before the Court. It did not in any way jeopardize their judicial independence.

So, Judge, I really hope that this does not turn out to be a minuet. I hope it turns out to be a conversation. I believe we—you and I and this Committee—owe it to the American people in this one democratic moment to have a conversation about the issues that will affect their lives profoundly. They are entitled to know what you think.

And I remind my colleagues, many of whom are on this Committee, they sure wanted to know what Harriet Miers thought about everything. They sure wanted to know in great detail. They were about ready to administer blood tests. The good news is no blood test here. The good news is no blood test, just a conversation, and I hope you will engage in it with us because I am anxious to get a sense of how you are going to approach these big issues.

I thank you very much, Judge.

Chairman SPECTER. Thank you, Senator Biden.

Senator Kyl?

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman.

Welcome, Judge Alito, to your confirmation hearing. At the outset, I am pleased to note that you have more judicial experience than any Supreme Court nominee in more than 70 years. Indeed, only one Supreme Court Justice in history, one Horace Lurton, nominated by President Taft, had more Federal appeals court experience. Moreover, you have devoted virtually your entire professional life to public service, and the Nation owes you gratitude for that service. I look forward to a dignified hearing followed by a fair up or down vote on the Senate floor.

Before discussing your nomination, I would like to take a moment to express my respect and admiration for the Justice whom you are nominated to replace, my fellow Arizonan Sandra Day O'Connor, whom I have known for more than 30 years. Justice O'Connor has served with great distinction during her career in the Arizona Legislature, on the Arizona Court of Appeals, and for what has been a quarter of a century on the U.S. Supreme Court. Arizonans are deeply proud of Justice O'Connor's service to this country.

She will always be remembered by Arizonans and all Americans as an extraordinary public servant.

Judge Alito, I would like to discuss your background and experience in the context of other Justices on the Supreme Court so that everyone understands how well you satisfy what we have come to expect from our top judges. Like all the sitting Justices, you had an outstanding education. One of your classmates at Yale Law School, Tony Kronman, who later went on to be the dean of the law school and could, I believe, fairly be described as a political liberal, has recently remarked, and I quote, "He impressed me"—speaking of you—"as being more interested in the technical, intellectual challenges of the law and its legal reasoning than its political uses or ramifications." Thus, even in your early 20's, it appears you were focused on the law as an independent pursuit rather than using law to influence political ends.

With your intellect and education, you could have become a wealthy attorney, but instead you devoted virtually all of your legal career to the public service. In doing so, you meet, and even exceed, the stellar examples set by Justices Thomas and Souter, each of whom devoted most of their pre-judicial careers to public service. Perhaps this is because, like Justices Ginsburg and Scalia, you had a father who was an immigrant to this Nation. It seems that immigrants often have a special understanding of the incredible opportunities that this Nation affords its citizens. Moreover, your father's long service to the people of New Jersey both as a schoolteacher and as a civil servant in the State legislature plainly served as a model for you.

I also note that you served in the U.S. Army Reserves from 1972 until 1980. If confirmed, only you and Justice Stevens would have any military experience. You would also be the first Supreme Court Justice to have served in the Army Reserves since Justice Frank Murphy did so during World War II.

You have spent much of your career as a Federal prosecutor pursuing terrorists, mob kingpins, drug dealers, and others who threaten our safety and our security. Justice Souter had a distinguished career as a State prosecutor, but no sitting Justice has served as a Federal prosecutor. Again, this experience could prove helpful given that approximately 40 percent of the Supreme Court docket involves criminal matters.

You also served as an attorney in the executive branch. Like Chief Justice Roberts, you served in the Solicitor General's office representing our Government before the Supreme Court. And like Justice Scalia, you served in the Office of Legal Counsel, providing constitutional advice to the President and the rest of the executive branch. In both of these roles, your job was to advance the policies of a President who twice won an electoral college landslide. He set the agenda, and you helped him implement it.

Similarly, Justice Thomas served Presidents Reagan and Bush in political/legal capacities, and Justice Breyer also worked in political jobs, both in President Johnson's Justice Department and as a lawyer to this Committee.

I note that you were just 39 when nominated to serve on the Third Circuit. Justice Kennedy was only 38 when nominated to the Ninth Circuit, and Justice Breyer only 42 when nominated to the

First Circuit. Like them, you now have a great deal of hands-on experience that you can bring to the Court for years to come.

During your judicial service, you amassed an impressive record for the Senate to review, including more than 350 authored opinions. It is this judicial record that should be the focus of this Committee, just as it was with all of the other sitting Justices on the Court. It appears to me that you easily fit into the mold of what this Nation has come to expect from a Supreme Court Justice: a first-rate intellect, demonstrated academic excellence, a life of engagement with serious constitutional analysis, and a reputation for fair-mindedness and modesty. These are the standards for a Supreme Court Justice, and you plainly meet these expectations. As a consequence, I view your nomination with a heavy presumption in favor of confirmation. Before I conclude, I would like, though, to address two other points.

First, some of my colleagues are fond of asking the question, Which side are you on? You have heard that today. Politicians must pick sides regularly, every time they vote, so it is perhaps natural that they see the world as a battle between competing groups. But it is wholly inappropriate as an approach to the judicial role. The only relevant side is that of the law and the Constitution. We do great injury to the integrity of the court system when we start speaking of sides and stop devoting ourselves to the pursuit of impartial justice.

During Chief Justice Roberts's confirmation hearings, I was struck by the way he answered the question. Then Judge Roberts explained that he had been asked earlier in the confirmation process, Are you going to be on the side of the little guy? Roberts explained that this question troubled him, and this is how he answered. He said, "If the Constitution says that the little guy should win, the little guy is going to win. But if the Constitution says that the big guy should win, well, then the big guy is going to win because my obligation is to the Constitution. That's the oath. The oath that a judge takes is not that I will look out for particular interests. The oath is to uphold the Constitution and the laws of the United States." And this is the essence of justice. Our courts provide a neutral forum for the adjudication of disputes under the law, not based on economic or political power, on race, on sex, or any other personal characteristics. Big guy, little guy—it should make no difference. The rule of law demands neutrality.

Second, I want to address the proper scope of questioning during these hearings, a matter that has also come up already. As I reminded Chief Justice Roberts at his hearings, the American Bar Association Model Code of Judicial Conduct dictates that, and I quote, "a judge or candidate for election or appointment to judicial office shall not, with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." In other words, no judicial nominee should answer any question that is designed to reveal how the nominee will rule on any issue that could come before the Court. This rule has come to be known as "the Ginsburg standard" because Justice Ginsburg stated during her own confirmation hearings that she would give no forecasts, no hints about how she

would rule on issues. And I was pleased to see that Chief Justice Roberts refused to prejudge issues or make promises in exchange for confirmation votes. We are all better off because of his principled stand.

Soon after his confirmation, Justice Ginsburg was asked about this Ginsburg standard as applied to the Roberts hearings, and she said, "Judge Roberts was unquestionably right. My rule was I will not answer a question that attempts to project how I will rule in a case that might come before the Court." In other words, Justice Ginsburg reaffirmed the Ginsburg standard.

In light of the Chief Justice's confirmation hearings and Justice Ginsburg's later remarks, I asked my colleagues for basic fair play. Apply the same standards to Judge Alito that we applied to John Roberts, Stephen Breyer, Ruth Bader Ginsburg, and all of the other sitting Justices. Let's not invent a new standard for Judge Alito or change the rules in the middle of the game. Politicians must let voters know what they think about issues before the election. Judges should not.

And it is not a hypothetical matter. Senator Kennedy in his opening statement expressed concern about the extent of the executive branch's authority to conduct surveillance of terrorists and said ultimately the courts will decide whether the President has gone too far. Indeed they will.

Judge Alito, I will tell you the same thing I told John Roberts. I expect you to adhere to the Code of Judicial Conduct, and I want you to know that I will strongly defend your refusal to give any indication of how you might rule on any matter that might come before you as a judge or to answer any question that you believe to be improper under the circumstances. Congratulations, Judge Alito, on your nomination.

Chairman SPECTER. Thank you, Senator Kyl.

Senator Kohl?

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you, Mr. Chairman.

Judge Alito, let me also send my welcome to you this afternoon and to your family. You are to be congratulated on your nomination.

Through its interpretation of the Constitution, the Supreme Court hugely shapes the fabric of our society for us and for future generations. Over the course of more than 200 years, it has found a right to equal education regardless of race. It has guaranteed an attorney and a fair trial to all Americans, rich and poor alike. It has allowed women to keep private medical decisions private. And it has allowed Americans to speak, vote, and worship without interference from their Government.

Through these decisions and many more, the judicial branch has in its finest hours stood firmly on the side of individuals against those who would trample their rights. In the words of Justice Black, "The courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice or public excitement."

As the guardian of our rights, the Supreme Court makes decisions every year which either protect the individual or leave him at the mercy of more powerful forces in our society. They consider questions like when can a disabled individual sue to gain access to a courthouse, when can a parent leave work to care for a sick child, when should the Government be allowed to listen to a private conversation, and when will the courthouse doors open or close to an employee suffering discrimination at work.

Whether interpreting the Constitution or filling in the blanks of a law or a regulation, every word of the Court's opinion can widen or narrow our rights as Americans and either protect us or leave us more vulnerable to any winds that blow. If confirmed, you will write the words that will either broaden or narrow our rights for the rest of your working life. You will be interpreting the Constitution in which we as a people place our faith and on which our freedoms as a Nation rest. And on a daily basis, the words of your opinions will affect countless individuals as they seek protection behind the courthouse doors.

Despite your enormous power, you will be free of all constraints, unaccountable and unrecallable. We give Supreme Court Justices this freedom because we expect them to remain above the pull of politics, to avoid the effects of public excitement and allow a broader view, not tied to the whims of the majority at a certain moment in the history. So for only a short time this month will the people through their Senators be able to question and to judge you. In short, before we give you the keys to the car, we would like to know where you plan to take us.

To a certain extent, we know more about what is in your heart and in your mind than we did with now Justice Roberts. You have a long track record as a judge and as a public official in the Justice Department. When we met privately and I asked you what sort of Supreme Court Justice you would make, your answer was fair when you said, "If you want to know what sort of a Justice I would make, then look at what sort of a judge I have been."

Taking this advice, your critics argue that your judicial record demonstrates that you will not sufficiently protect the individual, but will instead side with more powerful interests, narrow the rights we enjoy, and leave individual Americans more vulnerable to abuse. For example, they cite your *Casey* dissent as diminishing the power of married women over their own bodies. They identify your decision in the *Chittister* case as evidence that you will make it harder for working people to care for a family. They cite the *Bray* case and others where you often side with corporations to block the victims of discrimination from getting their day in court. Others raise concerns about your views on the rights of the accused when faced with the Government's enormous power in the criminal justice process.

In addition to your record on the bench, your opponents identify memos you wrote while in the Justice Department as further evidence of your hostility to individual rights. For example, in your now famous 1985 job application, you expressed pride in some of the work you did in the Solicitor General's office. You chose to single out the assistance that you provided in crafting Supreme Court briefs urging that "the Constitution does not protect a right to an

abortion." While these statements came in the context of your work on behalf of the Reagan administration, they were, nevertheless, your self-proclaimed personal views.

In the same job application, you wrote that you had pursued a legal career because you disagreed with many of the decisions of the Warren Court, especially, and I quote, "in the areas of criminal procedure, the Establishment Clause, and reapportionment." These Warren Court decisions establishing one person/one vote, *Miranda* rights, and protections for religious minorities are some of the most important cases protecting our rights and our liberties, protecting minorities against majority abuses and protecting individuals against Government abuses, and yet antagonism toward these decisions seems to have motivated your pursuit of the law.

Your supporters, on the other hand, contend that it is not fair to select a few specific cases in light of a career as a judge spanning 15 years. Further, they dismiss some of your early memos in the Justice Department as old and not particularly relevant. They argue that you are well within the mainstream of judges, especially Republican-appointed judges.

So it is our job to sort out the truth about your record, separate the rhetoric from the reality, and decide where you will lead the country. We will need to examine whether, as your critics contend, you will consistently side against the individual or whether, as your supporters contend, you are a mainstream conservative who will fairly decide all cases. I hope these hearings will add to our record in making this critical determination.

This would be an appropriate time to share my perspective on how we will judge the nominee. We have used the same test for each of the five previous Supreme Court nomination hearings: a test of judicial excellence. Judicial excellence, it seems to me, involves at least four elements:

First, a nominee must possess the competence, character, and temperament to serve on the bench.

Second, judicial excellence means that a Supreme Court Justice must have a sense of the values from which the core of our political and economic system goes. In other words, we should not approve any nominee whose extreme judicial philosophy would undermine rights and liberties relied upon by all Americans.

Third, judicial excellence requires an understanding that the law is more than an intellectual game and more than a mental exercise. He or she must recognize that real people with real problems are affected by the decisions rendered by the Court. Justice, after all, may be blind, but it should not be deaf.

And, finally, judicial excellence requires candor before confirmation. We are being asked to give the nominee enormous power, and so we want to know what is in your mind and in your heart.

Judge Alito, we are convinced that your intellect and experience qualifies you for this position. I enjoyed meeting you a few weeks ago and appreciated our discussion. Your legal talents are undeniably impressive, and your opinions are thoughtful and well reasoned. We are now familiar with your abilities in your long tenure as a judge. And yet we do not know whether the concerns some have raised about your judicial philosophy are overstated or whether we need to have serious doubts about your nomination. I look

forward to these hearings as an opportunity to learn more and measure whether you meet our test of judicial excellence.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kohl.

Senator DeWine.

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Thank you, Mr. Chairman.

Judge Alito, I want to welcome you and your family, appreciate you being here with us today.

The Constitution gives the Senate a solemn duty, a solemn duty when it comes to the nomination of any individual to sit on the U.S. Supreme Court. While the President is to nominate that individual, we in the Senate must provide our advice and consent. This function is not well defined. The Constitution does not set down a road map. It does not require hearings. In fact, it does not even require questioning on your understanding of the Constitution or the role of the Supreme Court.

To me, however, these things are certainly important. The reason is obvious. When it comes to the Supreme Court, the American people have only two times when they have any input into how our Constitution is interpreted and who will have the privilege to do so. First, we elect a President who has the power to nominate Justices to the Supreme Court. Second, the people, acting through their representatives in the Senate, have their say on whether the President's nominee should in fact be confirmed.

Judge Alito, I want to use our time together today to make a point about democracy. When it comes to our Constitution, judges perform certainly an important role. But the people, acting through their elected representatives, should play an even more important role. After all, our Constitution was intended as a popular document. It was drafted and ratified by the people. It established democratic institutions. It entrusts the people with the power to make the tough decisions. In most cases, it prefers the will of the people to the unchecked rule of judges. If confirmed, Judge, you should always keep this in mind.

In my opinion, Chief Justice Roberts put it best during his recent confirmation hearings, when he said, and I quote, "The Framers were not the sort of people, having fought a revolution, having fought a revolution to get the right of self government, to sit down and say, well, let's take all the difficult issues before us, let's have the judges decide them. That would have been the farthest thing from their mind," end of quote.

Sometimes, Judge, however, I fear that the Supreme Court forgets this advice. In the last 15 years, in fact, the Court has struck down, in whole or in part, more than 35 acts of this Congress, and nearly 60 State and local laws. Without question, the Court does play a vital role in our constitutional system. Sometimes local, State, and Federal law so clearly run afoul of the Constitution, that the Court must step in and strike them down.

In most cases, the Court performs this admirably and with great restraint. In recent years, the Court has struck down some laws that, in my opinion, did not deserve such a fate. Take, for instance,

the Americans with Disabilities Act; it passed this Congress with overwhelming bipartisan support. The law was supported by an extensive factual record, and it was based on our Government's long-standing constitutional power to fight discrimination wherever it exists. When the Court considered the ADA in the *Garrett* case, however, it ignored the Act's broad support, cast aside the legislative record, and struck down a portion of the law. The decision was a close one, 5–4. The majority relied on a highly controversial legal theory, and the case evoked a vigorous dissent.

This is precisely my problem with *Garrett*. In such a difficult case where the Constitution does not clearly support the majority's decision, the proper response is not to strike down the law. In such a case, the Court should defer to the will of the people. In other ways, Judge, the Court's recent decisions have made life more difficult for the democratic institutions that perform the day-to-day work of our Nation, recent cases involving affirmative action and the posting of the Ten Commandments on public property, which seem to me at least to prove the point. The Court has upheld one affirmative action program at the University of Michigan, but struck down another one, and has allowed the posting of the Ten Commandments outside of a public building, but banned it on the inside in another case.

To add to the confusion, some of the Court's decisions involve multiple concurrences and dissents, making it hard, even for lawyers and judges to figure out what the law is and why.

Chief Justice Roberts mentioned this problem at his hearing. And in one of his final statements as Chief Justice, William Rehnquist noted that one of the Court's decisions had so many opinions within it that he—and I quote—"didn't know we had so many Justices on the Court."

What has emerged in certain areas, therefore, is a patchwork, a patchwork that leaves local officials, State legislators, Members of Congress and the public guessing what the law permits and what it does not. In 1937, President Franklin Roosevelt reminded us that the Constitution is, and I quote, "a layman's document, not a lawyer's contract." But that very document does little to serve people when Supreme Court decisions are written so that even high-price lawyers cannot figure them out.

I am not the first to raise these democratic concerns. Many have faulted the Court for its lack of clarity in certain cases and many have criticized its recent lack of deference to decisions made by State legislatures and Congress. In fact, some have even suggested that this recent trend has transformed our democracy from one founded on "we, the people," to one ruled by "we, the Court." To me, the criticism has some force. The Constitution empowers the people to resolve our days' most contentious issues. When judges forget this basic truth, they do a disservice to our democracy and to our Constitution. Judges are not Members of Congress. They are not State legislators, Governors, nor Presidents. Their job is not to pass laws, implement regulations, nor to make policy. To use the words of Justice Byron White, words that I quoted at our last Supreme Court hearing: the role of the judge is simply to decide cases; to decide cases, nothing more.

Judge, from what I have seen so far, you do not need much reminding on this score. Your decisions are usually brief and to the point. You write with clarity and common sense, and in most cases you defer to the decisionmaking of those closest to the problem at hand. I do not expect to agree with every case that you decide, but your modest approach to judging seems to bode well for our democracy.

Over the next several days the members of this Committee will question you to find out what kind of Justice you will be. This hearing is really our opportunity to try to answer that question. Our constitutional system is founded on democracy, a world of people, not the unchecked rule of judges. If confirmed, it will be your job to faithfully interpret our Constitution and to defend our democracy case by case. I wish you well.

Thank you.

Chairman SPECTER. Thank you, Senator DeWine.

Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Welcome, Judge Alito. I am one that believes your appointment to the Supreme Court 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. So during these hearings, I think it is fair for us to try to determine whether your legal reasoning is within the mainstream of American legal thought and whether you are going to follow the law regardless of your personal views about the law.

Since you have provided personal and legal opinions in the past, I very much hope that you will be straightforward with us, share your thinking, and share your legal reasoning.

I would like to use my time to discuss with you 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 14th Amendment. This trend, I believe, if continued, would restrict and could even prevent the Congress from addressing major environmental and social issues of the future.

As I see it, certain of your decisions on the Third 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 is 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. The 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 your *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.

The subject of Executive power has come up, and indeed it is a very big one. I think we are all concerned about how you approach and decide cases involving expanded Presidential powers. Recently there have been several actions taken by the administration that highlight why the constitutional checks and balances between the branches of Government are so essential. These include the use of torture, whether through an expansive reading of law, or disregarding Geneva Conventions, including the Convention on Torture, whether the President is bound by ratified treaties or not, allowing the detention of American citizens without providing due process—of course, Sandra Day O'Connor was dispositive in the *Hamdi* case—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 that 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. So despite voting to sustain *Roe* on the Third Circuit, your opinions also raise questions about how you might rule if not bound by precedent, and of course, obviously, I would like to find that out.

I am also 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 can turn when they believed their constitutional rights were violated. This has been especially noteworthy in the arena of civil rights, and as has been mentioned, in that same 1985 job application, you wrote that while in college you developed a deep interest in constitutional law, and then you said, motivated in part by disagreement with the Warren Court's decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment. Now, of course, it was the Warren Court that brought us *Brown* v. *Board of Education*, and of course, reapportionment is the bedrock principle of "one man, one vote." So exactly what you mean by this I think is necessary to clear up.

Now, 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 how 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 Third Circuit, you sided against the individual alleging discrimination in about three-quarters of the cases before you.

We have a lot to learn about what your views are and your legal reasoning, and how you would apply that legal reasoning. I really look forward to the questions, and once again, because this appointment is so important, I hope you really will be straightforward with us, and thereby be really straightforward with the American people.

So thank you, and welcome.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman.

I would like to also extend my congratulations to you, Judge Alito and your family. It is a very special day, a great honor to be nominated to the Supreme Court, the greatest court in the world, in my view, and this will be a good process. The Senate has an obligation to make a vigorous inquiry, and they will do so. I just hope and truly believe that by the end of these hearings your answers will be heard. The charges that I have heard made I know will be rebutted. People will listen and see the answers that you give, and when they do, they will feel great confidence in you as a member of the Supreme Court.

You have a record as a brilliant but modest jurist, one who follows the law, who exercises restraint and does not use the bench as an opportunity to promote any personal or political agenda. This is exactly what I believe the American people want in a Justice to the Supreme Court. It is exactly what President Bush promised to nominate. You represent philosophically that kind of judge who shows restraint, but at the same time you bring extraordinary qualifications and abilities.

As has been said, judges are not politicians. They must decide discrete cases before them based on the law and the facts of that case. They are not policymakers. Every lawyer that has practiced in America knows that. That is what they want in a judge. That is what I understand they believe you are. That is why the ABA has given you their top rating, in my view.

This ideal of American law is the rule of law. It is the American ideal of justice, not to have an agenda, not to allow personal views to impact your decisionmaking, and I am real proud to see that your record indicates that.

I like Judge Roberts's phrase of "modesty." I believe that is your philosophy also. We had the opportunity for a time to serve as United States Attorneys together. You were the top prosecutor in the office in New Jersey, one of the largest in the country. You had the whole State, much larger than my office. I know your reputation as one of ability, but modesty. In fact, I remember distinctly somebody told me, "Don't underestimate Sam Alito. He's a modest kind of guy, but he's probably the smartest guy in the Department

of Justice." I think that is the reputation you had and one that you can be quite proud of.

Your record of achievement is extraordinary. You were Phi Beta Kappa at Princeton and a Woodrow Wilson scholar. You attended Yale Law School. You were an editor of the law review, elected by your colleagues, and of course, for a graduating law student at a prestigious law school or any law school, being an editor of the law review is an extraordinary honor.

You clerked for a Federal judge on the Third Circuit. You were an Assistant United States Attorney. You did appellate work, handling criminal cases, and as United States Attorney you were primarily a prosecutor. As I have checked the record, you will be the first person to serve on the Supreme Court since Tom Clark, who was appointed by Harry Truman in 1949, that had actual Federal prosecutorial experience, which I think is a great value. Matter of fact, I know it is a value. I have seen instances of Supreme Court rulings where errors have been made, mostly as a result of just not understanding the system and how it operates.

As an Assistant Solicitor General you argued 12 cases before the Supreme Court. That is an extraordinary number. Very, very few people in our country have had the opportunity to do that. Very few lawyers will ever in their career do one case much less 12.

So you did a great job, and I think that is why the ABA, the American Bar Association has rendered their views on you. It is a 15-member committee. All of them participate on a Supreme Court nominee. They take this very seriously. They interview judges with whom you work. They interview your colleagues. They interview people who litigated against you. They interview litigants who have lost before you as well as those who won before you, your co-counsel. And at the conclusion of all of that, they unanimously gave you their highest possible rating. I think that is an important thing. Some of us on our side of the aisle criticize the ABA. We say they tilt a little to the left, but their analysis process and the way they go about it provides valuable insight to this Committee and to the people of America, that the people of the country can know that they have interviewed a host of people who have dealt with you in every single area of your life, and they found you highly qualified, the best recommendation they can give, and that is something you should take great pride in.

We do not want an activist judge. That is not what we want in this country. By "activist" I mean a judge who allows his personal views to overcome a commitment to faithfully following the law, following the law as it is, not as you would like it to be, good or bad, following that law. That is what we count on. When we violate that, we undermine law, we undermine respect for law, and endanger this magnificent heritage of law that we have been given. From what I understand your approach to law, you have it right, and your record indicates that.

The judicial oath you take is important. Some might say you have to follow precedent and precedent is a very big part of what you do, but you take the oath to swear that you will support and defend the Constitution of the United States. You will take that oath if confirmed, and you have already taken it as a Third Circuit Judge. It is an oath not to decide whether a decision is good policy

or not. That is for the legislative branch. It is not an oath to defend the wall that the Supreme Court has enclosed sometimes around itself. It is not an oath to avoid admitting error in previous decision. But let me be more direct. The oath you take is not an oath to uphold precedent whether that precedent is super duper or not. If you love the Constitution, which I hope you do, and I intend to inquire about that, you will enforce the Constitution as it is, good and bad. That is your responsibility in our democracy.

We have already had this morning some matters that have been raised, and I think are worthy of just responding to briefly because allegations get made in these hearings, you may never get a chance by the time this hearing is over to rebut some of the things that have already been raised. Senator Kennedy claimed that you have not offered an opinion or a dissent siding with a claim of racial discrimination. I would point him to *U.S.* v. *Kithcart*. There you made it clear that the Constitution does not allow police officers to racially profile black drivers. A police officer received a report that two black males in a black sports car had committed three robberies. Later they pulled over a driver because he was a black man in a black sports car. You wrote that this violated the Fourth Amendment. You stated that the mere fact that Kithcart was black and the perpetrators had been described as two black males was plainly insufficient.

They also may want to look at your majority opinion in *Brinson* v. *Vaughn*, where you rule that the Constitution does not allow prosecutors to exclude African-Americans from jurors, and you granted the petitioner's habeas petition in that case, reversing the conviction. You stated the Constitution guarantees, "that a State does not use peremptory challenges of jurors to remove any black jurors because of his race, thus a prosecutor's decision to refrain from discriminating against some African-American voters does not cure discrimination against others."

As for dissents, you were the lone dissenter calling for an expansive interpretation of civil rights laws. Your dissent complained in an employer case that the majority had substituted its own opinion for the law, and you dissented, and later the Supreme Court vindicated you, 9–0.

I would also note you were questioned about judicial independence. I think some of our people have mentioned that, but an academic study of Federal Appeals Court opinions rated you the fourth most independent judge in the Federal judiciary. That is out of 98. They took that based on issues such as whether or not you are most likely to disagree with judges or agree with judges of a different political party.

Mr. Chairman, I thank you for your leadership, and look forward to a vigorous hearing. I am confident this nominee has the skills and graces to make an outstanding Supreme Court Justice.

Chairman SPECTER. Thank you, Senator Sessions.

We are going to turn to one more Senator, Senator Feingold, for an opening statement, and then we are going to take a 15-minute break. We will have concluded the opening statements of 12 of our 18 Judiciary Committee members. That will leave us four more. Then Senator Lautenberg and Governor Whitman to make the formal presentation of Judge Alito, and then Judge Alito's opening

statement. At this time we will adjourn and we will reconvene at 2:10.

Pardon me. We are going to proceed with you, Senator Feingold.

[Laughter.]

Senator FEINGOLD. Thank you, Mr. Chairman, I think.

Senator LEAHY. This is called the potted plant routine, Russ.

[Laughter.]

Chairman SPECTER. I am so anxious for the recess, I jumped the gun a little.

[Laughter.]

STATEMENT OF SENATOR RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Mr. Chairman, I too want to welcome our nominee and thank him in advance for the long hours that he will put in this week.

Judge, I do greatly admire your legal qualifications, and of course, your record of public service, and I wish you well here. And as with the hearing and the nomination of Chief Justice Roberts, I approach this proceeding with an open mind.

Judge Alito, I know that as a long-time student of the law in the Supreme Court, you appreciate the importance of the process that we begin today. A position on the Supreme Court is one of the highest honors and greatest responsibilities in our country. The Constitution requires the Senate to offer its advice and decide whether to grant its consent to your nomination, and the Senate has duly delegated to the Judiciary Committee the task of examining your record and hearing your testimony and responses to questions about your views.

So it is our job in these hearings to try to get a sense for ourselves, for our colleagues who are not on the Committee, and for the American people, of whether you should be given the enormous responsibility of protecting our citizens' constitutional freedoms on the Supreme Court. So you will, obviously, face tough questions here, Judge.

No one is entitled to a seat on the Supreme Court simply because he has been nominated by the President. I think the burden is actually on the nominee to demonstrate that he should be confirmed.

We begin these hearings today at an important time. Less than a month ago we learned that this administration has for years been spying on American citizens without a court order and without following the laws passed by Congress. Americans are understandably asking each other whether our Government believes it is subject to the rule of law. Now more than ever we need a strong and independent judicial branch. We need judges who will stand up and tell the executive branch it is wrong when it ignores or distorts the laws passed by Congress. We need judges who see themselves as custodians of the rights and freedoms that the Constitution guarantees even when the President of the United States is telling the country that he should be able to decide unilaterally, unilaterally, how far these freedoms go.

To win my support, Judge Alito will have to show that he is up to the challenge. His instincts sometimes seem to be to defer to the executive branch to minimize the ability of the courts to question

the Executive in national security cases, to grant prosecutors whatever powers they seek, and to deny relief to those accused of crimes who assert that their constitutional rights were violated. So it will be up to Judge Alito to satisfy the Senate that he can be fair and objective in these kind of cases.

We need judges on the bench who will ensure that the judicial branch of Government is the independent check on Executive power that the Constitution requires and that the American people expect.

In these days of corruption investigations and indictments in Washington, we also need judges who are beyond ethical reproach. In 1990, when the judge appeared before this Committee in connection with this nomination to the Court of Appeals, Judge Alito promised to recuse himself from cases involving a mutual fund company with which he had substantial investments, Vanguard. He kept those investments throughout his service on the Court of Appeals and still has them today. But in 2002 he sat on a panel in a case involving Vanguard. Since his nomination to the Supreme Court, we have now heard different explanations from the nominee and his supporters about why he failed to recuse himself. Needless to say, the shifting explanations and justifications are somewhat troubling. I hope that we will get the full and final story in these hearings.

Before we grant lifetime tenure to Federal judges, and particularly Justices of the Supreme Court, we must make sure that they have the highest ethical standards. The stakes for this nomination could hardly be higher. Justice O'Connor, as many have said, was the swing vote in many important decisions in the past decade. Her successor could well be the deciding vote in a number of cases that have already been argued this term, that may have to be reargued after a new Justice is confirmed. The outcome of these cases could shape our society for generations to come.

Now, we do not have the right to know how a nominee would rule on those cases. Indeed, we should all hope that the nominee does not know either, but we do have a right to know what and how a nominee thinks about the important legal issues that have come to the Court in recent years. Commenting on past Supreme Court decisions, in my view, would no more disqualify a nominee from hearing a future case on a similar topic than would a current Justice participating in those past decisions. Mr. Chairman, it simply cannot be that the only person in America who cannot express an opinion on a case where Justice O'Connor cast the deciding vote, is the person who has been nominated to replace her on the Court.

So I look forward to questioning you, Judge Alito, about Executive power, the death penalty, employment discrimination, criminal procedure and other important topics, and I look forward to your candid answers. I will have to say that I was rather pleased that the judge was actually less guarded in our private meeting, than were the other two Supreme Court nominees who I had had the privilege to meet. I hope he is even more forthcoming in this hearing.

Given his long judicial record and the memos we have seen that express his personal views on legal issues, I expect complete answers, and I think my colleagues do too. If a nominee expresses a

personal view on a legal issue in a memo written over a decade ago, I think we and the American people have the right to know if he still holds that view today.

Mr. Chairman, if confirmed to the Supreme Court, Judge Alito is likely to have a profound impact on the lives of Americans for decades to come. That is a fact. It is clear, Mr. Chairman, from how you have planned these hearings, that you recognize that.

Thank you for your efforts to ensure a full and fair evaluation of this nominee, and I not only look forward to the questioning, but I want to note that I have caused the recess to occur 3 minutes and 40 seconds earlier than it normally would have.

[Laughter.]

Chairman SPECTER. Thank you, Senator Feingold, for your brevity.

We will now take a 15-minute recess until 2:15.

[Recess from 2 p.m. to 2:15 p.m.]

Chairman SPECTER. It is 2:15. We will resume these hearings. Next up on opening statement is Senator Graham.

Senator GRAHAM. Shall I wait or go ahead, Mr. Chairman?

[Pause.]

Chairman SPECTER. Senator Graham, you may begin.

STATEMENT OF HON. LINDSEY O. GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator GRAHAM. Thank you, Mr. Chairman, and welcome back, Judge. I would hate for you to miss my opening statement, a loss for the ages.

Welcome to the Committee. Welcome to one of the most important events in your life. You have got the people that mean the most here with you today, your family, and I know they are proud of you, and I am certainly proud of what you have been able to accomplish.

To say the least, you come to the Senate in interesting political times. There is going to be a lot of talk by the Senators of this Committee about concepts that are important to Americans, but what I worry the most about is your time, believe it or not, will come and go. You will not be here forever. It may seem that way, but I think you are going to be just fine.

I don't know what kind of vote you are going to get, but you will make it through. It is possible you could talk me out of voting for you, but I doubt it. So I won't even try to challenge you along those lines. I feel very comfortable with you being on the Supreme Court based on what I know, and the hearings will be helpful to all of us to find out some issues that are important to us.

We had a talk recently about Executive power. That is very important to me. In time of war, I want the executive branch to have the tools to protect me, my family and my country. But also I believe even during a time of war, the rule of law applies.

I have got some problems with using a force resolution to the point that future Presidents may not be able to get a force resolution from Congress if you interpret it too broadly. And we will talk about those things and we will talk more about it.

I am going to talk a little bit about some of the points my colleagues have been making. Everybody knows you are a conserv-

ative. The question is are you a mainstream conservative. Well, the question I have for my colleagues is who would you ask to find out. Would you ask Senator Kennedy? Probably not. If you asked me who a mainstream liberal is, I would be your worst person to pick because I don't hang out over there.

I suspect that most all of us, if not all of us, will vote for you, and I would argue that we represent from the center line to the right ditch in our party and if all of us vote for you, you have got to be pretty mainstream. So the answer to the question, are you a mainstream conservative, will soon be know.

If every Republican member of the Judiciary Committee votes for you and you are not mainstream, that means we are not mainstream. And it is a word that means what you want it to mean. Advise and consent means what? Whatever you want it to mean. Advise and consent means the process has got to work to the advantage of people I like, and with people I don't want on the Court, it is a different process. That is politics.

Every Senator will have to live within themselves as to what they would like to see happen for the judiciary. My main concern here is not about you. It is about us. What are we going to be doing as a body to the judiciary when it is all said and done?

Roe v. *Wade* and abortion. If I wanted to work for Ronald Reagan, one of the things I would tell the Reagan administration is I think *Roe* v. *Wade* was wrongly decided. They are likely to hire me because they were trying to prove to the Court that the Court took away from elected officials a very important right, protecting the unborn.

I was on a news program with Senator Feinstein this weekend, who is a terrific person. She made a very emotional, compelling argument that she can remember back-alley abortions and women committing suicide when abortion was illegal. I understand that is very seared in her memory banks and that is important to her.

Well, let me tell you there is another side to that story. There are millions of Americans, a bunch of them in South Carolina, who are heartsick that millions of unborn children have been sent to certain death because of what judges have done. It is a two-sided argument. It is an emotional event in our society.

They are talking about filibustering maybe if you don't give the right answer. Well, what could possibly be the right answer about *Roe* v. *Wade*? If you acknowledge it is a precedent of the Court, well, then you would be right. If you refuse to listen to someone who is trying to change the way it is applied or to overturn it and you will say here I will never listen to them, you might talk me out of voting for you. I don't think any American should lose the right to challenge any precedent that the Supreme Court has issued because the judge wanted to get on the Court.

And you may be a great fan of *Roe* v. *Wade* and you think it should be there forever. There may be a case where someone disagrees with that line of reasoning. What I want from the judge is the understanding that precedent matters, but the facts, the brief and the law is what you are going to base your decision on as to whether or not that precedent stands, not some bargain to get on the Court, because I can tell you if that ever becomes a reason to filibuster, there are plenty of people that I personally know, if it

became fashionable to stand on the floor of the Senate to stop a nominee on the issue of abortion, who feel so deeply, so honestly held belief that an abortion is certain death for an unborn child that they would stand on their feet forever.

And is that what we want? Is that where we are going as a Nation? Are we going to take one case and one issue and if we don't get the answer we like that represents our political view on that issue, are we going to bring the judiciary to their knees? Are we going to say as a body it doesn't matter how smart you are, how many cases you have decided, how many things you have done in your life as a lawyer, forget about it, it all comes down to this one issue?

If we do, if we go down that road, there will be no going back, and good men and women will be deterred from coming before this body to serve their Nation as a judge at the highest levels. What we are saying and what we are doing here is far more important than just whether or not Judge Alito gets through the process.

What is the proper role of a Senator when it comes to advising and consenting? I would argue that if we start taking the one or two cases we cherish the most and make that a litmus test, we have let our country down and we have changed the historical standard.

Elections matter. Values debates occur all over this country. They occur in Presidential elections. It is no mystery as to what President Bush would do if he won. He would pick people like John Roberts and Sam Alito. That is what he said he would do. That is exactly what he has done. He has picked solid strict constructionists, conservatives, who have long, distinguished legal careers.

What did President Clinton do? He picked people left of the center who worked for Democrats. And it cannot surprise the people on the other side that the two people we picked worked for Ronald Reagan. We liked Ronald Reagan. President Clinton picked Ginsburg and Breyer. Justice Ginsburg was the general counsel for the ACLU. If I am going to base my decision based on who you represented as a lawyer, how in the world could I ever vote for somebody that represented the ACLU?

If I am going to make my decision based on whether or not I agree with the Princeton faculty and administration policies on ROTC students and quotas and I am bound by that, I will get killed at home. What Princeton does with their admission policies and whether or not a ROTC unit should be on a campus is an OK thing to debate; at least I hope it is OK. I think most Americans are going to be with the group that you are associated with, not the policies of Princeton.

The bottom line is you come here as an individual with a life well lived. Everybody who seems to have worked with you as a private lawyer, public lawyer and as a judge admires you, even though they may disagree with you.

My biggest concern, members of this Committee, is if we don't watch the way we treat people like Judge Alito, we are going to drive good men and women away from wanting to serve. There will be a Democratic President one day. I don't know when, but that is likely to happen, and there will be another Justice Ginsburg come

over. If she came over in this atmosphere, she wouldn't get 96 votes. Judge Scalia wouldn't get 98 votes, and that is sad to me.

I hope we will use this opportunity not only to treat you fairly, but not use a double standard. I hope we will understand that this is bigger than you, this is bigger than us, and the way we conduct ourselves and what we expect of you we had better be willing to expect when we are not in power.

Thank you.

Chairman SPECTER. Thank you, Senator Graham.

Senator Schumer.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman.

Judge Alito, welcome to you, Mrs. Alito, your two children, the rest of your family. I join my colleagues in congratulating you on your nomination. If confirmed, you will be one of nine people who collectively hold power over everyone who lives in this country. You will define our freedom, you will affect our security, and you will shape our law. You will determine on some days where we pray and how we vote. You will define on other days when life begins and what our schools may teach, and you will decide from time to time who shall live and who shall die. These decisions are final and appeals impossible.

That is the awesome responsibility and power of a Supreme Court Justice, and it is therefore only appropriate that everyone who aspires to that office bear a heavy burden when they come before the Senate and the American people to prove that they are worthy.

But while every Supreme Court nominee has a great burden, yours, Judge Alito, is triply high, first because you have been named to replace Sandra Day O'Connor, the pivotal swing vote on a divided Court; second, because you seem to have been picked to placate the extreme right wing after the hasty withdrawal of Harriet Miers; and finally, and most importantly, because your record of opinions and statements on a number of critical constitutional questions seems quite extreme.

So, first, as this Committee takes up your nomination, we can't forget recent history, because that history increases your burden and explains why the American people want us to examine every portion of your record with great care.

Harriet Miers's nomination was blocked by a cadre of conservative critics who undermined her at every turn. She didn't get to explain her judicial philosophy, she didn't get to testify at the hearing, and she did not get the up-or-down vote on the Senate floor that her critics are now demanding that you receive. Why? For the simple reason that those critics couldn't be sure that her judicial philosophy squared with their extreme political agenda. They seem to be very sure of you. The same critics who called the President on the carpet for naming Harriet Miers have rolled out the red carpet for you, Judge Alito. We would be remiss if we didn't explore why.

And there is an additional significance to the Miers precedent which is this: everyone now seems to agree that nominees should

explain their judicial philosophy and ideology. After so many of my friends across the aisle spoke so loudly about the obligation of nominees to testify candidly about their legal views and their judicial philosophy when the nominee was Harriet Miers, I hope we will not see a flip-flop now that the nominee is Sam Alito.

The second reason your burden is higher, of course, is that you are filling the shoes of Sandra Day O'Connor. Those are big shoes to be sure, but hers are also special shoes. She was the first woman in the history of the Supreme Court, is the only sitting Justice with experience as a legislator, and has been the most frequent swing vote in a quarter century of service.

While Sandra Day O'Connor has been at the fulcrum of the Court, you appear poised to add weight to one side. That alone is not necessarily cause for alarm or surprise, but is certainly a reason for pause. Are you in Justice O'Connor's mold or, as the President has vowed, are you in the mold of Justices Scalia and Thomas?

Most importantly, though, your burden is high because of your record. Although I haven't made up my mind, I have serious concerns about that record. There are reasons to be troubled. You are the most prolific dissenter in the Third Circuit.

This morning, President Bush said Judge Alito has the intellect and judicial temperament to be on the Court. But the President left out the most important qualification: a nominee's judicial philosophy.

Judge Alito, in case after case, you give the impression of applying careful legal reasoning, but too many times you happen to reach the most conservative result. Judge Alito, you give the impression of being a meticulous legal navigator, but in the end you always seem to chart a right-ward course.

Some wrongly suggest that we are being results-oriented when we question the results you have reached. But the opposite is true. We are trying to make sure you are capable of being fair, no matter the identity of the party before you. Sometimes, you give the government a free pass, but refuse to give plaintiffs a fair shake. We need to know that Presidents and paupers will receive equal justice in your courtroom.

If the record showed that an umpire repeatedly called 95 percent of pitches strikes when one team's players were up and repeatedly called 95 percent of pitches balls when the other team's players were up, one would naturally ask whether the umpire was being impartial and fair.

In many areas, we will expect clear and straightforward answers because you have a record on these issues; for example, Executive power, congressional power and personal autonomy, just to name a few. The President is not a king, free to take any action he chooses without limitation by law.

The Court is not a legislature, free to substitute its own judgment for that of elected bodies, and the people are not subjects, powerless to control their own most intimate decisions. Will your judicial philosophy preserve these principles or will it erode them?

In each of these areas, there is cause for concern. In the area of Executive power, Judge Alito, you have embraced and endorsed the

theory of the unitary Executive. Your deferential and absolutist view of separation of powers raises questions.

Under this view, in times of war the President would, for instance, seem to have inherent authority to wiretap American citizens without a warrant, to ignore congressional Acts at will, or to take any other action he saw fit under his inherent powers. We need to know, when a President goes to far, will you be a check on his power or will you issue him a blank check to exercise whatever power alone he thinks appropriate. Right now, that is an open question, given your stated views.

Similarly on the issue of federalism, you seem to have taken an extreme view, substituting your own judgment for that of a legislature. Certainly, one important case you wrote, in *Rybar* v. *U.S.*, that Congress exceeded its power by prohibiting the possession of fully automatic machine guns. Do you still hold these cramped views of congressional power? Will you engage in judicial activism to find ways to strike down laws that the American people want their elected representatives to pass and that the Constitution authorizes?

And, of course, you have made statements expressing your view that the, quote, "Constitution does not protect the right to an abortion," unquote. In fact, you said in 1985 that you personally believe very strongly this is true. You also spoke while in the Justice Department of, quote, "the opportunity to advance the goals of bringing about the eventual overruling of *Roe* v. *Wade*."

It should not be surprising that these statements will bring a searching inquiry, as many of my colleagues have already suggested. So we will ask you, do you still personally believe very strongly that the Constitution does not protect a right to an abortion? We will ask, do you view elevation to the Supreme Court, where you will no longer be bound by High Court precedent, as the long-sought opportunity to advance the goals of bringing about the eventual overruling of *Roe* v. *Wade*, as you stated in 1985?

Judge Alito, I sincerely hope you will answer our questions. Most of the familiar arguments for ducking direct questions no longer apply and certainly don't apply in your case. For example, the logic of the mantra repeated by John Roberts at his hearing that one could not speak on a subject because the issue was likely to come before him quickly vanishes when the nominee has a written record, as you do, on so many subjects.

Even under the so-called Ginsburg precedent, which was endorsed by Judge Roberts, Republican Senators and the White House, you have an obligation to answer questions on topics that you have written about. On the issue of choice, for example, because you have already made blanket statements about your view of the Constitution and your support for overruling *Roe*, you have already given the suggestion of pre-judgment on a question that will likely come before the Court. So I respectfully submit you cannot use that as a basis for not answering.

So I hope, Judge Alito, that when we ask you about prior statements you have made about the law, some strong, some even strident, you will simply not answer, in effect, no comment. That will not dismiss prior expressions of decidedly legal opinions as merely

personal beliefs, and that will enhance neither your credibility nor your reputation for careful legal reasoning.

I look forward, Judge, to a full and fair hearing.

Chairman SPECTER. Thank you, Senator Schumer.

Senator Cornyn.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman.

Judge Alito, welcome to the Committee, and to your family as well. I am a little surprised to learn that you have a triply high burden for confirmation here. I guess we will get a chance to explore that and the fairness of that, or whether all nominees ought to have the same burden before the Committee.

What I want to also make sure of is that we don't hold you to a double standard, that we don't expect of you answers to questions that Justice Ginsburg and others declined to answer in the interests of the independence of the judiciary and in the interests of observing the canons of judicial ethics.

Nevertheless, we have already heard a great deal about you and your credentials for the Supreme Court. As has been noted, you served with distinction on the court of appeals. You have served as a United States Attorney, and indeed you have served your entire adult life in public service.

We have also heard a bit today—and we will hear more as these proceedings unfold—about the testimonials from people who have worked with you, people who know you best, whether liberal, moderate or conservative. The judges on your court have praised you as a thoughtful and open-minded jurist, and we will hear more from them later in the week.

The same can be said of the dozens of law clerks who have worked with you over the last 15 years. As you know, law clerks are those who advise appellate judges on the cases they hear, and you have had law clerks from all political persuasions, from members of the Green Party, to Democrat clerks, even a clerk that went on to serve as counsel of record for John Kerry's campaign for President. And every single one of them says that you will make a terrific Supreme Court Justice, that you apply the law in a fair and even-handed manner, and that you bring no agenda to your job as a judge.

If fairness, integrity, qualifications and an open mind were all that mattered in this process, you would be confirmed unanimously. But we know that is not how the process works, or at least how it works today. We know that 22 Senators, including 5 on this committee, voted against Chief Justice Roberts's confirmation just a few short months ago. And my suspicion is that you do not come here with a total level playing field.

I am reluctantly inclined to the view that you and other nominees of this President to the Supreme Court start with no more than 13 votes on this Committee and only 78 votes in the full Senate, with a solid, immovable, and unpersuadable block of at least 22 votes against you, no matter what you say and no matter what you do. Now, that is unfortunate for you, but it is even worse for

the Senate and its reputation as the world's greatest deliberative body.

The question is why—with so many people from both sides of the aisle and across the ideological spectrum supporting your nomination—are liberal special interest groups and their allies devoting so much time and so much money to defeat your nomination? The answer, I am afraid, is that there are a number of groups who really don't want a fair-minded judge who has an openness to both sides of the argument. Rather, they want judges who will impose their liberal agenda on the American people—views so liberal that they cannot prevail at the ballot box.

So they want judges who will find traditional marriage limited to one man and one woman unconstitutional. They want judges who will ban any trace of religious expression from the public square. They even want judges who will prohibit schoolchildren from reciting the Pledge of Allegiance. As I say, none of these are mainstream positions embraced by the American people. So the strategy is to try to impose their agenda through unelected judges.

Judge Alito, the reason why these groups are trying to defeat your nomination—because you won't support their liberal agenda—is precisely why I support it. I want judges on the Supreme Court who will not use their position to impose personal policy preferences or a political agenda on the American people. I want judges on the Supreme Court who will respect the words and the meaning of the Constitution, the laws enacted by Congress, and the laws enacted by State legislatures.

Now, this doesn't mean, as you know, that a judge will always reach what might be called a conservative result. It means that judges will reach whatever result is directed by the Constitution, by the law, and by the facts of a case. Sometimes it might be called conservative, sometimes it might be called liberal. But the point is that the meaning of the Constitution and other laws should not change unless we the people change them.

A Supreme Court appointment is not a roving commission to rewrite our laws however you and your colleagues see fit. I will give you one example of an area where I believe our Supreme Court has been rewriting the Constitution for a long time. It is an area near and dear to me and others in this country. I am speaking of the ability of people of faith to freely express their beliefs in the public square.

There is no doubt where the Founding Fathers stood on this issue. They believed that people of faith should be permitted to express themselves in public. They believed that this country was big enough and free enough to allow expression of an enormous variety of views and beliefs. They believed that freedom of expression included religious views and beliefs, so long as the government did not force people to worship in a particular manner and remained neutral on what those views and beliefs were.

But this country has gotten seriously off track under the Supreme Court when it went so far as to limit the right of even private citizens to freely express their religious views in public. As I mentioned to you when we met early on in these proceedings, I had an opportunity, as some have had on this Committee, to argue a case before the U.S. Supreme Court. When I was attorney general,

I helped argue a case called *Santa Fe Independent School District* v. *Doe*.

The school district in that case had the temerity to permit student-led, student-initiated prayer before football games. And, of course, someone sued. I repeat, this is student-led, student-initiated, voluntary prayer. The Supreme Court held by a vote of six to three that even this was unconstitutional.

The decision led the late Chief Justice Rehnquist to remark that the Court now exhibits "hostility to all things religious in public life." It is hard to disagree with him. Depictions or expressions of sex, violence, crime are all permitted virtually without limit, but religion, it seems, never.

Now, this is where you come in, Judge Alito. I appreciate your record on the Third Circuit respecting the importance of neutrality of government when it comes to religious expression on a voluntary basis by individual citizens. It is my sincere hope that, when confirmed, you will persuade your colleagues to reconsider their attitude toward religious expression and grant it the same freedom currently reserved for almost all other non-religious speech.

No wonder many in America seem to believe that the Supreme Court has become one more inclined to protect pornography than to protect religious expression. Most people in America don't believe that "God" is a dirty word. But the sad fact is that some Americans are left to wonder whether the Supreme Court might have greater regard for it if it were.

Again, welcome to the Committee and thank you for your continued willingness to serve our great Nation.

Chairman SPECTER. Thank you, Senator Cornyn.

Senator Durbin?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Mr. Chairman. Judge Alito, welcome to you and your family before the Judiciary Committee. You have heard time and again from my colleagues why this seat on the Supreme Court means so much. They have quoted the statistics of 193 5–4 decisions where Sandra Day O'Connor was the deciding vote in 148 of those instances. She was a critical vote in issues of civil rights, human rights, workers' rights, women's rights, restraining the power of an overreaching President.

If you look at the record, the enviable record which Sandra Day O'Connor has written, you find she was the fifth and decisive vote to safeguard Americans' right to privacy, to require courtrooms to grant access to the disabled, to allow the Federal Government to pass laws to protect the environment, to preserve the right of universities to use affirmative action, to ban the execution of children in America. And Justice O'Connor was the fifth vote to uphold the time-honored principle, which bears repeating, of separation of church and state. There was real wisdom in the decision of our forefathers in writing a Constitution that gave us an opportunity to grow as such a diverse Nation, and we should never forget it.

Justice O'Connor has been the critical decisive vote on many issues that go to the heart of who we are as a Nation. We believe, many of us, that the decision on filling this vacancy is going to tip

the scales of justice on the Supreme Court one way or the other, and that is why we are so mindful of the importance of our task.

Yesterday, the Chicago Tribune editorialized that anyone who questions your nomination has a heavy burden of proof. I disagree. I believe the burden of proof is yours, Judge Alito, the burden of demonstrating to the American people and this Committee that you or any nominee is worthy to serve on the highest Court, to succeed Sandra Day O'Connor.

My friend Illinois Senator Paul Simon once said as a member of this same Committee that the test for a Supreme Court nominee is not where he stands on any given issue. The test is this: Will you use your power on the Court to restrict freedom or expand it? In the simplest terms, I think Paul Simon got it right. That is the best test because the Supreme Court is the last refuge in America for our rights and liberties. In my lifetime, it is the Supreme Court, not Congress, that integrated public schools, that allowed people of different races to marry, and established the principle that our Government should respect the value of privacy of American families. These decisions are the legacy of Justices who chose to expand American freedom. If you are confirmed, Judge Alito, will you continue their legacy?

You and I spoke about the *Griswold* decision in my office. It is hard to imagine that 40 years ago people could be convicted of a crime, fined, and sent to prison for using the most common forms of birth control. The Supreme Court looked at that decision and said that is just wrong. We may not find the word "privacy" in the Constitution, but that is just inherent to our freedom as Americans. It seems like a given now. Who would even question it? But it has not been that long ago that up here on Capitol Hill we were involved in a bitter debate over the tragedy of Terri Schiavo. And Republican congressional leaders threatened Federal judges with impeachment if they did not agree to intervene into that family's painful personal decision. We see it in attempts on Capitol Hill to impose gag rules on doctors on what they can say to their patients about family planning. And we certainly see it now with an effort by this Government to tap our phones, invade our medical records, credit information, library records, and the most sensitive personal information in the name of national security.

Now, Justice O'Connor was the critical fifth vote to protect our right of privacy. We want to know whether you will be that vote as well. You were the only judge on your court to authorize a very intrusive search of a 10-year-old girl. You were the only judge on your court who voted to diminish the right of privacy in the case of *Planned Parenthood* v. *Casey*, a position that was specifically rejected by the Supreme Court. And as a Government lawyer, you wrote that you personally believed very strongly the Constitution does not protect the right to an abortion.

Like many, I have thought about this issue of abortion time and again. It is not an easy issue for most people. I have thought about the law and the impact of my personal religious beliefs and feelings. I have thought about the real lives of people and the tragic experiences of the women that I have met. And I have come to believe over the years that a woman should be able to make this agonizing decision with her doctor and her family and her conscience

and that we should be very careful that we don't make that decision a crime except in the most extreme circumstances.

There is also the issue of personal privacy when it comes to the Executive power. Throughout our Nation's history, during times of war, whether it was habeas corpus in the Civil War, the Alien and Sedition Acts in World War I, or Japanese internment camps in World War II, Presidents have gone too far. And in going too far, they have taken away the individual rights of American citizens. The last stop to protect those rights and liberties is the Supreme Court. That is why we want to make certain that when it comes to the checks and balances of the Constitution, you will stand with our Founding Fathers in protecting us from a Government or a President determined to seize too much power in the name of national security.

As a Government lawyer, you pushed a policy of legislative construction designed to make congressional intent secondary to Presidential intent. You wrote, and I quote, "The President will get the last word on questions of interpretation." In speeches to the Federalist Society, you have identified yourself as a strong proponent of the so-called unitary Executive theory. That is a marginal theory at best, and yet it is one that you have said you believe in.

This is not an abstract debate. The Bush administration has repeatedly cited this theory to justify its most controversial policies in the war on terrorism. Under this theory, the Bush administration has claimed the right to seize American citizens in the United States and imprison them indefinitely without charge. They have claimed the right to engage in torture, even though American law makes torture a crime. Less than 2 weeks ago, the White House claimed the right to set aside the McCain torture amendment that passed the Senate 90–9. What was the rationale? The unitary Executive theory, which you have supported.

In the *Hamdi* case, Justice O'Connor wrote for the plurality, and it has been quoted many times: "A state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." If you are confirmed, Judge Alito, who will inspire your thinking if this President or any President threatens our fundamental constitutional rights? Will it be the Federalist Society or will it be Sandra Day O'Connor?

Two months ago, Rosa Parks was laid to rest. Her body laid in state in the Capitol Rotunda, a fitting tribute to the mother of our modern civil rights movement. Her courage is well known. The courage of Federal Judge Frank Johnson, whom we talked about, is well known as well. He was the one who gave the legal authority for the right to march from Selma to Montgomery, and he suffered dearly for it. He was ostracized and rejected. His life was threatened as a result of it.

When we met in my office, Judge Alito, you told me about how your father as a college student was almost expelled for standing up to the college president who decided that the school basketball team should not use its African-American players against an all-white opponent. That university president did not want to offend their all-white opponent, but your dad stood up, and you were so proud of that moment in your family history. I admire your father's courage as well. But just as we do not hold the son responsible for

the sins of the father, neither can we credit the son for the courage of the father. As Supreme Court Justice, would you have the courage to stand up for civil rights even if it is unpopular?

We want to understand what you meant in 1985 when you said from the heart that you disagreed with the Warren Court on reapportionment, the one man/one vote principle. That was a civil rights decision. We want you to explain your membership in an organization that you highlighted at Princeton University that tried to challenge the admission of women and minorities. And I think we want to make certain of one thing. We want to make certain that every American who stood in silent tribute to Rosa Parks hopes that you will break your silence and speak out clearly for the civil rights that define our unity as a Nation.

There have been many controversial cases alluded to here. Some people have questioned, What is the difference? What difference in my life does it make if Sam Alito is on the bench or if he isn't? Why would I care if it is a narrow interpretation or a broad interpretation of the law? How does it affect my life? We know it affects everyone's life. We were reminded just very recently with the tragedy that was in the headlines. In one of your dissents, you would have allowed a Pennsylvania coal mine to escape worker safety and health requirements required by Federal law. Last week's tragedy at the Sago mine reminds us that such a decision could have life and death consequences.

Judge Alito, millions of Americans are concerned about your nomination. They are worried that you would be a judicial activist who would restrict our rights and freedoms. During your hearing, you will have a chance to respond, and I hope you do. More than any recent nominee, your speeches, your writings, your judicial opinions make it clear that you have the burden to prove to the American people that you would not come to the Supreme Court with any political agenda. Clear and candid answers are all that we ask.

I sincerely hope you can convince the U.S. Senate and the American people that you will be a fifth vote on the Supreme Court that the American people can trust to protect our most basic important freedoms and preserve our time-honored values.

Thank you very much.

Chairman SPECTER. Thank you, Senator Durbin.

Senator Brownback?

STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator BROWNBACK. Thank you, Mr. Chairman.

Welcome, Judge Alito, your wife and family. Delighted to have you here. You only have two more pitchers, and then you get a bat. So I am sure people will be happy to hear from you.

Mr. Chairman, before I go forward with my statement, I would like to enter into the record a summary of four cases that Judge Alito has ruled on where he backed employees claiming racial discrimination. It has been entered a couple of times here that he has not ruled in favor of people claiming racial discrimination, and I have a summary of four cases where he has, and I want to enter that into the record.

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

Senator BROWNBACK. Judge Alito, I welcome you to the hearing. This is an extraordinary process. It is a fabulous process and a chance for a discussion with you, with the American public, about the role of the judiciary in our society today. It has become an ever-expanding and important discussion because of the expanding role of the courts in recent years in American society. When the courts, improperly, I believe, assume the power to decide more political than legal issues in nature, the people naturally focus less on the law and more on the lawyers that are chosen really to administer the law. Most Americans want judges who will stick to interpreting the law rather than making it. It is beyond dispute that the Constitution and its Framers intended this to be the role of judges.

For instance, although he was perhaps the leading advocate for expansive Federal power, you can look at Founding Father Alexander Hamilton, nevertheless assuring—assuring—the countrymen in Federalist 78 that the role of the Federal courts under the proposed Constitution would be limited. He said, "The courts must declare the sense of the law, and if they should be disposed to exercise will instead of judgment, the consequences would equally be the substitution of their pleasure to that of the legislative body."

It seems like we are back at an old debate—the role of the courts—and I believe you and others would look and say that the role of the courts is limited, and it is not to decide political matters.

Chief Justice Marshall later explained in *Marbury* v. *Madison* that the Constitution permitted Federal courts neither to write nor execute the laws but, rather, to say what the law is. That narrow scope of judicial power was the reason the people accepted the idea that the Federal courts could have the power of judicial review. That is the ability to decide whether a challenged law comports with the Constitution.

The people believed that while the courts would be independent, they would defer to the political branches on policy issues. This is the most foundational and fundamental of issues. And yet we are back in discussing it because of the role of the judiciary expanding in this society today.

It may seem ironic, but the judicial branch preserves its legitimacy through refraining from action on political questions. That concept was put forward best by Justice Frankfurter, appointed by President Roosevelt. He said, "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed and, therefore, most dependable within narrow limits."

Now, I want to take on this point of the reservation of certain seats on the bench for certain philosophies, which it seems as if we have heard a great deal about today that you need to be like Sandra Day O'Connor in judicial philosophy to be able to go on her seat on the bench. Some interest groups have put forward that philosophy and argued that you deserve closer scrutiny because you don't appear to have the same philosophy, or even opposition if it is not determined that you do not have the same judicial philosophy. This testimony suggests that that would change the ideological balance, that you would change that ideological balance, there-

fore, you should not be approved. And I say that that notion is not anywhere in the understanding of the role of the judges. It creates a double standard for your approval and looks conveniently—it looks suspiciously convenient for the opposition to put forward.

Seats on the bench are not reserved for causes or interests. They are given to those who will uphold the rule of law so long as the nominee is well qualified to interpret and apply the law. This has long been the case of the Supreme Court. And I want to note here that historically the makeup of the Court has changed just as elected branches have changed. In fact, nearly half of the Justices, 46 of 109, who have served on the Supreme Court replaced Justices appointed by a different political party. In recent years, even as the Court has become an increasingly political body, the Senate is not focused on preserving any perceived ideological balance when Democrat Presidents have appointed people to the Court. And the best example of that is the Senate rejecting that notion when Ruth Bader Ginsburg came in front of the Senate and was approved 96–3 to be on the Supreme Court to replace conservative Justice Byron White. This was in 1993.

Now, Justice Ginsburg, it was noted earlier, was the general counsel for the ACLU, certainly a liberal group. It was abundantly clear during the confirmation hearing that Ginsburg would swing the balance of the Court to the left. But because President Clinton won the election and because Justice Ginsburg clearly had the intellectual ability and integrity to serve on the Court, she was confirmed.

During her hearing, hardly any mention was made about balance with Justice White. The only discussion that occurred about Justice White was when Senator Kohl, our colleague, asked her what she thought of Justice White's career. And she started off by saying that she was not an athlete.

History has shown that she did, in fact, dramatically change the balance of the Court in many critical areas, such as abortion, the privacy debate expansion, and child pornography. And I have behind me three of the key cases where Justice White ruled one way, even wrote the majority opinion, and Justice Ginsburg ruled the other way with the majority. You talk about a swing of balance, and yet the issue was not even raised at Justice Ginsburg's confirmation hearing, and yet now it seems as if that is the paramount issue—not only the paramount issue, it actually makes you have to go to a higher standard to be approved. And that is just simply not the way we have operated in the past, nor is it the way we should operate now.

As I stated at Justice Roberts's hearing, the Court has injected itself into many of the political debates of our day, and as my colleague Senator Cornyn has mentioned, the Court has injected itself in the definition of marriage, deciding whether or not human life is worth protecting, permitting Government to transfer private property from one person to another, even interpreting the Constitution on the basis of foreign and international laws.

The Supreme Court has also issued and never reversed a number of decisions that are repugnant to the Constitution's vision of human dignity and equality. Although cases like *Brown* v. *Board of Education* in my State are famous for correcting constitutional

and court errors, there remain several other instances in which the Court strayed and stayed beyond the Constitution and the laws of the United States. Among the most famous of these Supreme Court cases of exercise of political power, I believe, are the cases of *Roe* v. *Wade* and *Doe* v. *Bolton*, two 1973 cases based on false statements which created a constitutional right to abortion. And you can claim whatever you want to of being pro-life or pro-choice, but the right to abortion is not in the Constitution. The Court created it. It created a constitutional right. And these decisions removed a fully appropriate political judgment from the people of several States and has led to many adverse consequences.

For instance, it has led to the almost complete killing of a whole class of people in America. As I noted to my colleagues in the Roberts hearings, this year—this year—between 80 to 90 percent of the children in America diagnosed with Down syndrome will be killed in the womb simply because they have a positive genetic test—which can be wrong and is often wrong, but they would have a positive genetic test for Down syndrome and they will be killed.

America is poorer because of such a policy. We are at our best when we help the weakest. The weak make us strong. To kill them makes us all the poorer, insensitive, calloused, and jaded. *Roe* has made it not only possible but has found it constitutional to kill a whole class of people simply because of their genetic makeup. This is the effect of *Roe*.

I think this is a proper issue for us to consider, and the judge you are replacing noted one time "that the Court's unworkable scheme for constitutionalizing abortion has had this institutionally debilitating effect should not be surprising since the Court is not suited to the expansive role it has claimed for itself in the series of cases that began with *Roe*."

You will have many issues in front of you, many that we will not discuss here in front of this committee. I think it unfortunate that we only narrow in on so few of the cases that you are likely to hear in front of you. And yet that is the nature of the day because they are the hot, political, heat-seeking cases. You are undoubtedly qualified. You are cited by the ABA to be unanimously well qualified. I look forward to a thorough discussion and a hopeful approval of you to be able to join the Supreme Court of the United States.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Brownback.

We now move to the final opening statement. When we finish the statement of Senator Coburn, we are going to go right to the presenters, Senator Lautenberg and Governor Whitman. So I would like them to be on notice that we will be doing that in just a few moments, and following Senator Lautenberg and Governor Whitman, we will be hearing from Judge Alito.

Senator Coburn, the floor is yours.

STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator COBURN. Thank you. Judge Alito, welcome. I know you are tired of this, and I will try to be as brief as possible.

One of the advantages of going last is to be able to hear what everybody else has said, and as I have listened today, we have talked about the unfortunate, the frail. The quotes have been "fair shake for those that are underprivileged." We have heard values, "strong, free, and fair," "progress of our judiciary." We have heard "the vulnerable, the more vulnerable, the weak, those who suffer." We have heard of an "Alito mold" that has to be in the mold of somebody else. And as a practicing physician, the one disheartening thing that I hear is these very common words, this "right to choose," and how we sterilize that to not talk about what it really is.

I have had the unfortunate privilege of caring for over 300 women who have had complications from this wonderful right to choose to kill their unborn babies. And that is what it is. It is a right of convenience to take the life. And the question that arises as we use all these adjectives and adverbs to describe our positions as we approach a Supreme Court nominee is where are we in America when we decide that it is legal to kill our unborn children. I mean, it is a real question for us. I debate honestly with those who disagree with me on this. It is a real issue of measurement of our society when we say it is fine to destroy unborn life who has a heartbeat at 16 days post-conception; 39 days post-conception you can measure the brain waves and there is pain felt. The ripping and tearing of an unborn child from its mother's womb through the hands of another and we say that is fine, you have a constitutional right to do that.

How is it that we have a right of privacy and due process to do that, but you do not have the right, as rejected unanimously by the Supreme Court in 1997, to take your own life in assisted suicide. You know, how is it that we have sodomy protected under that due process, but prostitution unprotected. It is schizophrenic. And the reason it is schizophrenic is there is no foundation for it whatsoever other than a falsely created foundation that is in error.

I don't know if we will ever change that. It is a measure of our society. But the fact is you cannot claim in this Senate hearing to care for those that are underprivileged, those that are at risk, those that are vulnerable, those that are weak, those that are suffering, and at the same time say I don't care about those who have been ripped from the wombs of women and the complications that have come about throughout that.

So the debate for the American public and the real debate here is about *Roe*. Don't let it—we are going to go off in all sorts of directions, but the decisions that are going to be made in votes on the Committee and the votes on the floor is going to be about *Roe*, whether or not we as a society have decided that this is an ethical process, that we have this convenient process that, if we want to rationalize one moral choice with another, we just do it through abortion, this taking of the life—of life of an unborn child.

I asked Chief Justice Roberts about this definition of life. You know, what is life? The Supreme Court cannot figure it out or does not want to figure it out. The fact that we know that there is no life if there is no heartbeat and brain waves, we know that in every State and every territory. But when we have heartbeat and brain waves, we refuse to accept it as the presence of life. This lack of

logic of which we approach this issue because we like and we favor convenience over ethics, we favor convenience over the hard parts of life that actually make us grow.

Senator Brownback talked about those with disabilities that are destroyed in the womb because of a genetic test that is sometimes wrong. I would put forward that we all have disabilities. Some of us, you just can't see it. And yet who makes the decision on whether or not we're qualified or not. We have gone down a road to which we don't have the answers for. That is why we have the schizophrenic decisions coming out of the Supreme Court that don't balance logically with one versus another decision.

So my hope as we go through this process is to not confuse it with easy words and really be honest and straightforward about what this is about. I firmly believe that the Court should take another direction on many of these moral issues that face us. If we are to honor the heritage of our country, whether it be in terms of religious freedom, whether it be in terms of truly protecting life, protecting not just the unborn but who comes next, the infirm, the elderly, the maimed, the disabled—that is who comes next. As we get into the budget crunch of taking care of those people in the years to come, I believe we ought to have that debate honestly and openly. But the fact is we are going to cover it with everything except the real fact is we have made a mistake going down that road in terms of saying we can destroy our unborn children and there are no consequences to it.

So I welcome you. This is a difficult process for you and your family. I am hopeful that you will be treated fairly. I am very disturbed at the picture that was painted by Senator Kennedy that you are not a man of your word, that you are dishonest. The implication that you are not reliable I don't think is a fair characterization of what I have read. And I look forward to you being able to give answers as you can to your philosophy. The real debate is we have had an activist Court, and the American people do not want an activist Court. And the real fear from those who might oppose you is that you will bring the Court back within a realm of where the American people might want us to be with the Supreme Court, one that interprets the law, equal justice under the law, but not advancing without us advancing, the legislative body advancing ahead of you.

I welcome you. I return the balance of my time, and I look forward to your introduction and your opening statement.

Chairman SPECTER. Thank you very much, Senator Coburn.

We will now turn to our presenting witnesses, Senator Lautenberg and Governor Whitman. In accordance with our standing rules of the Committee, the presenters will each have 5 minutes. They have been so informed, and we first welcome our colleague, Senator Frank Lautenberg, to present Judge Alito.

PRESENTATION OF SAMUEL A. ALITO, JR., OF NEW JERSEY, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, BY HON. FRANK LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thank you, Mr. Chairman, and Senator Leahy, colleagues on this Committee. Thank you for the opportunity to testify here today. John Corzine, U.S. Senator, and now Governor-elect in New Jersey, wanted to be here, but transition duties in Trenton prevent him from doing so.

Now, I have been honored to serve in the U.S. Senate for 21 years, and I am convinced that our duty to provide advice and consent for Justices of the Supreme Court is our most important constitutional responsibility. Our mandate is to be a Nation of laws, and the Supreme Court is the place where we look to safeguard our civil rights and our individual liberties.

But I believe that Justices must recognize that our Constitution is an 18th century document that needs to be applied in the context of the 21st century. We also depend on the Supreme Court to uphold the integrity of our Government. So I am privileged to have the opportunity to introduce Sam Alito, Jr., to this Committee, and his beautiful family that he brought along to fortify his candidacy.

Judge Alito was born and raised in the great State of New Jersey. Our State has a legacy of producing outstanding jurists, most notably the late William J. Brennan, who ushered in our Nation's re-commitment to civil rights in the latter half of the 20th century. Another distinguished jurist, Justice Antonin Scalia, also was born in New Jersey.

In 1950, Sam Alito was born in our State's capital city, Trenton, New Jersey, to a family of worthy achievement. Judge Alito's father—I am moving too quickly here—Judge Alito's father was an immigrant from Italy who taught history in high school and later ran the New Jersey Office of Legislative Services, which is similar to our own congressional Research Service, in that it provides objective, unbiased information to the legislature. Judge Alito's mother was a librarian, teacher and school principal, and she is now 91 and still, as I understand it, residing in the family home in Hamilton, New Jersey.

From his parents, Judge Alito learned the importance of education and integrity. Judge Alito and his sister went to public school in Hamilton, New Jersey, where they both joined the debating team. It seemed like the debating experience paid off, as both he and his sister have excelled in the legal profession.

Sam Alito then went on to Princeton University, where his yearbook entry predicted that one day he would warm a seat on the Supreme Court. He graduated from Yale School in 1975, and then served as a clerk for Circuit Court Judge Leonard Garth, with whom he currently serves.

In 1977, Sam Alito joined the U.S. Attorney's office in Newark, where he met his future wife, Martha, who is present here today. They later moved to Washington, where Sam Alito served as an assistant to the Solicitor General and later in the Department of Justice Office of Legal Counsel.

In 1987, Judge Alito returned home to New Jersey after President Reagan appointed him U.S. Attorney for the District of New Jersey. He was a strong prosecutor, and nobody was surprised when President George H.W. Bush appointed him to the Third Circuit Court in 1990, and I had the privilege of introducing him then as well.

Judge Alito's accomplishments in life are the embodiment of the American dream. I am honored today to introduce him to the Committee. He is a young man. If the Senate confirms him for a lifetime appointment to the Supreme Court, he could serve for three decades, or even longer, especially judging it from my point of view. His decisions would affect our rights, the rights of our children, our grandchildren, and other future generations.

Mr. Chairman, you know well it is the job of this Committee to evaluate Judge Alito's qualifications and fitness for the Court, including his views on legal issues. And I know every member of the Committee takes that obligation seriously, and I trust that Judge Alito will be forthcoming and cooperative in this process. I have had a chance to meet him. I know that he responded to the questions that I put to him. Maybe they were too easy, but he responded very well to them.

I thank you, Mr. Chairman. I am pleased to be here with our former Governor, Christie Whitman, and we haven't sat at a table together for a long time, but it is a good opportunity to do so.

Thank you.

Chairman SPECTER. Senator Lautenberg, do you care to make a recommendation on the nominee?

Senator LAUTENBERG. I care to present the evidence, just the evidence, Mr. Chairman, and we will let the record speak for itself.

Chairman SPECTER. Our next presenter is Governor Whitman, distinguished two-term Governor for the State of New Jersey, and in the Cabinet of President Bush as Administrator of the Environmental Protection Agency.

We welcome you here, Governor Whitman, and look forward to your testimony.

PRESENTATION OF SAMUEL A. ALITO, JR., OF NEW JERSEY, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, BY CHRISTINE TODD WHITMAN, FORMER GOVERNOR OF NEW JERSEY, AND FORMER ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

Governor WHITMAN. Thank you, Mr. Chairman. It is a pleasure to be here today with Senator Lautenberg to introduce Judge Samuel A. Alito, Jr., and I do urge your support for his nomination to the Supreme Court.

I won't go into his family background. Senator Lautenberg has done that—save to mention one member of the family that he didn't, which is that the Judge's sister, Rosemary, is a nationally recognized employment attorney and someone who is recognized as part of a family that has devoted itself to public service and continues to do that.

Judge Alito personifies the motto of the civic pride embodied in the slogan of his hometown, "Trenton makes, the world takes." And with the consent of the Senate, one of the most important bodies in the world, the U.S. Supreme Court, can take a proud product of Trenton, New Jersey, into their chambers.

But I am not here to discuss Judge Alito's family background or his State ties. I am here to discuss his own history of achievement and his potential to be a great Associate Justice of our Supreme Court.

Sam Alito has excelled at everything he has undertaken. He was an exceptional student at Princeton University and Yale Law School, an outstanding young attorney at the Justice Department, an accomplished United States Attorney, and for the past 15 years has been a respected and exemplary Federal Appeals Court Judge.

The American Bar Association just gave him their highest rating for his seat as Justice, and in his past two appearances before the Senate for confirmation, he has received unanimous support.

There is, however, more to my support of Judge Alito. Like other Americans, I have read many articles dissecting positions Judge Alito has taken throughout his career, trying to discern how he might decide on issues likely to appear before the Supreme Court that he would confront as a Justice. I too have examined the record. In the final analysis, my decision to support Judge Alito for this position is not based on whether I agree with him on a particular issue or set of issues or on his conformity with any particular political ideology. In fact, while we may agree on some political issues, I know there are others on which we disagree. Nevertheless, one's agreement or disagreement on a political question is, after all, ultimately irrelevant to the issue of whether or not Judge Alito should serve as an Associate Justice of the Supreme Court.

The Court's role is not to rule based on Justices' personal persuasions, rather on persuasive arguments grounded on fact, those facts presented in that particular case, and on their interpretation of the Constitution. Those decisions are, of course, grounded in the hard reality of disputed fact and the messiness of the real world, but they are also guided by principles of law and justice which have long been treasured by the people of this country. We should look for Justices who understand that instinctively in the very core of their being. I saw this trait in Judge Alito when he served on the Appeals Court during my terms as Governor, and I have every reason and every confidence that he will exhibit the same as a Supreme Court Justice.

Policy in the United States is defined through the laws crafted by the legislative branch of Government and carried out by the executive. Our judges make decisions based on their interpretation of the intent of those laws. We do not want Justices to conform their decisions' ideologies. We do want Justices whose opinions are shaped by the facts before them and by their understanding of the Constitution. We should also look for Justices who possess the necessary qualities of intellect and humility, desirable in those with great responsibility and who can express their thinking clearly and in understandable language. While we should expect the Justices will hold philosophies that will guide their decisions, we should

equally expect that they will not hold ideologies that will predetermine their decisions. That is the genius of our system.

Mr. Chairman, some have suggested that Judge Alito has an ideological agenda. I believe that an honest and complete review of his record as a whole will find that his only agenda is fidelity to his judicial craft. If Judge Alito has a bias, it is in favor of narrowly drawn opinions that respect precedent and reflect the facts before him.

Members of the Committee, yours is an extraordinary responsibility. Decisions by our Supreme Court will affect the lives of Americans for generations to come. As politicians, whether current or retired, we all have deeply held positions we want to protect. When I was Governor, it fell to me five times to appoint members of the New Jersey State Supreme Court. One thing that experience taught me was that it is virtually impossible to find judges who will act as you would act were you in their position. That is as it should be. Your responsibility is to the extent possible to determine whether or not the nominee before you has the legal background, intelligence and integrity to be a credit to the Court.

Sam Alito has been a model as a Federal Appeals Court Judge. He has shown that he has the intellect, the experience and the temperament to serve with true distinction. I have every confidence he will be a balanced, fair and thoughtful Justice. I urge this Committee to favorably report his nomination to the U.S. Senate.

Thank you very much.

Chairman SPECTER. Thank you very much, Governor Whitman.

Without objection, the statement of Senator Corzine will be made a part of the record.

We appreciate your coming, Senator Lautenberg, appreciate your coming Governor Whitman.

Judge Alito, if you will resume center stage. Judge, you can remain standing. We now come to the formal swearing in of the nominee. I count 41 cameras in the well.

[Laughter.]

Chairman SPECTER. And there are just behind you, a grouping of cameras, seven in number, and I see three more. So you are well up to 50, which exceeds the number present, only 28, for Chief Justice Roberts. So that may be an omen. I am stalling for time a little bit here to allow the photographers to position themselves. They have sat, if not patiently, impatiently, all day. We may move the swearing in to the beginning of the ceremony in the future so they can all go out and do something productive.

[Laughter.]

Chairman SPECTER. If you would raise your right hand, do you solemnly swear that the testimony you will give before the Committee of the Judiciary of the U.S. Senate will be the truth, the whole truth and nothing but the truth, so help you God?

Judge ALITO. I do.

Chairman SPECTER. Thank you, Judge Alito. You may be seated, and we welcome whatever opening comments you care to make.

STATEMENT OF SAMUEL A. ALITO, JR., OF NEW JERSEY, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge ALITO. Thank you very much, Mr. Chairman. I am deeply honored to appear before you. I am deeply honored to have been nominated for a position on the Supreme Court, and I am humbled to have been nominated for the seat that is now held by Justice O'Connor. Justice O'Connor has been a pioneer, and her dedicated service of the Supreme Court will never be forgotten, and the people of the country certainly owe her a great debt for the service that she has provided.

I am very thankful to the President for nominating me, and I am also thankful to the members of this Committee and many other Senators who took time from their busy schedules to meet with me. That was a great honor for me, and I appreciate all of the courtesies that were extended to me during those visits. And I want to thank Senator Lautenberg and Governor Whitman for coming here today and for their kind introductions.

During the previous weeks, an old story about a lawyer who argued a case before the Supreme Court has come to my mind, and I thought I might begin this afternoon by sharing that story. The story goes as follows:

This was a lawyer who had never argued a case before the Court before, and when the argument began, one of the Justices said, "How did you get here?" meaning how had his case worked its way up through the court system. But the lawyer was rather nervous, and he took the question literally, and he said—and this was some years ago. He said, "I came here on the Baltimore and Ohio Railroad."

This story has come to my mind in recent weeks because I have often asked myself how in the world did I get here. And I want to try to answer that today and not by saying that I came here on I–95 or on Amtrak.

I am who I am in the first place because of my parents and because of the things that they taught me, and I know from my own experience as a parent that parents probably teach most powerfully not through their words but through their deeds. And my parents taught me through the stories of their lives, and I don't take any credit for the things that they did or the things that they experienced. But they made a great impression on me.

My father was brought to this country as an infant. He lost his mother as a teenager. He grew up in poverty. Although he graduated at the top of his high school class, he had no money for college, and he was set to work in a factory. But at the last minute, a kind person in the Trenton area arranged for him to receive a $50 scholarship, and that was enough in those days for him to pay the tuition at a local college and buy one used suit. And that made the difference between his working in a factory and going to college.

After he graduated from college, in 1935, in the midst of the Depression, he found that teaching jobs for Italian-Americans were not easy to come by, and he had to find other work for a while. But eventually he became a teacher, and he served in the Pacific during

World War II, and he worked, as has been mentioned, for many years in a nonpartisan position for the New Jersey Legislature, which was an institution that he revered.

His story is a story that is typical of a lot of Americans, both back in his day and today, and it is the story, as far as I can see it, about the opportunities that our country offers and also about the need for fairness and about hard work and perseverance and the power of a small good deed.

My mother is a first-generation American. Her father worked in the Roebling Steel Mill in Trenton, New Jersey. Her mother came from a culture in which women generally did not even leave the house alone, and yet my mother became the first person in her family to get a college degree. She worked for more than a decade before marrying. She went to New York City to get a master's degree, and she continued to work as a teacher and a principal until she was forced to retire. Both she and my father instilled in my sister and me a deep love of learning.

I got here in part because of the community in which I grew up. It was a warm but definitely an unpretentious, down-to-earth community. Most of the adults in the neighborhood were not college graduates. I attended the public schools. In my spare time, I played baseball and other sports with my friends. And I have happy memories and strong memories of those days and good memories of the good sense and the decency of my friends and my neighbors.

And after I graduated from high school, I went a full 12 miles down the road, but really to a different world, when I entered Princeton University. A generation earlier, I think that somebody from my background probably would not have felt fully comfortable at a college like Princeton, but by the time I graduated from high school, things had changed. And this was a time of great intellectual excitement for me. Both college and law school opened up new worlds of ideas. But this was back in the late 1960s and early 1970s. It was a time of turmoil at colleges and universities. And I saw some very smart people and very privileged people behaving irresponsibly, and I couldn't help making a contrast between some of the worst of what I saw on the campus and the good sense and the decency of the people back in my own community.

I am here in part because of my experiences as a lawyer. I had the good fortune to begin my legal career as a law clerk for a judge who really epitomized open-mindedness and fairness. He read the record in detail in every single case that came before me. He insisted on scrupulously following precedents, both the precedents of the Supreme Court and the decisions of his own court, the Third Circuit. He taught all of his law clerks that every case has to be decided on an individual basis, and he really didn't have much use for any grand theories.

After my clerkship finished, I worked for more than a decade as an attorney in the Department of Justice, and I can still remember the day as an Assistant U.S. Attorney when I stood up in court for the first time and I proudly said, "My name is Samuel Alito, and I represent the United States in this court." It was a great honor for me to have the United States as my client during all of those years.

I have been shaped by the experiences of the people who are closest to me, by the things I have learned from Martha; by my hopes and my concerns for my children, Phillip and Laura; by the experiences of members of my family, who are getting older; by my sister's experiences as a trial lawyer in a profession that has traditionally been dominated by men. And, of course, I have been shaped for the last 15 years by my experiences as a judge of the court of appeals.

During that time, I have sat on thousands of cases. Somebody mentioned the exact figure this morning. I don't know what the exact figure is, but it is way up in the thousands. And I have written hundreds of opinions. And the members of this Committee and the members of their staff who have had the job of reviewing all of those opinions really have my sympathy.

[Laughter.]

Judge ALITO. I think that may have constituted cruel and unusual punishment.

I have learned a lot during my years on the Third Circuit, particularly, I think, about the way in which a judge should go about the work of judging. I have learned by doing, by sitting on all of these cases, and I think I have also learned from the examples of some really remarkable colleagues.

When I became a judge, I stopped being a practicing attorney, and that was the big change in role. The role of a practicing attorney is to achieve a desirable result for the client in the particular case at hand. But a judge can't think that way. A judge can't have any agenda. A judge can't have any preferred outcome in any particular case. And a judge certainly doesn't have a client. The judge's only obligation—and it's a solemn obligation—is to the rule of law, and what that means is that in every single case, the judge has to do what the law requires.

Good judges develop certain habits of mind. One of those habits of mind is the habit of delaying reaching conclusions until everything has been considered. Good judges are always open to the possibility of changing their minds based on the next brief that they read or the next argument that is made by an attorney who is appearing before them or a comment that is made by a colleague during the conference on the case, when the judges privately discuss the case.

It has been a great honor for me to spend my career in public service. It has been a particular honor for me to serve on the court of appeals for these past 15 years because it has given me the opportunity to use whatever talent I have to serve my country by upholding the rule of law. And there is nothing that is more important for our Republic than the rule of law.

No person in this country, no matter how high or powerful, is above the law, and no person in this country is beneath the law.

Fifteen years ago, when I was sworn in as a judge of the court of appeals, I took an oath. I put my hand on the Bible and I swore that I would administer justice without respect to persons, that I would do equal right to the poor and to the rich, and that I would carry out my duties under the Constitution and the laws of the United States. And that is what I have tried to do to the very best

of my ability for the past 15 years, and if I am confirmed, I pledge to you that that is what I would do on the Supreme Court.

Thank you.

Chairman SPECTER. Thank you very much, Judge Alito, for those opening comments.

We will adjourn at this point, and we will resume tomorrow morning at 9:30, when we will start the first round of questioning with each Senator on round one having 30 minutes.

[Whereupon, at 3:40 p.m., the Committee was adjourned.]

[The biographical information of Judge Alito follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

NOMINEE FOR THE SUPREME COURT OF THE UNITED STATES

GENERAL (PUBLIC)

1. Name: **Full name (include any former names used).**

   Samuel Anthony Alito, Jr.

2. Position: **State the position for which you have been nominated.**

   Associate Justice of the Supreme Court of the United States

3. Address: **List current office address. If state of residence differs from your place of employment, please list the state where you currently reside.**

   Frank R. Lautenberg United States Courthouse & Post Office Building
   50 Walnut Street
   Newark, NJ 07101

4. Birthplace: **State date and place of birth.**

   April 1, 1950. Trenton, New Jersey

5. Marital Status: **List spouse's name, occupation, employer's name and business address(es). Please also indicate the number of dependent children.**

   Martha-Ann (Bomgardner) Alito. Librarian, substitute teacher, Caldwell-West Caldwell Board of Education, Harrison Building, 104 Gray Street, West Caldwell, NJ 07006. Two dependent children.

6. Education: **List in reverse chronological order any college, law school, and other institutions of higher education attended. Please include dates of attendance, whether a degree was received, and the date each degree was received.**

   1972-1975: Yale Law School, J.D. June 1975
   1968-1972: Princeton University, A.B. June 1972

7. Employment Record: **List in reverse chronological order, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, elected official or employee since graduation from college, and if you received payment for your services. Include the name and address of the employer and job**

title or job description, or the name and address of the institution or organization and your title and responsibilities, where appropriate.

June 1990 – Present: Judge, U.S. Court of Appeals for the Third Circuit. Chambers address: Frank R. Lautenberg United States Courthouse & Post Office Building, 50 Walnut Street, Newark, NJ 07101. Court headquarters: United States Courthouse, 601 Market Street, Philadelphia, PA 19106-1790. Paid.

March 1987 – June 1990: United States Attorney for the District of New Jersey. Peter J. Rodino Federal Building, 970 Broad Street, Suite 700, Newark, NJ 07102. Paid.

December 1985 – March 1987: Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice. 950 Pennsylvania Ave., NW, Washington, DC 20530-0001. Paid.

August 1981 – December 1985: Assistant to the Solicitor General, U.S. Department of Justice. 950 Pennsylvania Ave., NW, Washington, DC 20530-0001. Paid.

November 1977 – August 1981: Assistant U.S. Attorney, District of New Jersey. Peter J. Rodino Federal Building, 970 Broad Street, Suite 700, Newark, NJ 07102. Paid.

July 1976 – August 1977: Law clerk, Hon. Leonard I. Garth, U.S. Court of Appeals for the Third Circuit. Martin Luther King, Jr. Courthouse & Federal Building, Newark, NJ 07102. Paid.

January – June 1976: Law clerk, Warren, Goldberg & Berman. 210 East Hanover Street, Trenton, NJ 08608. Paid.

September – December 1975: Active duty, United States Army, Fort Gordon, GA. Paid.

June – August 1974: Summer Associate, Pitney Hardin Kipp & Szuch. 163 Madison Avenue, Morristown, NJ 07960. Paid.

June – August 1973: Intern, New Jersey Public Defender. 216 South Broad Street, Trenton, NJ 08608. Paid.

July – August 1972: Summer Clerk, Mercer County Counsel. 209 South Broad Street, Trenton, NJ 08650. Paid.

June – July 1972: Summer Clerk, Pemberton Township. 500 Pemberton-Browns Mills Road, Pemberton, NJ 08068. Paid.

8. **Military Service and Draft Status: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number and type of discharge received. Please list, by approximate date, Selective Service classifications you have held, and state briefly the reasons for any classification other than I-A.**

   I was given Selective Service Classification I-A in approximately April 1968. I was enrolled in the Army Reserve Officer Training Corps from September 24, 1970, until I was commissioned as a second lieutenant in the Army Reserves upon graduation from college on June 5, 1972. After law school, I was on active duty for training as a first lieutenant for training from September 13, 1975, to December 12, 1975. I was in the Army Reserves (inactive) from 1972 to June 30, 1980, when I was honorably discharged as a captain. My serial number was my Social Security number.

9. **Honors and Awards: List any scholarships, fellowships, honorary degrees, academic or professional honors or awards, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement you have received.**

   Princeton University: Phi Beta Kappa; selected Scholar of Woodrow Wilson School of Public and International Affairs; McConnell Foundation Scholarship for summer thesis research; debating awards.

   Yale Law School: Awards for best moot court argument and best contribution to Yale Law Journal.

   Since Law School:

   Department of Justice Awards, 1978-85;

   Selected for membership in American Bar Foundation, 1991;

   St. Thomas More Award, 1995, given by the St. Thomas More Association of Seton Hall University and Law School;

   Peter J. Rodino Award, 1999, given by the Peter J. Rodino Law Society of Seton Hall Law School for embracing and carrying on the legacy of Peter J. Rodino;

   Family Research Council Golden Gavel Award, 2001, for Saxe v. State College Area School Distr., 240 F.3d 200 (3d Cir. 2001);

   N.J. Law Journal Award, 1999, for commitment to the bench, bar, and people of the Third Circuit;

   Honorary membership, Phi Alpha Delta Law Fraternity International, April 2003;

   Selected for membership in the American Law Institute, 2003.

10. **Bar Associations: List all bar associations, or legal or judicial-related committees, selection panels, or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups. Also, if any such association, committee, or conference of which you were or are a member issued any reports, memoranda, or policy statements prepared or produced with your participation, please furnish the committee with four (4) copies of these materials, if they are available to you. "Participation" includes, but is not limited to, membership in any working group of any such association, committee, or conference which produced a report, memorandum, or policy statement, even where you did not contribute to it.**

Advisory Committee on Appellate Rules, Committee on Rules of Practice and Procedure, Judicial Conference of the United States: Chair, October 2001 – October 2005; member, October 1997 – September 2001. I have attached several reports that were issued during the period when I served as the Chair of the Advisory Committee on Appellate Rules of the Committee on Rules of Practice and Procedure.

Association of the Federal Bar of New Jersey: Member, Advisory Board, 1988 – present.

New Jersey State Bar Association, Executive Board of Federal Practice and Procedure Committee: Member, 1987 – 1989.

New Jersey State Bar Association. I have no records of membership dates. I have requested information from the New Jersey State Bar Association but have not yet received a response.

Essex County Bar Association: Member, 1975 – present.

American Bar Foundation: Fellow, June 1991 – October 2000; Lifetime Fellow, October 2000 – present.

Lawyers' Advisory Committee for the United States District Court for the District of New Jersey: Member, Executive Committee, 1987 – 1990.

American Law Institute: Member, 2003 – present.

American Judicature Society: Member, 2002 – present.

Federalist Society for Law and Public Policy Studies: Member, 1983– present.

Yale Law Journal Advisory Board: Advisory Board Member, 2004 – present.

Federal Sentencing Reporter (Vera Institute for Justice): Advisory Board Member, 1988 – 1993.

National Environmental Enforcement Council: Member. I was a member of this organization while I served as the United States Attorney for the District of New Jersey. While I do not recall the exact dates, it was between March 1987 and June 1990.

Phi Alpha Delta Law Fraternity International: Honorary Member, April 2003 – present.

Constitution Project Sentencing Initiative: Member, 2004 – present.

National Italian American Foundation International Law Institute: Member, 2005-present.

11. Bar and Court Admission:

a. **List the date(s) you took the examination and date you passed for all states where you sat for a bar examination. List any state in which you applied for reciprocal admission without taking the bar examination and the date of such admission or refusal of such admission.**

New Jersey: exam taken July 31, 1975, admitted December 9, 1975

New York: reciprocal admission on July 13, 1982

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

U.S. Court of Appeals for the District of Columbia Circuit, November 30, 1987

New York State courts, July 13, 1982

U.S. Court of Appeals for the Second Circuit, June 11, 1981

U.S. Supreme Court, March 26, 1979

U.S. Court of Appeals for the Third Circuit, March 29, 1977

New Jersey State courts, December 9, 1975

United States District Court for the District of New Jersey, December 9, 1975

I am aware of no lapses in membership.

12. Memberships:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11, to which you belong, or to which you have belonged, or in which you have participated since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications. Please describe briefly the nature and objectives of each such organization, the nature of your participation in each such organization, and identify an officer or other person from whom more detailed information may be obtained.

Yale Law School Alumni Association of New Jersey: This is a regional alumni association for Yale Law School graduates. The alumni association serves to keep alumni involved in the law school and updated on events. I have participated as a member. I spoke at a dinner meeting and at another I introduced the Dean of the Law School. I have been a member from 1987 – present. For more information, contact Frank Pasquale, Associate Professor, Seton Hall Law School, One Newark Center, Newark, NJ 07102-5210.

Princeton Alumni Council Careers Committee: The Alumni Council represents alumni interests and concerns to the University. During 1991 – 1993, I served as the Chair of the Careers Committee, which assists in developing mentoring groups and on-campus careers programs for alumni. In this capacity, I attended meetings of the Alumni Council Executive Committee. During 1989 – 1991 and 1993 – 1994, I was a Committee member. For more information, contact Margaret Moore Miller, Director, Princeton Alumni Council, Princeton University, Princeton, NJ 08540.

Princeton Alumni Association of Essex County, New Jersey: This is a regional association for Princeton alumni. Membership is automatic for alumni in the area. I have been a member from 1987 to the present, but have not been active in my membership. For more information, contact Mary Tabor Engel, 100 Upper Mountain Ave., Montclair, NJ 07042.

Princeton Schools Committee of Essex County: I was a member from 1998 – 2003. This is regional alumni group that interviews applicants to Princeton and submits reports on interviews. I interviewed about five to ten applicants per year. For more information, contact Frank E. Ferruggia, Esq., McCarter & English, LLP, Four Gateway Center, 100 Mulberry St., P.O. Box 652, Newark, NJ 07101-0652.

Princeton Club of Washington, DC: This is a regional association for Princeton alumni. I was a member from approximately 1983 – 1987, but was not active in my membership. For more information, contact Sheila L. Summers, Executive Secretary, The Princeton Club of Washington, 4227 46th St., NW, Washington, DC 20016.

Concerned Alumni of Princeton: This was a group of Princeton alumni. A document I recently reviewed reflects that I was a member of the group in the 1980s. Apart from that document, I have no recollection of being a member, of attending meetings, or otherwise participating in the activities of the group. The group has no current officers from whom more information may be obtained.

National Italian American Foundation: This is a non-profit organization that serves to preserve and protect Italian American heritage and culture. Among other things, it sponsors programs that provide educational and career support to youth. I have participated in this group as a member from 2002 – present. For more information, contact John B. Salamone, National Executive Director, National Italian American Foundation, 1860 19th St., NW, Washington, DC 20009.

Knollwood Tennis Club: My family and I have been members from 2003 – present. It is a neighborhood group that owns two clay tennis courts but has no other facilities or property. For more information, contact Glenn Martin, 91 Westover Ave., West Caldwell, NJ 07006.

Seton Hall Law School Self Study Committee: I was a member from the fall of 1999 through spring 2000. This was a group appointed by the law school to study various aspects of the school in preparation for re-accreditation by the American Bar Association. For more information, contact Dean Patrick Hobbs, Seton Hall Law School, One Newark Center, Newark, NJ 07102.

b. If any of these organizations of which you were or are a member or in which you participated issued any reports, memoranda, or policy statements prepared or produced with your participation, please furnish the committee with four (4) copies of these materials, if they are available to you. "Participation" includes, but is not limited to, membership in any working group of any such association, committee, or conference which produced a report, memorandum or policy statement, even where you did not contribute to it. If any of these materials are not available to you, please give the name and address of the organization that issued the report, memoranda, or policy statement, the date of the document, and a summary of its subject matter.

The Seton Hall Law School Self Study Committee produced a report entitled "2001 Self Study." Copies are supplied.

As the Chair of the Princeton Alumni Council Careers Committee, I provided oral reports at meetings of the Alumni Council Executive Committee concerning the work of the Careers Committee, and I may have provided written materials, but I do not specifically recall ever having done so. I have not retained any papers relating to my service on this Committee, but I have contacted the Careers

Committee and requested any materials from the relevant time period. I will forward any such materials to the Committee.

To the best of my recollection, I have not participated in producing any other reports, memoranda, or policy statements in conjunction with my membership in the organizations listed in response to question 12.a.

c. Please indicate whether any of these organizations currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

To my knowledge, the entities listed in response to question 12.a. do not discriminate and never have discriminated on the basis of race, sex, or religion through formal membership requirements or the practical implementation of membership policies.

13. <u>Published Writings, Testimony and Speeches:</u>

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other material you have written or edited, including material published only on the Internet. Please supply four (4) copies of all published material to the Committee.

Foreword, 1 SETON HALL CIR. REV. 1 (2005).

Panel Speaker at the Federalist Society's 2000 National Lawyers Convention: Presidential Oversight and the Administrative State, *in* 2 ENGAGE (Federalist Soc'y, Wash. D.C.) 11 (2001).

The Role of the Lawyer in the Criminal Justice System, 2 FEDERALIST SOC'Y CRIM. L. NEWS (Federalist Soc'y, Wash., D.C.) 3 (1998), *available at* http://www.fed-soc.org/Publications/practicegroupnewsletters/criminallaw/role-crimv2i3.htm

Change in Continuity at the Office of Legal Counsel, 15 CARDOZO L. REV. 507 (1993).

Reviewing the Sentencing Commission's 1991 Annual Report, 5 FED. SENT. REP. 166 (1992).

The First Amendment: Information, Publication and the Media, 1 SETON HALL CONST. L.J. 327 (1991).

The Next Page in Federal Sentencing, LEGAL TIMES, August 28/September 4, 1989, at 19.

What Role Should Individual Sentencing Judges Play in the Guideline Development Process?, 1 FED SENT. REP. 372 (1989).

Racketeering Made Simple(r), *in* THE RICO RACKET 1 (Gary L. McDowell ed. 1989).

Introduction to *After the Independent Counsel Decision: Is Separation of Powers Dead?*, 26 AM. CRIM. L. REV. 1667 (1989).

Shift Won't Hamper Crime Fight, DAILY J. (Vineland, N.J.), May 5, 1989.

The Year Wasn't So Bad, NAT'L. L.J., Sep. 26, 1998, at 12.

Documents and the Privilege Against Self-Incrimination, 48 U. PITT. L. REV. 27 (1986).

Equal Protection and Classification Based on Family Membership, 80 DICK. L. REV. 410 (1976).

The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court, 83 YALE L.J. 1202 (1974).

b. Please supply four (4) copies of any testimony, official statements, or other communications relating, in whole or in part, to matters of public policy, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary, 107th Cong. (2002).

Testimony before Committee of the N.J. Legislature in 1988 or 1989 on bills to permit pretrial detention in certain cases.

Confirmation Hearings on Federal Appointments: Hearings before the Senate Comm. on the Judiciary, 100th Cong. (1990).

c. Please list all speeches, talks, or presentations by you which relate in whole or in part to issues of law or public policy. For each one, please give the name and address of the group before which the speech was given, the date of the speech, and a summary of its subject matter. For each of these, please supply four (4) copies of your prepared remarks or any outline or notes from which you spoke. If a recording or transcript is available, please supply four

(4) copies of those as well. If press reports about the speech, talk, or presentation are available to you, please supply them.

While I was the United States Attorney for the District of New Jersey (March 1987 – June 1990), I was frequently called upon to speak, usually regarding the work of the office or law enforcement issues. Most of these speeches were delivered extemporaneously or using notes, which I did not keep. I have listed those events that I can specifically recall or for which I have located records, but I am sure that there are others that I cannot specifically recall and for which I have no records.

Annual Judicial Conference of the United States District Court for the District of New Jersey, Princeton, NJ, March 22, 1985 (United States District Court for the District of New Jersey, Martin Luther King, Jr. Federal Building & Courthouse, 50 Walnut Street, Newark, NJ 07102). Panel member on "Multiple Representation and the Corporate Defendant in Criminal and Civil Litigation - The Tough Questions of Privilege and Strategy." I have no recollection of the substance of my remarks and am unable to find any notes.

Kaiser-Permanente Conference, Dallas, TX, approximately 1986. (Kaiser Permanente, 1 Kaiser Plaza, Oakland, CA 94612). I summarized the Office of Legal Counsel opinion on AIDS and the Rehabilitation Act. I am unable to locate any materials relating to this talk.

The New Jersey Institute for Continuing Legal Education in cooperation with the Federal Practice and Procedures Committee of the New Jersey State Bar Association, 1988, New Brunswick, NJ (New Jersey Institute for Continuing Legal Education, One Constitution Sq., New Brunswick, NJ 08901). I participated in a CLE presentation entitled, "Special Problems Faced by Criminal Defendants and Their Lawyers: The Forfeiture of Attorney's Fees, Subpoenas for Defense Attorneys." I have no recollection of the substance of my remarks and am unable to find any notes.

Passaic County Bar Association's Law Day Celebration, May 2, 1988, Paterson, NJ (77 Hamilton Street, Paterson, NJ 07505). I spoke about the history of Law Day and the meaning that has been attached to it through the years. I specifically discussed the problem of drugs. A text of the speech is supplied.

Child Pornography and Exploitation Seminar sponsored by the Law Enforcement Coordinating Committee of New Jersey, May 17, 1988, Newark, NJ (United States Attorney's Office, Peter J. Rodino Federal Building, 970 Broad Street, Newark, NJ 07102.) I spoke about enforcement of federal laws on child pornography. A copy of the speech is supplied.

Graduation ceremony for new New Jersey State Police Troopers, July 28, 1988, West Trenton, NJ (New Jersey State Police, River Road, P.O. Box 7068, West

Trenton, NJ 08628). I spoke about the importance of the work of the State Police and the problem of crime in the state of New Jersey. A copy of the speech is supplied.

Annual Federalist Society Lawyers' Convention, November 1989, Washington, DC (1015 18th St., N.W., Washington, DC 20036). I participated as a moderator on a panel entitled, "Debate -- After the Independent Counsel Decision: Is Separation of Powers Dead?" On the panel were Hon. Charles Fried, professor at Harvard Law School and former Solicitor General, and Paul M. Bator, then-professor at University of Chicago Law School and former Deputy Solicitor General. A copy of the transcript is attached.

New Jersey Institute of Continuing Legal Education, Seminar, 1989, New Brunswick, NJ (New Jersey Law Center, One Constitution Sq., New Brunswick, NJ 08901). I provided an outline of discovery in criminal cases. The outline from which I spoke is supplied.

Yale Law School Association of New Jersey, March 2, 1989, in West Orange, NJ (c/o Frank Pasquale, Associate Professor, Seton Hall Law School, One Newark Center, Newark, N.J. 07102.) I spoke about the work and priorities of the United States Attorney's Office for the District of New Jersey. I am unable to find any text or notes relating to this talk.

The 200 Club of Union County (a non-profit organization dedicated to providing aid and support to uniformed officers in the county), November 3, 1989, Mountainside, NJ (222 Park Ave., Scotch Plains, NJ 07076). I spoke about law enforcement's need for the help of private citizens. A copy of the speech is supplied.

Yale Law School Federalist Society, April 10, 1991, New Haven, CT (127 Wall Street, New Haven, CT 06520). I spoke about the evolution of federal sentencing, the Sentencing Reform Act, and the Sentencing Guidelines. The notes used in delivering this talk are supplied.

Symposium sponsored by the University of Pennsylvania chapter of the Federalist Society, October 20, 1990, Philadelphia, PA (3400 Chestnut Street, Philadelphia, PA 19104). I moderated a panel discussion on "State Crime in the Federal Forum." The panel members were Judges Jon O. Newman and Roger J. Miner of the United States Court of Appeals for the Second Circuit, Professor Robert Blakey of the Notre Dame Law School, and L. Gordon Crovitz of the Wall Street Journal. I am unable to locate any text or notes relating to the substance of my remarks.

Widener Law School, early 1990s, Harrisburg, PA (Harrisburg Campus, 3800 Vartan Way, Harrisburg, PA 17106). I spoke about federal sentencing. As best I can recall, my remarks were very similar to those given at Yale Law School in

1991, and I probably used the same notes. I am unable to locate any other materials relating to the substance of my talk.

Princeton University Class in Politics 305, early 1990s, Princeton, NJ (Department of Politics, Princeton University, Princeton, NJ 98540). As best I can recall, I spoke about the Third Circuit and my work as a judge. I am unable to locate any materials relating to these remarks.

Panel discussion sponsored by the Rutgers School of Law Newark chapter of the Federalist Society, April 13, 1992, Newark, NJ (123 Washington Street, Newark, NJ 07102). I moderated a panel discussion on "Judicial Activism: Individual Rights - the Court as Super Legislature." The panel members were Hon. Charles Fried, professor at Harvard Law School and former Solicitor General; Professor James Pope of Rutgers School of Law Newark; and George McCarter, Esq., then of McCarter & English. I have no specific recollection of the substance of my remarks. I am unable to locate any materials relating to these remarks.

Seton Hall School of Law, early 1990s, Newark, NJ (One Newark Center, Newark, NJ 07102). As best I can recall, I spoke about differences between federal and New Jersey constitutional law on some issues of criminal procedure and perhaps some other issues. I am unable to locate any materials relating to these remarks.

Continuing legal education workshop sponsored by the Federalist Society, May 7, 1992, New York, NY (1015 18th St., NW, Washington, DC 20036). The workshop focused on Commerce Clause issues in the pre-Lopez era, including the dormant Commerce Clause, state taxation of commerce, and the federalization of crime. As best I can recall, my talk was basically historical. I believe that I recounted the problems relating to commerce that contributed to the call for a constitutional convention and the limited discussion of the Commerce Power in the Philadelphia Convention and the state ratifying conventions. I also recall discussing the competing arguments concerning the dormant Commerce Clause. I am unable to locate any materials relating to these remarks.

New Jersey Department of Law and Public Safety, March 24, 1993, Trenton, NJ (Hughes Justice Complex, 25 W. Market St., Trenton, NJ 08625). I spoke about the work of my court and effective appellate advocacy. Notes that I used in delivering this talk are supplied.

Yale Law School Association of New Jersey, 1995, West Orange, NJ (c/o Frank Pasquale, Associate Professor, Seton Hall Law School, One Newark Center, Newark, NJ 07102). I introduced the new dean of the Yale Law School. A copy of my remarks is supplied.

Conference on the Tenth Amendment sponsored by the Heritage Foundation and Federalist Society, September 12, 1995, Washington, DC (Heritage Foundation,

214 Mass. Ave., NE, Washington, DC 20002; Federalist Society, 1015 18th St., NW, Washington, DC 20036). I moderated a panel discussion on the Commerce Clause. The panel members were Professor Steven Calabresi, Northwestern Law School; Professor Jonathan Macey, then at Cornell Law School; and Dr. Roger Pilon, CATO Institute. I provided a brief introduction to the topic and the Supreme Court's decision in United States v. Lopez, 514 U.S. 549 (1995). I then introduced the panel members. Notes that I used are supplied.

Luncheon sponsored by Seton Hall School of Law, October 1995, West Orange, NJ (One Newark Center, Newark, NJ 07102). I gave remarks after I was presented with Seton Hall Law School's St. Thomas More Medal. A copy of the speech is supplied.

Seton Hall School of Law, October 18, 1995, Newark, NJ (One Newark Center, Newark, NJ 07102). I spoke about appellate advocacy. Notes that I used in delivering this talk are supplied. I recall giving similar talks to Seton Hall Law School students on several other occasions but I have no record of the dates and no papers relating to these talks.

Annual Conference of the United States District Court for the District of New Jersey, April 11, 1996, West Orange, NJ (United States District Court for the District of New Jersey, Martin Luther King, Jr. Federal Building & Courthouse, 50 Walnut Street, Newark NJ 07102). I spoke about technological issues facing the courts, including video taped appellate records, oral arguments by video conferencing, and televised oral arguments. A copy of the speech is supplied.

Duke Law School chapter of the Federalist Society, November 19, 1996, Durham, NC (Science Drive and Towerview Rd., Durham, NC 27708). I spoke about the selection, role, and importance of federal law clerks. Notes relating to this talk are supplied.

Portrait presentation ceremony for Judge Leonard I. Garth, June 25, 1997, Newark, NJ (United States Court of Appeals for the Third Circuit, 610 Market St., Philadelphia, PA 19106). I spoke about the work and character of my colleague, Hon. Leonard I. Garth. A copy of the remarks is supplied.

Constitutional Conclave sponsored by Pennsylvania Bar Institute, October 24, 1997, Philadelphia, PA, (5080 Ritter Rd., Mechanicsburg, PA 17055). I was a member of a panel that discussed a variety of constitutional issues. As I recall, other panel members included Hon. Louis Pollak of the United States District Court for the Eastern District of Pennsylvania and Professor Seth Kreimer of the University of Pennsylvania Law School. My recollection is that the remarks were extemporaneous, and I am unable to locate any materials relating to these remarks.

Annual Federalist Society Lawyers Convention, November 1997, Washington, DC (1015 18th St., NW, Washington, DC 20036). I spoke on "The Role of the Lawyer in the Criminal Justice System" and explained why the model of the lawyer as a "gladiator" is inaccurate and deleterious. A copy of the speech is supplied.

Rutgers School of Law Newark, March 23, 1998, Newark, NJ (123 Washington Street, Newark NJ 07102). I discussed effective appellate advocacy. I spoke from notes but am unable to locate the notes. I recall giving similar talks at Rutgers School of Law Newark on other occasions but have no records concerning these talks.

New Jersey State Bar Association, Federal Practice and Procedure Section, Teaneck, NJ, May 15, 1998 (N.J. State Bar Assn., One Constitution Sq., New Brunswick, NJ 08901). I spoke on "Presenting the Appeal to the Panel." Notes relating to this talk are supplied.

Editorial Board of the New Jersey Law Journal, May 6, 1999, West Orange, NJ (238 Mulberry St., P.O. Box 20081, Newark, NJ 07101). I spoke after receiving an award from the Board. I cannot specifically recall the substance of my remarks. I am unable to locate any materials relating to these remarks.

Investiture of Hon. Melvin S. Kracov, March 22, 2000, Brennan Courthouse, Jersey City, NJ (Superior Court of New Jersey, Brennan Courthouse, Jersey City, NJ 07306). I spoke about the life, character, and work of Judge Kracov. A copy of the speech is supplied.

Seminar sponsored by American Bar Association Employment and Labor Section, June 1, 2000, Rutgers School of Law Newark, Newark, NJ (321 North Clark St., Chicago, IL 60610). I summarized recent Third Circuit cases concerning employment discrimination claims. I am unable to locate any materials relating to these remarks.

Annual American Bar Association Convention, July 2000, New York, NY (321 North Clark St., Chicago, IL 60610). I moderated a panel discussion on "Non-Delegation's Revival." I provided a very brief introduction to the issue and explained the decision of the District of Columbia Circuit in American Trucking Associations, Inc. v. United States EPA, 175 F.3d 1027 (D.C. Cir. 1999), rev'd sub nom Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001), which was then pending before the Supreme Court. I also introduced the panel members. A copy of my remarks is supplied.

Third Circuit Judicial Conference, October 17, 2000, Hershey, PA (United States Court of Appeals for the Third Circuit, 610 Market St., Philadelphia, PA 19106). Judge Richard Arnold of the United States Court of Appeals for the Eighth Circuit and I spoke on "Use of Non-Precedential opinions." As best I can recall, Judge

Arnold summarized his arguments in Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000), which held that the Constitution requires that all courts of appeals' decisions be given precedential weight. As best I can recall, I summarized scholarship reaching the contrary conclusion and discussed the practical value of non-precedential opinions. I am unable to locate any materials relating to these remarks.

Annual Federalist Society Lawyers Convention, November 2000, Washington, DC (1015 18th St., NW, Washington, DC 20036). I was a member of a panel that discussed "Presidential Oversight and the Administrative State." I discussed the Framers' understanding of the power of the President over the various components of the Executive Branch as well as the treatment of this question in Morrison v. Olson, 487 U.S. 654 (1988). A transcript is supplied.

Conference sponsored by the Heritage Foundation, April 18, 2002, Philadelphia, PA (214 Mass. Ave., NE, Washington, DC 20002). I spoke about the importance of *amicus curiae* briefs in the court of appeals and the Supreme Court. A copy of my remarks is supplied.

Portrait presentation ceremony for Judge Morton I. Greenberg, May 30, 2002, Philadelphia, PA (United States Court of Appeals for the Third Circuit, 610 Market St., Philadelphia, PA 19106). I spoke about the work and character of my colleague, Hon. Morton I. Greenberg. A copy of the remarks is supplied.

National Symposium for United States Court of Appeals Judges, October 21, 2002, Washington, DC (Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE, Washington, DC 20002). Judge Richard Arnold of the Eighth Circuit and I spoke on the use of unpublished opinions. As best I can recall, I spoke about proposed Federal Rule of Appellate Procedure 32.1. I am unable to locate any materials relating to these remarks.

Rex E. Lee Advocacy Award Luncheon, February 2003, Washington, DC (J. Reuben Clark Law School, Brigham Young University, Provo, UT 84601). The luncheon was hosted by the Washington, DC chapter of the J. Reuben Clark Law Society and the Dean of the J. Reuben Clark Law School at Brigham Young University. I spoke about the life, work, and character of former Solicitor General Rex E. Lee. A copy of the speech is supplied.

Pepperdine Law School, March 17, 2003, Malibu, CA (24255 Pacific Coast Highway, Malibu, CA 90263). I discussed with first-year students the general problems faced by appellate courts in deciding cases involving civil liberties in times of national emergency. I used as examples North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002); Ex Parte Milligan, 71 U.S. 2 (1866), the Japanese-American Internment Cases; Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003); and Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003). Notes and printouts of Power Point slides used in giving this talk are supplied.

Pepperdine Law School, March 18, 2003, Malibu, CA (24255 Pacific Coast Highway, Malibu, CA 90263). I discussed appellate practice and procedure with upper-class students. I am unable to locate any materials relating to these remarks.

Conference sponsored by Princeton University, June 21, 2003, Williamsburg, VA (Princeton University, Princeton, NJ 08540). I was a member of a panel that addressed the question "How Does Democracy Restrain the Power of the Judiciary?" I argued that in constitutional litigation our constitutional system lacks external restraints that can be routinely invoked and thus relies heavily on judicial restraint. Notes used in delivering this talk are supplied.

ABA Appellate Practice Institute, October 3-6, 2003, Reno, NV (321 North Clark St., Chicago, IL 60610). I spoke several times about aspects of appellate advocacy. I am unable to locate any materials relating to these remarks.

Rutgers School of Law Newark, March 24, 2003, Newark, NJ (123 Washington Street, Newark NJ 07102). I spoke about federal clerkships. I am unable to locate any materials relating to these remarks.

American Bar Association, March 8, 2004 (321 North Clark St., Chicago, IL 60610). I spoke at an ABA CLE event. I am unable to locate any materials relating to these remarks.

Seton Hall University School of Law, Federalist Society Student Division, September 23, 2004, Newark, NJ (One Newark Center, Newark, NJ 07102). I spoke informally over lunch in my chambers with a small group of students. I believe that I simply described in general terms the work of my court. I did not use any notes.

Annual Federalist Society Lawyers' Convention, November 2004, Washington, DC (1015 18th St., NW, Washington, DC 20036). I moderated a panel discussion on the Patriot Act. I provided a brief introduction to the topic and introduced the participants: Hon. Viet Dinh, a professor at Georgetown Law School and the former Assistant Attorney General for the Office of Legal Policy; Timothy Lynch of the Cato Institute; Udi Ofer of the New York Civil Liberties Union; and Hon. Christopher Wray, then the Assistant Attorney General for the Criminal Division. Notes used in delivering this introduction are supplied.

Panel discussion on sentencing sponsored by the Constitution Project and the American Constitution Society, March 9, 2005, Washington, DC (Constitution Project, 1120 19th Street, NW, Eighth Floor, Washington, DC 20036; American Constitution Society for Law and Public Policy, 1333 H Street, NW, 11th Floor, Washington, DC, 20005). Judge Paul Friedman of the United States District Court for the District of Columbia, Judge Nancy Gertner of the United States

District Court for the District of Massachusetts, and I participated in a panel discussion on federal sentencing. The panel discussed the effect of United States v. Booker, 125 S. Ct. 738 (2005) on the future of federal sentencing. A transcript of the panel discussion is supplied.

Conference sponsored by the Atlantic Legal Foundation on the Attorney-Client Privilege, March 10, 2005, Washington, D.C. (60 East 42nd St., New York, N.Y. 10165). I was a member of a panel assigned to discuss the question "Should the Attorney-Client Privilege be Abolished?" I discussed areas in which the privilege might be modified either through legislation or the development of case law. I specifically addressed the question of selective waiver. A transcript is supplied.

Washington & Lee Law School, March 18, 2005, Lexington, VA (Lewis Hall, Lexington, VA 24450). I gave the keynote address at a conference on the use of unpublished, "depublished," withdrawn, and per curiam opinions. My speech attempted to explain why the courts of appeals have come to rely so heavily on so-called "unpublished" opinions. I also discussed the consequences of taking an alternative approach. A copy of the speech is supplied.

d. Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I spoke to reporters regularly during my service as United States Attorney regarding cases handled by the office. I also recall being interviewed by reporters when I became U.S. Attorney and during my service as U.S. Attorney. I have attached as appendix 1 a list of all newspaper articles in which I was quoted. There may have been additional occasions when I spoke to a reporter for which I am unable to locate a record. I have provided copies of all articles that I was able to locate.

14. Public Office, Political Activities and Affiliations:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you made for elective office or unsuccessful nominations for appointed office.

July 1976 – August 1977: Law clerk, Hon. Leonard I. Garth, U.S. Court of Appeals for the Third Circuit. Appointed by Judge Leonard I. Garth.

November 1977 – August 1981: Assistant United States Attorney, Office of the United States Attorney for the District of New Jersey. Career position.

August 1981 – December 1985: Assistant to the Solicitor General, Office of the Solicitor General, U.S. Department of Justice. Career position.

December 1985 – March 1987: Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice. Appointed by Attorney General Edwin Meese.

March 1987 – April 1990: United States Attorney for the District of New Jersey. Appointed by President Ronald W. Reagan.

b. If, in connection with any public office you have held, there were any reports, memoranda, or policy statements prepared or produced with your participation, please supply four (4) copies of these materials. Please also provide four (4) copies of any resolutions, motions, legislation, nominations, or other matters on which you voted as an elected official, the corresponding votes and minutes, as well as any speeches or statements you made with regard to policy decisions or positions taken. "Participation" includes, but is not limited to, membership in any subcommittee, working group or other such group, which produced a report, memorandum, or policy statement, even where you did not contribute to it. If any of these materials are not available to you, please give the name of the document, the date of the document, a summary of its subject matter, and where it can be found.

I have attached two reports published during my tenure as U.S. Attorney for the District of New Jersey. In addition, the Department of Justice has released materials that I drafted or participated in drafting during my tenure as a Deputy Assistant Attorney General in the Office of Legal Counsel and provided copies to the Committee. An appendix of these materials is attached.

United States Attorney's Office for the District of New Jersey, 1988 Annual Report.

United States Attorney's Office for the District of New Jersey, 1989 Annual Report.

c. List all memberships and offices held in and services rendered, whether compensated or uncompensated, to any political party, election committee, or transition team. Please supply four (4) copies of any memoranda analyzing issues of law or public policy that you wrote on behalf of or in connection with a presidential transition team.

None.

d. If in connection with any public office, you have ever filed a financial disclosure form, ethics form, or any similar form, please supply four (4) copies of each one.

Please see attached financial disclosure forms. Both the Department of Justice and the Administrative Office of the U.S. Courts maintain financial disclosure forms for six years. In addition to those forms since 1999, I have provided forms that I was able to locate in my personal records.

15. Legal Career: **Please answer each part separately.**

a. Describe chronologically your law practice and legal experience after graduation from law school, including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Yes. I served as a law clerk to Judge Leonard I. Garth, U.S. Court of Appeals for the Third Circuit, from 1976 – 1977.

ii. whether you practiced alone, and if so, the addresses and dates;

No.

iii. the dates, names and addresses of any law firms, law offices, companies, or governmental agencies with which you have been affiliated and the nature of your affiliation with each.

January – June 1976: Law clerk, law firm of Warren, Goldberg & Berman, 210 E. Hanover Street, Trenton, NJ 08608.

July 1976 – August 1977: Law clerk, Hon. Leonard I. Garth, U.S. Court of Appeals for the Third Circuit, U.S. Courthouse and Post Office Building, Newark, NJ 07101.

November 1977 – August 1981: Assistant U.S. Attorney, Office of the United States Attorney for the District of New Jersey, 970 Broad Street, Newark, NJ 07102.

August 1981 – December 1985: Assistant to the Solicitor General, Department of Justice, Washington, DC 20530.

December 1985 – March 1987: Deputy Assistant Attorney General, Office Legal Counsel, Department of Justice, Washington, DC 20530.

March 1987 – June 1990: United States Attorney for the District of New Jersey, 970 Broad Street, Newark, NJ 07102.

June 1990 – Present: Judge, U.S. Court of Appeals for the Third Circuit. U.S. Courthouse and Post Office Building, Newark, NJ 07101.

b. Describe:

i. the general character of your law practice and, where appropriate, indicate by date any changes in its character over the years.

I have devoted my legal career to public service, and while practicing law my client was the United States. I began my service in 1976 as a law clerk to Judge Leonard I. Garth, U.S. Court of Appeals for the Third Circuit. Judge Garth continues to serve on the Third Circuit, and I have been fortunate to have him as a colleague.

After my appellate clerkship, I joined the U.S. Attorney's Office for the District of New Jersey in 1977. I focused on appellate matters, primarily criminal. While an Assistant U.S. Attorney, I argued more than 20 cases and briefed more than 75 cases on behalf of the United States in the Third Circuit. I also served as an associate counsel in an important espionage trial.

In 1981, I continued my appellate work when I joined the Office of the Solicitor General, United States Department of Justice, as an Assistant to the Solicitor General. The Office of the Solicitor General is responsible for representing the United States and its agencies and officers before the Supreme Court. As an Assistant, I made recommendations to the Solicitor General, through the Deputy Solicitors General, on the merits of appellate matters. I was responsible for drafting petitions for and oppositions to certiorari, as well as merits briefs in both civil and criminal matters. All briefs and petitions were subject to the approval of the Solicitor General. During this time, I argued twelve cases before the Supreme Court on behalf of the United States.

In 1985, I joined the Office of Legal Counsel, United States Department of Justice, as a Deputy Assistant Attorney General. The Office of Legal Counsel provides legal advice and opinions to the agencies and officers of the United States. With the Assistant Attorney General and under his direction, I assisted in preparing formal opinions for the Office of Legal Counsel and in rendering informal opinions and legal advice on a wide variety of subjects and legal questions facing the departments and agencies of the Executive Branch.

In 1987, I became the United States Attorney for the District of New Jersey. I was responsible for the management of all federal criminal prosecutions and the prosecution and defense of all civil matters within the district. As U.S. Attorney, I set initiatives for the office. During my tenure, the office handled important white-collar crime, public corruption, drug trafficking, and organized crime prosecutions. I personally participated in court proceedings and in major decisions involving the office's most important trials and investigations. I also reviewed in detail the proposed charges and evidence in all major cases prosecuted by the office.

ii. your typical former clients and the areas, if any, in which you have specialized.

While practicing, all of my "clients" were federal agencies, officers, or employees. With the exception of time spent as an Assistant United States Attorney doing principally criminal work, my practice has been highly diversified.

c. Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

i. Indicate the percentage of these appearances in:
1. federal courts;
2. state courts of record;
3. other courts.

Federal courts: over 99%
State courts: less than 1%

ii. Indicate the percentage of these appearances in:
1. civil proceedings;
2. criminal proceedings.

Civil: approximately 10%
Criminal: approximately 90%

Virtually all of my court appearances have been in federal court. When I was an Assistant United States Attorney (1978-81), approximately 90% of my appearances were in criminal matters. When I was an Assistant to the Solicitor General (1981-85), I argued 12 cases in the United States Supreme Court. Of these, eight cases were civil and four were criminal. When I was in the Office of Legal Counsel (1985-87), I did not appear in court. When I was the United States Attorney for the District of New Jersey (1987-90), I argued four appeals, three criminal and one civil, and I appeared in district court in a number of proceedings. Almost all, if not all, of these appearances were in criminal matters.

d. List all cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

i. What percentage of these trials were:
1. jury;
2. non-jury.

As a practicing attorney, I focused almost exclusively on appellate matters. I did serve as lead trial counsel in two criminal cases tried to verdict or judgment, one jury and one non-jury. I was an associate counsel in one jury trial.

United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990). I served as lead counsel in this case. Kikumura involved an attempted terrorist bombing in which a verdict of guilty on all counts was reached on stipulated facts following extensive pretrial hearings. See United States v. Kikumura, 698 F. Supp. 546 (D.N.J. 1988). The verdict in Kikumura was followed by a detailed factual hearing at which the nature and circumstances of the offenses were proved for purposes of sentencing. See United States v. Kikumura, 706 F. Supp. 331 (1989).

United States v. Stonaker, 860 F.2d 1076 (3d Cir. 1988)(Table). I served as lead counsel in this 1987 trial for the shooting of an FBI agent. The defendant was convicted and sentenced to 23 years in prison.

United States v. Enger, 472 F.Supp. 490 (D.N.J. 1978). As an Assistant U.S. Attorney, I was associate counsel in this complex espionage trial.

e. List all appellate cases in which you made oral arguments, and supply four (4) copies of any briefs on which you worked.

All Supreme Court arguments are listed in response to question 15.f. I have not kept records of all oral arguments in which I participated at the appellate level, although I indicated in my questionnaire for my nomination to the U.S. Court of Appeals for the Third Circuit that I argued more than 20 cases and briefed more than 75 cases in the Third Circuit while in the U.S. Attorney's Office. I have made my best efforts to reconstruct my work based on public databases and with the assistance of the U.S. Attorney's Office for the District of New Jersey and the Clerk's Office for the Third Circuit. I have been able to determine that I participated in oral argument in the published cases listed below. As best I can determine, I also presented oral argument in the cases listed below that were decided without a published opinion. It was the practice of the U.S. Attorney's Office for oral argument to be presented by the AUSA who was principally responsible for the brief, and the U.S. Attorney's Office has determined that I was principally responsible for the briefs in these cases. I have attached all appellate briefs that I was able to secure.

United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990)
United States v. Accetturo, 842 F.2d 1408 (3d Cir. 1988)
Matter of Grand Jury Empanelled March 17, 1987, 836 F.2d 150 (3d Cir. 1988)
Public Citizen v. Burke, 843 F.2d 1473 (D.C. Cir. 1988)
Matter of Grand Jury Empaneled March 19, 1980, (Docket No. 81-1782)
United States v. Friedland, 660 F.2d 919 (3d Cir. 1981)
United States v. Alessandrello, 637 F.2d 131 (3d Cir. 1980)

United States v. Miller, 624 F.2d 1198 (3d Cir. 1980)
Appeal of Malfitano, 633 F.2d 276 (3d Cir. 1980)
United States v. Costanzo, 625 F.2d 465 (3d Cir. 1980)
United States v. Martinez, 613 F.2d 473 (3d Cir. 1980)
Matter of Grand Jury Empanelled February 14, 1978, 603 F.2d 469 (3d Cir. 1979)
United States v. Stassi, 583 F.2d 122 (3d Cir. 1978)
United States v. Tonelli, 577 F.2d 194 (3d Cir. 1978)
United States v. Geary, (Docket No. 78-1330)
United States v. Holder, (Docket No. 78-1939)
United States v. Levin, (Docket No. 78-1306)
United States v. Michael, (Docket No. 78-2545)
United States v. Shabazz, (Docket No. 78-1385/5)
United States v. Labriola, (Docket No. 77-2172)
United States v. DeFalco, (Docket No. 77-1540)

f. Describe your practice, if any, before the Supreme Court of the United States. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice. Give a detailed summary of the substance of each case, outlining briefly the factual and legal issues involved, the party or parties whom you represented, the nature of your participation in the litigation, and the final disposition of the case. Please also provide the individual names, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

As an Assistant to the Solicitor General, I argued 12 Supreme Court cases and drafted or assisted in drafting approximately 55 merits briefs or petitions for certiorari. The relevant petitions and briefs are attached.

1. Oregon v. Kennedy, 456 U.S. 667 (1982). The issue before the Court was whether the Double Jeopardy Clause prohibits the retrial of a criminal defendant who successfully moved for a mistrial on the basis of a prosecutorial error that was not intended to provoke the mistrial request.

The United States, participating as *amicus* in support of Oregon, argued that a rule of law prohibiting retrial absent prosecutorial intent to obtain a mistrial would substantially impair the right of the public to secure a resolution of criminal charges and would create grave practical problems for judicial administration. The Supreme Court, in an opinion written by then-Justice Rehnquist, agreed with the reasoning advanced in our brief. The Court adopted a standard that focused on whether the government deliberately denied the defendant an opportunity to meaningfully exercise his or her due process rights. Specifically, the Court held that where a defendant in a criminal trial moves for a mistrial, he may invoke the double jeopardy bar in a subsequent prosecution only if the prosecutorial or judicial conduct in question was intended to provoke the defendant to move for a mistrial.

I worked on the government's brief as *amicus curiae*, and I orally argued the case on March 29, 1982. With me on the brief were Rex E. Lee, then-Solicitor General, (deceased); D. Lowell Jensen, then-Assistant Attorney General, Chambers of Senior District Judge D. Lowell Jensen, United States Courthouse, 1301 Clay Street, Oakland, CA (510) 637-3540; Andrew L. Frey, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006, (202) 263-3291; and David B. Smith, English & Smith, 626 King Street, Suite 213, Alexandria, VA 22314, (703) 548-8911. Counsel for the petitioner was David Frohnmayer, then-Attorney General of Oregon, University of Oregon, Office of the President, 110 Johnson Hall, Eugene OR 97403, (541) 346-3036. With him on the brief were Robert E. Barton, then-Assistant Attorney General, Cosgrave Vergeer Kester LLP, 805 SW Broadway, 8th Floor, Portland, OR 97205, (503) 323-9000; John C, Bradley, then-Assistant Attorney General, Multnomah County District Attorney's Office, Multnomah County Courthouse, 1021 SW Fourth Avenue, Room 600, Portland, OR 97204, (503) 988-3162; Thomas H. Denney, then-Assistant Attorney General, Oregon Department of Justice, 1162 Court Street NE, Salem, OR 97301, (503) 378-4400; and Stephen F. Peifer, then-Assistant Attorney General, Office of the United States Attorney for the District of Oregon, 1000 SW 3rd Avenue, Suite 600, Portland, OR 97204, (503) 727-1012. Counsel for the respondent was Donald C. Walker (deceased).

2. Russello v. United States, 464 U.S. 16 (1983). The petitioner, a member of an arson ring formed to defraud insurance companies, was ordered to forfeit some $340,000 in insurance proceeds. The issue before the Court was whether racketeering profits and proceeds constituted an "interest" within the meaning of the RICO statute and were thus subject to forfeiture upon conviction. The petitioner contended that the insurance profits were not an "interest," because the relevant section of the RICO statute reached only interests "in an enterprise."

On behalf of the government, I emphasized the importance of requiring the forfeiture of illegal profits and proceeds in preventing organized criminal activities. The Supreme Court unanimously agreed in an opinion written by Justice Blackmun. Following the analysis in the government's brief, the Court first examined the plain language of the RICO statute and concluded that the term "interest" included every property interest, including a right to profits or proceeds. Next, the Court examined the structure of the relevant section in relation to other statutes and to other provisions of the RICO statute, and concluded that Congress deliberately incorporated a looser definition of "interest" with respect to forfeitures. The Court determined that Congress specifically "intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Russello, 464 U.S. at 26. Relying on the language, structure, and legislative history of the RICO statute, the Court upheld the petitioner's forfeiture of insurance proceeds.

I worked on the government's brief as respondent, and I argued the case on October 5, 1997. With me on the briefs were Rex E. Lee, then-Solicitor General (deceased); D. Lowell Jensen, then-Assistant Attorney General, Chambers of Senior District Judge D. Lowell Jensen, 1301 Clay Street, Oakland, CA 94612, (510) 637-3540; Andrew L. Frey, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington DC 20006, (202) 263-3291; and Sara Criscitelli, 347 Boyd Avenue, Takoma Park, MD 20912, (301) 270-1045. Counsel for petitioner was Ronald A. Dion, Esq., 5701 SW Fifth Street, Plantation, FL 33317,

(954) 581-4727. With him on the brief was Alvin E. Entin, Entin, Margules & Della Fere PA, 110 SE 6th Street, Suite 1970, Fort Lauderdale, FL 33301, (954) 524-8697.

3. United States v. Villamonte-Marquez, 462 U.S. 579 (1983). Customs officials and police officers boarded a sailboat anchored on a channel with access to the Gulf of Mexico. Once on board, they first inspected the vessel's documentation and then discovered 5,800 pounds of concealed marijuana. The issue before the Court was whether, under the Fourth Amendment, customs officials acting pursuant to a statute, but without reasonable suspicion, may board a vessel with easy access to the open sea and inspect its documents. The respondents argued that the statute allowing customs officials to board vessels and inspect documents infringed respondents' Fourth Amendment rights against unreasonable search and seizure.

On behalf of the government, I argued that the suspicionless boardings pursuant to the statute were consistent with the Fourth Amendment, important for public safety, and essential in the ongoing battle against drug-trafficking crimes. The Supreme Court agreed in a majority opinion authored by then-Justice Rehnquist. After acknowledging the historical pedigree of the relevant statute (modeled after a similar statute passed in 1790, by the same Congress that promulgated the Bill of Rights), the Court devoted the bulk of its opinion to explaining the differences between waterborne commerce and vehicular traffic on highways. Ultimately, the Court determined that the strength of the governmental interest in securing waterways outweighed the statute's authorization of limited intrusion on the Fourth Amendment.

I worked on the government's brief as petitioner, and I argued the case on February 23, 1983. With me on the briefs were Rex E. Lee, then-Solicitor General, (deceased); D. Lowell Jensen, then-Assistant Attorney General, Chambers of Senior District Judge D. Lowell Jensen, 1301 Clay Street, Oakland, CA 94612, (510) 637-3540; Andrew L. Frey, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street NW, Washington DC 20006, (202) 263-3291; Louis M. Fischer, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, 20530, (202) 514-2613; James G. Lindsay, (current address unknown); Stuart P. Seidel, Baker & McKenzie LLP, 815 Connecticut Avenue NW, Washington, DC 20006, (202) 463-7295; and Jeanne Mullenhoff, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, 20530, (202) 616-8429. Counsel for the respondent was Richard P. Ieyoub, Esq., Couhig Partners, 1100 Poydras Street, New Orleans, LA 70163, (504) 588-9750.

4. United States v. Weber Aircraft Corp., 465 U.S. 792 (1983). An Air Force pilot, who was severely injured when he ejected from his plane, sued respondents as the entities responsible for the design and manufacture of the ejection equipment. The respondents sought discovery of confidential unsworn statements from safety investigations conducted by the Air Force after the accident. To that end, the respondents filed requests for the statements under the Freedom of Information Act (FOIA). The issue before the Court was whether confidential statements made by witnesses in an Air Force air crash safety investigation were protected from disclosure under the Freedom of Information Act.

On behalf of the government, I made two principal arguments. First, I argued that the FOIA exemption for material routinely privileged in a civil discovery context applied to these

confidential statements. Second, I argued that Congress specifically intended to protect confidential statements given in military air safety investigations. The Supreme Court, in a unanimous opinion written by Justice Stevens, held that the statements were protected from disclosure. The Court reasoned that exempting information that would not otherwise have been collected was consistent with FOIA because it would not reduce the amount of information available to the public.

I worked on the government's petition and brief, and I argued the case on March 30, 1984. With me on the briefs were Rex E. Lee, then-Solicitor General, (deceased); J. Paul McGrath, then-Assistant Attorney General, American Standard, One Centennial Avenue, P.O. Box 6820, Piscataway, NJ 08855, (732) 980-6000; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street NW, Washington, DC 20006, (202) 263-3000; Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, 20530, (202) 514-3441; and Wendy M. Keats, Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, (202) 514-0265. Counsel for the respondent was Jacques E. Soiret, Esq., Kirtland & Packard, 2361 Rosencrans Avenue, fourth floor, El Segundo, CA 90245, (310) 536-1000. With him on the brief for respondent Weber Aircraft Co. were Marshall Silberberg, 660 Newport Center Drive, Suite 340, Newport Beach, CA 92660, (949) 718-0960; and Robert M. Churella, Kirtland & Packard, 2361 Rosencrans Avenue, Fourth Floor, El Segundo, CA 90245, (310) 536-1000

5. United States v. Doe, 465 U.S. 605 (1984). During an investigation of corruption in awarding government contracts, the respondent sought to quash a subpoena of certain business records because producing the records would involve testimonial self-incrimination. Previously, the Supreme Court had held that contents of business records ordinarily are not privileged because they are created voluntarily and without compulsion. Fisher v. United States, 425 U.S. 391 (1976). The issue before the Court was the extent to which the Fifth Amendment privilege against compelled self-incrimination applied to the business records of a sole proprietorship.

On behalf of the government, I argued that the rationale of Fisher applied equally in this case because the government had not compelled the creation of the documents it sought. I also emphasized that such records were extremely important in investigations of complex criminal activity. The Supreme Court, in an opinion written by Justice Powell, held that contents of business records were not privileged, but the act of producing records was privileged and could not be compelled without a grant of use immunity. Based upon this reasoning, the Supreme Court ruled in favor of the government in Doe because the records were prepared voluntarily and because the subpoena would not force the respondent to restate, repeat, or affirm the truth of their contents.

I worked on the government's petition and brief, and I argued the case in the Supreme Court on December 7, 1983. Also on the government's briefs were Rex E. Lee, then-Solicitor General (deceased); Andrew L. Frey, then-Deputy Solicitor General, Mayer Brown Rowe & Maw, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3291; Stephen S. Trott, then-Assistant Attorney General, Chambers of Senior Circuit Judge Stephen S. Trott, United States Courthouse, 550 West Fort Street, Suite 667, Boise, ID 83724, (208) 334-1612; and Joel M. Gershowitz, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington,

DC 20530, (202) 514-3742. Counsel for the respondent was Richard T. Philips, 704 Passaic Avenue, West Caldwell, NJ 07006-6408, (973) 227-1800.

6. Community Television of Southern California v. Gottfried, 459 U.S. 498 (1983). The question presented was whether the Federal Communications Commission (FCC), as part of its licensing process for public television stations, must independently assess a station's compliance with Section 504 of the Rehabilitation Act. On behalf of the FCC, I argued that Congress did not intend for the FCC to adjudicate violations of Section 504. In addition, I argued that such a requirement would be inconsistent with the provisions and policies of the Communications Act.

In an opinion authored by Justice Stevens, the Court agreed and held that the FCC could review a public television station's license renewal application under the same standard that it applied to a commercial licensee's renewal application. The Court noted that the legislative history of Section 504 did not indicate any congressional intent to impose enforcement obligations on the FCC. The Court also reasoned that because the statute did not differentiate between commercial and public television stations, the FCC acted within its discretion when it imposed uniform obligations on both groups of licensees.

I worked on the petition and brief on behalf of the FCC, and I argued the case in the Supreme Court on October 12, 1982. With me on the briefs were Rex E. Lee, then-Solicitor General (deceased); Stephen M. Shapiro, then-Deputy Solicitor General, Mayer Brown Rowe & Maw, 71 South Wacker Drive, Chicago, IL 60606-4637, (312) 782-0600; Stephen A. Sharp, then-General Counsel, Federal Communications Commission, (current address unknown); Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, (202) 418-1740; C. Grey Pash, Jr., Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, (202) 418-1751; and Linda L. Oliver, Hogan & Hartson LLP, 555 13th Street, NW, Washington, DC 20004-1109, (202) 637-5600. Counsel for petitioner Community Television was Edgar F. Czarra, Jr., Covington and Burling, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401, (202) 662-6000. With him on the briefs were Mark D. Nozette, Attorneys' Liability Assurance Society, Inc., Suite 5700, 311 South Wacker Drive, Chicago, IL 60606-6622, (312) 697-6900; and Richard A. Meserve, Covington and Burling, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401, (202) 662-6000. Counsel for respondents Gottfried et al. in both cases was Charles M. Firestone, Aspen Institute, One Dupont Circle, NW, Suite 700, Washington, DC 20036-1133, (202) 736-5800. With him on the briefs were Abraham Gottfried (current address unknown) and Stanley Fleishman (deceased).

7. Federal Communications Commission v. League of Women Voters of California, 468 U.S. 364 (1984). The question presented was whether a statute prohibiting "editorializing" by public broadcasting stations that received grants from the Corporation for Public Broadcasting, 47 U.S.C. § 399, violated the First Amendment.

On behalf of the FCC, I argued that Congress has the power to establish and finance a public noncommercial and educational broadcasting system and to require that subsidized stations licensed as part of that system refrain from direct editorializing and political

electioneering. Alternatively, I argued that Congress has the power to decide that it will not subsidize private editorializing and electioneering with public funds.

The Supreme Court disagreed. In an opinion by Justice Brennan, the Court struck down the statute on the ground that its ban on editorializing was broader than needed to protect against the risk of governmental interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official views of the government.

I worked on the government's petition and brief, and I argued the case in the Supreme Court on January 16, 1984. With me on the brief were Rex E. Lee, then-Solicitor General (deceased); J. Paul McGrath, then-Assistant Attorney General, American Standard, One Centennial Avenue, P.O. Box 6820, Piscataway, NJ 08855-6820, (732) 980-6000; Paul Bator, then-Deputy Solicitor General (deceased); Anthony J. Steinmeyer, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, (202) 514-3388; and Michael Jay Singer, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, (202) 514-5432. Counsel for the respondent was Frederic D. Woocher, Esq., Strumwasser & Woocher LLP, 100 Wilshire Blvd Ste 1900, Santa Monica, CA, (310) 576-1233. With him on the briefs were Bill Lann Lee, Lieff, Cabraser, Heimann, & Bernstein, LLP, Embarcadero Center West, 275 Battery Street, Suite 3000, San Francisco, CA 94111, (415) 956-1000; and John R. Phillips, Phillips & Cohen LLP, 2000 Massachusetts Avenue, NW, 1st Floor, Washington, DC 20036, (202) 833-4567.

8. Chemical Manufacturers Association v. Natural Resources Defense Council, 470 U.S. 116 (1985). This consolidated case arose from a challenge by the Natural Resources Defense Council to regulatory action by the Environmental Protection Agency (EPA). At issue was whether the EPA could grant variances from national pollution standards to plants whose operations involved "fundamentally different factors" from those considered by the EPA in establishing the national standards. The lower court decision prohibiting such variances threatened to interfere with the EPA's plan to implement the Clean Water Act, imperiled existing pollution standards, and would have delayed the promulgation of new standards.

On behalf of the EPA, I argued that the EPA's practice of allowing such variances constituted a reasonable and permissible exercise of its discretion under the Clean Water Act, given the statute's text, legislative history, and goals. The Supreme Court agreed with the government and reversed the lower court in an opinion authored by Justice White.

I worked on the brief on behalf of the EPA, and I argued the case in the Supreme Court on November 6, 1984. With me on the brief were Rex E. Lee, then-Solicitor General (deceased); F. Henry Habicht, II, then-Assistant Attorney General, Safety-Kleen Corp., One Brinckman Way, Elgin, IL 60123, (800)-323-5040; Louis F. Claiborne, then-Deputy Solicitor General (deceased); Jose R. Allen, Skadden, Arps, Slate, Meagher & Flom LLP, Four Embarcadero, Suite 3800, San Francisco, CA 94111, (415) 984-6400; Barry S. Neuman, Barry S. Neuman, PLLC, 1615 L Street, NW, Washington, DC 20036, (202) 466-2886; A. James Barnes, then-General Counsel, Environmental Protection Agency, Indiana University Law School, 107 South Indiana Avenue, Bloomington, IN 47405, (812) 856-3342; and Susan G. Lebow, then-Assistant General Counsel, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW,

Washington, DC 20460, (202) 564-7700. Counsel for the petitioner was Theodore L. Garrett, Covington and Burling, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401, (202) 662-6000. Counsel for the respondent was Frances Dubrowski, 3215 Klingle Rd. NW, Washington, DC, (202) 295-9009.

9. Atkins v. Parker, 472 U.S. 115 (1985). Food stamp recipients in Massachusetts challenged a congressionally-mandated change in their benefit levels. At issue was whether the notice given to the recipients violated the Due Process Clause of the Fourteenth Amendment. On behalf of the Secretary of Agriculture, I argued that the notice provided was sufficient to satisfy the due process requirements of notice and opportunity to respond. I argued that the Due Process Clause does not mandate individualized advance notice of legislative changes in benefit levels. Alternatively, I argued that the Massachusetts notice, which was coupled with other procedures for reducing the risk of error, was constitutionally sufficient.

Reversing a decision of the U.S. Court of Appeals for the First Circuit, the Supreme Court agreed with the government and held that the notice disseminated to the food stamp recipients complied with all statutory, regulatory, and constitutional requirements. In an opinion authored by Justice Stevens, the Court held that the relevant statute did not require individualized notice of a general change in the law and that the notice complied with a regulation that did require individual notice of a change in the law that would affect benefit levels. In addition, the Court held that the program beneficiaries were not deprived of their constitutional right to due process because there was sufficient notice and opportunity to challenge adverse actions and the legislative process provided all the process that was due.

I argued the case in the Supreme Court on November 27, 1984. On the brief were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, The Gillette Company, Prudential Tower Building, 39th Floor, Boston, MA 02199, (617) 421-7863; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, N.W., Washington, DC 20006-1101, (202) 263-3000; then-Assistant to the Solicitor General Michael W. McConnell, United States Court of Appeals for the Tenth Circuit, 125 South State Street, Suite 5402, Salt Lake City, UT 84138, (801) 524-5145; Leonard Schaitman, Civil Division, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, 20530, (202) 514-2000; and Bruce G. Forrest, then-Department of Justice attorney, 2709 Woodley Rd, NW, Washington, DC 20008, (202) 332-9607. Counsel for petitioner Massachusetts Commissioner of Public Welfare were: Francis X. Bellotti, then-Attorney General of Massachusetts, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo P.C., One Financial Center, Boston, MA 02111, (617) 348-1606; Ellen L Janos, then-Assistant Attorney General of Massachusetts, Gaston & Snow, One Federal Square, Boston, MA 02110, (617) 426-4600; E. Michael Sloman, then-Assistant Attorney General of Massachusetts, Meyer, Connolly, Sloman, & MacDonald, LLP, 12 Post Office Square, Boston, MA 02109, (617) 423-2254; and Carl Valvo, then-Assistant Attorney General of Massachusetts, Cosgrove, Eisenberg, and Kiley, P.C. , Suite 1820, One International Place, Fort Hill Square, Boston, MA 02110, (617) 439-7775. Counsel for respondents were Steven A. Hitov, 192 Willow Street, Roxbury, MA 02032, (617) 325-6417, and J. Paterson Rae, Western Mass. Legal Services, Springfield, MA, 55 Federal Street, Greenfield, MA 01301, (413) 774-3747.

10. National Railroad Passenger Corporation v. Atchison, Topeka & Santa Fe Railway Co., 470 U.S. 451 (1985). This case concerned the Rail Passenger Service Act of 1970 (RPSA), which created Amtrak, an independent corporation, and authorized it to contract with local railway companies to take over their passenger service obligations in exchange for a fee. After doing so, Amtrak sharply curtailed the discounted travel previously afforded to railway employees. Congress, in 1972, required Amtrak to restore these privileges, but required local railways to reimburse its costs for doing so. Subsequently, in 1979, Congress modified the reimbursement formula to increase the payments to exceed Amtrak's costs for transporting railway employees.

Several railways sued, arguing: (1) that either the RPSA or their contracts with Amtrak contractually obligated the United States to forbear charging them for the cost of intercity rail travel; and (2) that the reimbursement requirement, or at least the charge in excess of Amtrak's costs, constituted a deprivation of property without due process of law under the Fifth Amendment.

On behalf of the United States, I defended Congress's authority to legislate without creating contractual obligations. I argued that even if a right against the United States was found to exist, no such rights were violated. The RPSA did not compel private railroads to resume operation of passenger trains; instead, it simply required them to reimburse Amtrak for the continued provision of a benefit the railroads had themselves initiated. Moreover, even if the 1979 Amendments did alter contract rights, they did not violate the Fifth Amendment Due Process Clause because Congress did not act arbitrarily or irrationally.

The Court agreed that the RPSA did not restrict Congress's power because of the strong presumption that statutes do not create contractual obligations that restrict future governmental action, absent a clear expression of an intent to do so. The Court also agreed that the Amtrak contracts did not preclude legislative action because private parties may not restrict the scope of Congress's authority by contract.

I worked on the government's brief and argued the case in the Supreme Court on January 15, 1985. With me on the brief were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154, (212) 546-4000; Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530 (202) 514-3301; and Al Daniel, Jr., Cowan, DeBaets, Abrahams & Sheppard LLP, 41 Madison Avenue, New York, NY 10010, (212) 974-7474. Representing Amtrak were Paul F. Mickey Jr., Steptoe & Johnson, 1330 Connecticut Avenue, NW, Washington, DC 20036, (202) 249-3000; William R. Perlik, retired, living in McLean, VA (current address unknown); David R. Johnson, Visiting Professor of Law, New York Law School, 57 Worth Street, New York, NY 10013 (212) 431-2000; and Andrea Timko, retired, living in Washington, DC (current address unknown). Counsel for respondents were George A. Platz, retired, living in Winnetka, Illinois (current address unknown); Howard J. Trienens, Sidley Austin Brown & Wood, 1 South Dearborn Street, Chicago, IL 60603, (312) 853-7417; Thomas W. Merrill, Sidley Austin Brown & Wood, 1 South Dearborn Street, Chicago, IL 60603, (312) 853-7834; and William A. Brasher, Brasher Law Firm, 1 Metropolitan Square, 211 North Broadway, Suite 2300, Street Louis, MO 63102, (314) 621-7700.

11. Army & Air Force Exchange Services v. Sheehan, 456 U.S. 728 (1982). This case was filed by a former civilian employee of the Army & Air Force Exchange Service (AAFES) who was terminated after pleading guilty to drug possession. The plaintiff was appointed through an AAFES executive management program, which was subject to special regulations. The plaintiff alleged that his agreement to participate in this program created an actual or implied contract with the United States sufficient to create Tucker Act jurisdiction in federal court over his action for money damages.

On behalf of the government, I argued that the District Court lacked jurisdiction to entertain the claim. As instrumentalities of the United States, military exchanges share the government's sovereign immunity. Congress has the power to waive sovereign immunity, but the court below had failed to point to any statute or regulation containing the requisite waiver. I argued that the plaintiff was an appointee, rather than an employee, and therefore had no employment contract to raise under the Tucker Act. Further, in order to sustain respondent's suit, the Court would have to imply a contract enforceable under the Tucker Act using the program's regulations. The Court agreed with the government's position and, in an opinion written by Justice Blackmun, found that the Tucker Act does not itself create a cause of action; rather a plaintiff must identify another federal statute that authorizes a suit for money damages against the United States. The regulations to which respondent pointed did not do so.

I worked on the government's brief and argued the case in the Supreme Court on February 23, 1982. With me on the briefs were Rex E. Lee, then-Solicitor General (deceased); J. Paul McGrath, then-Assistant Attorney General, American Standard Companies Inc., Piscataway, NJ 08855, (732) 980-6000; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006, (202) 263-3000; William Kanter, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, 20530, (202) 514-4575; and Eloise E. Davies (current address unknown). Counsel for the respondent was Ira E. Tobolowsky, Tobolowsky & Burk, P.C., 4305 West Lovers Lane, Dallas, TX 75209, (214) 352-0662.

12. Belknap v. Hale, 463 U.S. 491 (1983). This case regarded the extent to which to the National Labor Relations Act (NLRA) preempts state law claims arising out of strike activity. Specifically, the question presented was whether the NLRA preempts a state law misrepresentation and breach-of-contract action against an employer, brought by strike replacements displaced by reinstated strikers after having been offered and accepted jobs on a permanent basis and assured they would not be fired to accommodate returning strikers.

On behalf of the National Labor Relations Board as *amicus curiae*, I argued that the NLRA preempted the state law causes of action, because allowing such suits would interfere with Congress's regulatory scheme, and would undermine the dual objectives of encouraging peaceful settlement of labor disputes and uniformly administering federal law. The argument was based on a line of preemption cases described in Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976), which proscribed state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated.

The Supreme Court, in an opinion by Justice White, held otherwise. The Court noted two doctrines allowing preemption by the NLRA: the doctrine set out in the Machinists case relied upon by the NLRB and the doctrine that applies when the state cause of action concerns conduct that is prohibited or protected by the Act. See San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). Under this latter doctrine, however, if the subject of regulation is only peripherally of concern to federal law or is so deeply rooted in local law that Congress would not have intended to preempt the application of state law, courts must balance state interests with those underlying the Act. Ultimately, the Supreme Court was not convinced that allowing state suits would impermissibly burden either the federal system of labor regulation promulgated by the Act or the employer faced with a striking work force.

I argued on behalf of the government. On the brief were Rex E. Lee, then-Solicitor General (deceased); Robert E. Allen (current address unknown); Norton J. Come, Division of Enforcement, Litigation Supreme Court Branch, Office of the General Counsel, NLRB, 1099 14th Street, NW, Washington DC, 20570, (202) 273-2977; and Linda Sher, Division of Enforcement Litigation Appellate Court Branch, Office of the General Counsel, NLRB, 1099 14th Street, NW, Washington DC, 20570, (202) 273-2960. Appearing for the petitioner was Larry E. Forrester (current address unknown). Appearing for the respondents were Cecil Davenport 4636 Swift Run Dr., Leesburg, FL 34748; and Hollis Searcy, 800 Stone Creek Parkway, Suite 1, Louisville, KY 40223, (502) 425-6200.

Following are cases that I did not argue before the Court, but in which my name appeared on the briefs.

13. United States v. Inadi, 475 U.S. 387 (1986). The issue before the Court was whether the Confrontation Clause of the Sixth Amendment barred the prosecution from introducing statements falling within the co-conspirator exception to the hearsay rule when the prosecution had not established that the declarant was unavailable to testify at trial.

On behalf of the government, we argued that no unavailability showing was required. Specifically, we argued that the Confrontation Clause was intended to prohibit trial by affidavit and comparable practices, not to proscribe or generally regulate the admission of hearsay. We also argued that the co-conspirator exception is not analogous to the prior testimony exception, and noted that the Court's Confrontation Clause decisions treat most hearsay exceptions other than the prior testimony exception as presumptively valid. Finally, we maintained that reevaluating the co-conspirator rule would be duplicative and disruptive, and would also stultify the evolution of federal and state rules of evidence.

The Supreme Court agreed with the government's position. In an opinion authored by Justice Powell, the Court held that the Confrontation Clause does not preclude admission of out-of-court statements made by a co-conspirator absent a showing of unavailability. The Court held that its earlier decision in Ohio v. Roberts, 448 U.S. 56 (1980), which held that the Confrontation Clause required unavailability for admission of prior testimony, did not apply to any out-of-court statement; that the principles underlying the unavailability rule in Roberts did not apply to statements by co-conspirators; and that the burdens of imposing an unavailability requirement in this context outweighed the benefits.

I worked on the government's briefs. With me on the briefs were Charles Fried, then-Solicitor General, Harvard Law School, Cambridge, MA, 1563 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4636; Andrew L. Frey, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3000; then-Assistant Attorney General Stephen S. Trott, United States Court of Appeals for the Ninth Circuit, 550 West Fort Street, Boise, ID 83724, (208) 334-1612; and Patty Merkamp Stemler, Criminal Appellate Section, Department of Justice, 950 Constitution Avenue, NW, Washington, DC, 20530, (202) 514-2000. Representing the respondent were Holly Maguigan, New York University School of Law, 245 Sullivan Street, New York, NY 10012, (212) 998-6433; William F. Sheehan, Goodwin Proctor & Hoar, 901 New York Avenue, NW Washington, DC 20001, (202) 346-4303; and Julie Shapiro, Seattle University School of Law, 901 12th Avenue, Seattle, WA 98122-1090 (206) 398-4043.

14. Mitchell v. Forsyth, 472 U.S. 511 (1985). This case involved the immunity of the Attorney General from suit for acts performed in the exercise of his national security functions. Attorney General Mitchell, upon the FBI Director's request, had approved a warrantless wiretap in a national security case. The government argued that the Attorney General should be absolutely immune from liability for damages when he acts to protect the national security, because he should be free to act promptly and effectively for the national good without concern for his personal liability or potential entanglement in litigation. Alternatively, the government argued that the Attorney General was entitled to qualified immunity under Supreme Court precedent holding that a government official is immune from liability for damages unless he violated a "clearly established" legal standard. When Attorney General Mitchell authorized the wiretaps at issue in this case, it was unclear whether the law required a warrant for national security wiretaps. The Supreme Court ruled that the Attorney General does not have absolute immunity. However, because the acts giving rise to the litigation did not clearly violate the law, the Court found that the Attorney General was entitled to qualified immunity.

I worked on the government's briefs. With me on the briefs were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154-0037, (212) 546-4000; Paul M. Bator, then-Deputy Solicitor General (deceased); Barbara L. Herwig, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-5425; Gordon W. Daiger, retired, living in Bethesda, MD (current address unknown); and Larry L. Gregg, U.S. Attorney's Office, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, VA 22314, (703) 299-3700. Appearing for the respondents were David Rudovsky, Kairys, Rudovsky, Epstein & Messing, 924 Cherry Street, Suite 500, Philadelphia, PA 19107, (215) 925-4400; and Michael Avery, Suffolk University Law School, 120 Tremont Street, Boston, MA, 02108, (617) 573-8000.

15. Cargill, Inc. and Excel Corp. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986). This case involved the ability of a private party to seek injunctive relief for violation of the antitrust laws. The questions presented were, first, whether Section 16 of the Clayton Act requires a plaintiff to prove a threat of antitrust injury; and, if so, whether loss or damage due to increased competition qualifies as such an injury. On behalf of the government, we argued that mere assertion of a

more competitive environment would not constitute an antitrust injury; we also suggested that accusations of future predatory pricing related to corporate mergers should be viewed with skepticism. The Supreme Court, in an opinion written by Justice Brennan, clarified that a private plaintiff seeking relief under Section 16 must show threat of injury of the type that the antitrust laws were designed to prevent. The Court went on to hold that a showing of loss or damage merely due to increased competition (for example, as here, due to proposed corporate merger) does not constitute an antitrust injury, but that predatory pricing is capable of inflicting antitrust injury.

I worked on the petition for certiorari in this case, which was filed on behalf of the United States and the Federal Trade Commission as *amici curiae* urging reversal. Arguing the case for the United States was Louis R. Cohen, then-Deputy Solicitor General, Wilmer Cutler Pickering Hale and Dorr, 2445 M Street, NW, Washington, DC 20037, (202) 663-6000. With me on the petition for a writ of certiorari were Charles Fried, then-Solicitor General, Harvard Law School, 1563 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4636; Douglas Ginsburg, then-Assistant Attorney General, Chambers of Chief Judge Douglas H. Ginsburg, E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, NW, Washington, DC 20001, (202) 216-7190; Lawrence G. Wallace, then-Deputy Solicitor General, retired, Chevy Chase, MD 20815; Charles F. Rule, then-Deputy Assistant Attorney General, Fried, Frank, Harris, Shriver & Jacobson, 1001 Pennsylvania Avenue, NW, Suite 800, Washington, DC 20004, (202) 639-7000; Catherine G. O'Sullivan, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2413; and Andrea Limmer, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2886.

16. Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). This case involved the effect and constitutionality of race-based classifications designed to benefit minorities and the appropriate degree of scrutiny to which courts should subject such classification. The question presented was whether a school board, consistent with the Equal Protection Clause, may extend preferential protection against layoffs to some of its employees because of their race or national origin. On behalf of the government, we argued that state-sponsored quotas granting preference must satisfy strict scrutiny under the Equal Protection Clause like all other state-sponsored racial classifications. The Court, in a plurality opinion authored by Justice Powell, clarified that strict scrutiny applies regardless of whether the racial classification operates against a group that historically has not been subject to governmental discrimination. Applying this standard, the Court determined that because the provision in question did not meet the heavy burden imposed by strict scrutiny, it violated the Equal Protection Clause.

I worked on the brief in this case, which was filed on behalf of the United States as *amicus curiae*. With me on the brief were Charles Fried, then-Acting Solicitor General, Harvard Law School, 1563 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4636; William Bradford Reynolds, then-Assistant Attorney General, Howrey LLP, 1299 Pennsylvania Avenue, NW, Washington, DC 20004, (202) 383-6912; Charles J. Cooper, then-Deputy Assistant Attorney General, Cooper & Kirk, 1500 K Street, NW, Suite 200, Washington, DC 20005, (202) 220-9600; Walter W. Barnett, (deceased); David K. Flynn, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2195; and Michael Carvin, then-Deputy Assistant Attorney General, Jones Day, 51 Louisiana Avenue, NW, Washington,

DC 20001, (202) 879-3939. Counsel for the petitioners was K. Preston Oade, Jr., Holme Roberts & Owen, 1700 Lincoln Street, Suite 4100, Denver, CO 80203-4541, (303) 861-7000; with him on the briefs were Constance E. Brooks, Brooks & Schluter, 999 18th Street, Suite 1605, Denver, CO 80202, (303) 297-9100; and Thomas Rasmussen (current address unknown). Counsel for the respondents was Jerome A. Susskind (deceased).

17. United States v. Abel, 469 U.S. 45 (1984). The question presented in this case was whether the prosecution could present evidence regarding a defense witness's common membership with the defendant in a particular organization in order to impeach the witness's testimony. On behalf of the government, we argued that the witness's common membership with the defendant in a prison gang whose tenets required its members to commit perjury on behalf of other members was admissible to show bias. The Supreme Court agreed with our position and, in an opinion written by then-Justice Rehnquist, unanimously held that the Federal Rules of Evidence permitted such evidence to show a witness's bias in favor of the defendant.

I assisted in the drafting the government's petition and brief. With me on the government's brief were Rex E. Lee, then-Solicitor General (deceased); Stephen S. Trott, then-Assistant Attorney General, Chambers of Senior Circuit Judge Stephen S. Trott, United States Courthouse, 550 West Fort Street, Suite 667, Boise, ID 83724, (208) 334-1612; Andrew L. Frey, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street NW, Washington, DC 20006, (202) 263-3291; and Gloria C. Phares, Patterson Belknap Webb & Tyler LLP, 1133 Avenue of the Americas, New York, NY 10036, (212) 336-2686. Counsel for respondent was Yolanda Barrera Gomez, 421 E. Huntington Dr., Monrovia, CA 91016. With her on the briefs was Peter M. Horstmann (current address unknown).

18. Daily Income Fund v. Fox, 464 U.S. 523 (1984). This case involved the application of the rules of civil procedure to a shareholder derivative action. The respondent, a shareholder of a mutual fund, brought an action against the fund and its investment advisor. The respondent alleged that the fees paid by the fund to the investment advisor were unreasonable, violating the investment advisor's fiduciary duties under Section 36(b) of the Investment Company Act of 1940. The question presented was whether Rule 23.1 of the Federal Rules of Civil Procedure requires that an investment company security holder first make a demand on the company's board of directors before bringing an action to recover allegedly excessive fees. On behalf of the government, we argued that an investment company security holder who brings suit under Section 36(b) does not need to make such a demand prior to filing his action. The Supreme Court agreed with our position and, in an opinion written by Justice Brennan, held that Rule 23.1 does not require such a demand.

I worked on the brief in this case, which urged affirmance on behalf of the Securities and Exchange Commission as *amicus curiae*. With me on the brief were Rex E. Lee, then-Solicitor General (deceased); Louis F. Claiborne, then-Deputy Solicitor General (deceased); Daniel L. Goelzer, Public Company Accounting Oversight Board, 1666 K Street, NW, Washington, DC 20006, (202) 207-9100; Paul Gonson, Kirkpatrick & Lockhart Nicholson Graham LLP, 1800 Massachusetts Avenue, NW, Washington, DC 20036, (202) 778-9434; Jacob H. Stillman, Office of the General Counsel, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549, (202) 551-5100; Richard A. Kirby, Preston Gates Ellis & Rouvelas Meeds, 1735

New York Avenue, NW, Suite 500, Washington, DC 20006, (202) 661-3730; and Myrna Siegel (current address unknown). Counsel for the petitioners was Daniel A. Pollack, Pollack & Kaminsky, 114 West 47th Street, Suite 1900, New York, NY 10036, (212) 575-4700. With him on the briefs were Frederick P. Schaffer, City University of New York – Office of the General Counsel and Vice Chancellor for Legal Affairs, 535 East 80th Street, New York, NY 10021, (212) 794-5506; George C. Seward, Seward & Kissel LLP, One Battery Park Plaza, New York, NY 10004, (212) 574-1200; and Anthony R. Mansfield (deceased). Counsel for the respondent was Richard M. Meyer, Milberg Weiss Bershad & Schulman LLP, One Pennsylvania Plaza, 49th Floor, New York, NY 10119, (212) 946-9457.

19. FTC v. Grolier, Inc., 462 U.S. 19 (1983). This case involved the Freedom of Information Act's work-product exemption. The question presented was to what extent, if at all, the work product exemption applies when the litigation for which the requested documents were generated has been terminated. On behalf of the Federal Trade Commission, we argued that the work product remains privileged because disclosure, regardless of timing, would undermine the proper function of the adversarial process in ways that the exemption was designed to prevent. The Supreme Court agreed with our position and, in an opinion written by Justice White, held that under the Freedom of Information Act, attorney work product is exempt from required disclosure without regard to the status of the litigation for which it was prepared.

I assisted in the drafting the government's brief on behalf of the Federal Trade Commission as petitioner. With me on the government's brief were Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street NW, Washington, DC 20006, (202) 263-3225; J. Paul McGrath, then-Assistant Attorney General (American Standard, One Centennial Avenue, P.O. Box 6820, Piscataway, N.J. 08855); Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-3441. Counsel for the respondent was Daniel S. Mason, Zelle, Hofmann, Voelbel, Mason & Gette LLP, 44 Montgomery Street, Suite 3400, San Francisco, CA 94104, (415) 693-0700, and with him on the brief were Frederick P. Furth, The Furth Firm LLP, 225 Bush Street, 15th Floor, San Francisco, California 94104, (415) 433-2070; Michael P. Lehmann, The Furth Firm LLP, 225 Bush Street, 15th Floor, San Francisco, California 94104, (415) 433-2070; and Richard M. Clark, Howard & Howard Attorneys, P.C., Comerica Building, 151 South Rose Street, Suite 800, Kalamazoo, MI 49007, (269) 382-8772.

20. Tibbs v. Florida, 457 U.S. 31 (1982). This case presented the question whether the Double Jeopardy Clause precludes reprosecution when a conviction is reversed on appeal not because the evidence was legally insufficient but because the verdict was contrary to the weight of the evidence. We argued for the government that the Double Jeopardy Clause does not bar reprosecution in this situation for two reasons. First, unlike the reversal of a conviction for legally insufficient evidence, reversal based on the weight of evidence does not establish that an acquittal should have been granted at trial. Reprosecuting a defendant whose initial conviction was not supported by the weight of the evidence therefore does not trigger the same double-jeopardy concerns. Second, barring reprosecution after reversal for evidentiary weight would usurp the jury's authority as trier of fact. The Supreme Court, in an opinion by Justice O'Connor, held after examining the policies underlying the Double Jeopardy Clause that a reversal based on weight rather than the sufficiency of the evidence allows a new prosecution.

I worked on the brief in this case, which was filed on behalf of the United States as *amicus curiae* urging affirmance. With me on the brief were Rex E. Lee, then-Solicitor General (deceased); D. Lowell Jensen, then-Assistant Attorney General, Chambers of Senior District Judge D. Lowell Jensen, 1301 Clay Street, Oakland, CA 94612, (510) 637-3540; and John Fichter De Pue, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, (202) 305-2335. Counsel for petitioner was Louis R. Beller 900 Euclid Avenue #14, Miami Beach, FL 33139. Counsel for respondent was Michael A. Palecki, then-Assistant Attorney General of Florida, 6194 Verdura Way, Tallahassee, FL 32311, (850) 877-8689. With him on the briefs were Jim Smith, then-Attorney General of Florida, 403 E. Park Avenue, Tallahassee, FL 32301 (850) 577-0444; and Deborah A. Osmond Frankel, then-Assistant Attorney General of Florida, 51305 Pointe Dr., Inverness, FL 34450.

21. Cleavinger v. Saxner, 474 U.S. 193 (1985). This case presented the question whether members of a prison disciplinary committee are entitled to absolute immunity from personal damages liability for actions taken while adjudicating cases in which inmates are charged with rules infractions. On behalf of the United States, we argued that absolute immunity should obtain because members of prison disciplinary committees, like grand jurors and administrative law judges, serve in a quasi-judicial capacity. Given the adjudicative nature of their work, they should be entitled to absolute immunity from personal damages liability. In addition, we argued that members of prison disciplinary committees play a vital role in maintaining prison security. Subjecting such officers to damages liability would compromise both their willingness to serve in such a capacity and their ability to engage in independent decisionmaking. Thus, institutional order and safety would be jeopardized if committee members were not afforded complete immunity. The Supreme Court rejected our arguments in an opinion by Justice Blackmun. The Court analogized service on a prison committee to service on a school board where members were entitled to only qualified immunity

I participated in drafting the brief for the United States. Also on the brief were Rex E. Lee, then-Solicitor General (deceased); Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3000; The Honorable Stephen Trott, then-Assistant Attorney General, U.S. Court of Appeals for the Ninth Circuit, 550 West First Street, Boise, ID 83724, (208) 334-1612; Gloria C. Phares, Patterson Belknap Webb & Tyler LLP, 1133 Avenue of the Americas, New York, NY 10036, (212) 336-2686. Appearing for the respondents were G. Flint Taylor, People's Law Office, 1180 North Milwaukee, Chicago, IL 60622, (773) 235-0070; and Charles W. Hoffman, Office of the State Appellate Defender, 400 West Monroe, Suite 202, P.O. Box 5240, Springfield, IL 62705, (217) 782-7203.

22. Heckler v. Chaney, 470 U.S. 821 (1985). This case arose from a challenge by death row inmates to the use of certain drugs in executions by lethal injection. The inmates claimed that the use of the drugs for this purpose violated the Federal Food, Drug, and Cosmetic Act (FDCA) and that the Food and Drug Administration was required to enforce their claim. At issue was whether an administrative agency's decision not to take enforcement action was subject to judicial review under the Administrative Procedure Act (APA).

On behalf of the Secretary of Health and Human Services, we argued that the APA did not authorize judicial review in these circumstances. The Supreme Court, in an opinion by then-Justice Rehnquist, unanimously agreed with the government's position and reversed a decision of the U.S. Court of Appeals for the District of Columbia Circuit. The Court held that judicial review is inappropriate if a statute does not offer any meaningful standard against which to judge the agency's action. In such cases, the enforcement of the statute is committed to agency discretion as a matter of law. Moreover, an agency's decision not to take action is presumed immune from judicial review under the APA, a presumption not overcome by the enforcement provisions of the FDCA.

I participated in drafting both the petition for certiorari and the merits briefs submitted for the United States, but did not argue the case. With me on the briefs were Rex E. Lee, then Solicitor-General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, The Gillette Company, Prudential Tower Building, 39th Floor, Boston, MA 02199, (617) 421-7863; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3000; Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2000; John M. Rogers, then-Department of Justice attorney, United States Court of Appeals for the Sixth Circuit, Community Trust Bank Building, 100 East Vine Street, Suite 400, Lexington, KY 40507, (859) 233-2680; Thomas Scarlett, then-Chief Counsel, Food and Drug Administration, Hyman, Phelps & McNamara, 700 Thirteenth Street, NW, Suite 1200, Washington, DC 20005, (202) 737-5600; Michael P. Peskoe, then-Associate Chief Counsel, Food and Drug Administration, Edwards, Angel, Palmer & Dodge, 111 Huntington Avenue, Boston, MA 02199-7613, (617) 239-0240. Counsel for the respondent were Steven M. Kristovich, Munger Tolles & Olson, 355 South Grand Avenue, 35th Floor, Los Angeles, CA 90071-1560 (213) 683-9251; David E. Kendall, Williams & Connolly LLP, 725 Twelfth Street, NW, Washington, DC 20005, (202) 434-5145; Julius LeVonne Chambers, Ferguson, Stein, Chambers, Gresham & Sumter, 741 Kenilworth Avenue, Suite 300, Charlotte, NC 28204-2828, (704) 375-8461; James M. Nabrit III, NAACP Legal Defense & Educ. Fund, Inc, 99 Hudson Street, Suite 1600, New York, NY 10013, (212) 965-2200; John Charles Boger, University of North Carolina School of Law, Van Hecke-Wettach Hall, 100 Ridge Road, Chapel Hill, NC 27599-3380, (919) 843-9288; James S. Liebman, Columbia Law School, Jerome Greene Hall, Rm. 846, Mailbox B-16, New York NY 10027, (212) 854-3423; and Anthony G. Amsterdam, New York University School of Law, 245 Sullivan Street, New York, NY 10012, (212) 998-6632.

23. SEC v. O'Brien, 467 U.S. 735 (1984). This case presented the issue whether the Securities and Exchange Commission (SEC) must notify a target of a non-public investigation when the SEC issues an administrative subpoena in that investigation to a third party. On behalf of the SEC, we argued that such notification was not required. No constitutional provision, statute, rule, or prior case, we noted, demanded that notification be provided. Moreover, imposition of a new notice requirement would cause law enforcement serious problems that Congress could not have intended. The Supreme Court, in an opinion by Justice Marshall, unanimously agreed and held that neither the Fourth, Fifth, nor Sixth Amendment was implicated by an administrative investigation. It also concluded that the statutes administered by the SEC did not require the agency to notify targets upon issuance of an administrative subpoena.

I worked on the government's briefs, along with Rex E. Lee, then-Solicitor General (deceased); Kenneth S. Geller, then Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006, (202) 263-3000; Daniel L. Goelzer, Public Company Accounting Oversight Board, 1666 K Street, NW, Washington, DC 20006, (202) 207-9100; Paul Gonson, Kirkpatrick & Lockhart Nicholson Graham LLP, 1800 Massachusetts Avenue, NW, Washington, DC 20036, (202) 778-9434; Linda Feinberg, Superior Court Judge, 9 Roseberry Ct., Lawrenceville, NJ 08648; Larry Lavoie, General Counsel, First Investors Corporation, 95 Wall Street, New York, NY 10005; Harry J. Weiss, Wilmer Cutler Pickering Hale & Dorr, LLP, 2445 M Street, NW, Washington, DC 20037, (202) 663-6000; and Elizabeth A. Spurlock (current address unknown). Counsel for the respondent was William D. Symmes, Witherspoon, Kelley, Davenport & Toole, 1100 U.S. Bank Building, 422 West Riverside, Spokane, WA 99201, (509) 624-5265.

24. Dickerson v. New Banner Institute, 460 U.S. 103 (1983). The question presented in this case was whether firearms disabilities imposed by provisions of the Gun Control Act apply to a person who was convicted of a state offense punishable by imprisonment for a term exceeding one year but whose conviction was expunged. On behalf of the Director of the Bureau of Alcohol, Tobacco and Firearms, we argued that statutorily prescribed disabilities are not automatically removed by expunction of the conviction under a state statute. The text of the statute applies to all persons "convicted" of certain crimes, regardless of whether the conviction is subsequently expunged. Other provisions of the Act and related federal statutes reinforce this conclusion and show that Congress carefully distinguished between present status and the occurrence of past events.

The Supreme Court agreed in an opinion by Justice Blackmun. The Court accepted our argument that an expunction under state law does not alter the effect of a disabling conviction for purposes of the federal statute, finding that the interpretation was supported not just by statutory text but by the purpose of Title IV, which was intended to curb crime by keeping firearms out of the hands of those not legally entitled to possess them.

I participated in drafting the government's briefs. With me on the briefs were Rex E. Lee, then-Solicitor General (deceased); Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw, 1909 K Street, NW, Washington, DC 20006, (202) 263-3000; J. Paul McGrath, then-Assistant Attorney General, American Standard, One Centennial Avenue, P.O. Box 6820, Piscataway, NJ 08855-6820, (732) 980-6000; William Kanter, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-4575; and Douglas Letter, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-3602. Counsel for the respondent was Lewis C. Lanier, Lanier Law Firm, 450 Summers Avenue, Orangeburg, SC 29115, (803) 268-9800; with him on the brief was Jack R. McGuinn, (current address unknown).

25. Local Number 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland, 478 U.S. 501 (1986). This case concerned whether a federal district court may, consistent with Title VII of the Civil Rights Act of 1964, adopt and implement a consent decree that provides race-based preferences to individuals not shown to have been victims of the employer's discrimination. The United States submitted an *amicus* brief arguing that such a

consent judgment was unlawful for two reasons: first, because it violated the remedial principle expressed in Section 706(g) of Title VII, which bars the adoption of race-based quotas; and, second, because the consent judgment was entered over the objection of a union that intervened as of right and whose members were adversely affected.

The Supreme Court, in an opinion by Justice Brennan, rejected our position and held that Title VII allows entry of a consent decree that may benefit individuals who were not victims of discriminatory practices. The majority reasoned that voluntary race-conscious relief is not rendered impermissible because it is incorporated into a consent decree, regardless of whether a court would be precluded from imposing race-conscious relief after trial. The Court concluded that a consent decree may provide broader relief than the court itself could have awarded after trial. The Court also held that the lack of consent by the union did not invalidate the consent decree as one party cannot prevent the other parties from resolving their disputes with each other by withholding consent.

I participated in drafting the government's *amicus* brief urging reversal. William Bradford Reynolds, then-Assistant Attorney General, Howrey LLP, 1299 Pennsylvania Avenue, NW, Washington, DC 20004-2402, (202) 383-6912, argued the case for the United States. With me on the brief were Charles Fried, then-Solicitor General, Harvard Law School, 1563 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4636; Carolyn B. Kuhl, then-Assistant Attorney General, the Chambers of Judge Carolyn B. Kuhl, Superior Court of California, 111 North Hill Street, Los Angeles, CA 90012, (213) 974-5707; Michael Carvin, then-Deputy Assistant Attorney General, Jones Day, 51 Louisiana Avenue, NW, Washington, DC 20001-2113, (202) 879-3939; Walter W. Barnett (deceased); and David K. Flynn, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2195. Petitioner Local Number 93 was represented by William L. Summers, Summers & Vargas Co., LPA, 23240 Chagrin Boulevard, Suite 525, Cleveland, OH 44122, (216) 591-0727. Respondent Vanguards of Cleveland was represented by Edward R. Stege, Jr., Stege & Michelson Co., LPA, 200 Public Square, Suite 3220, Cleveland, OH 44114, (216) 348-0700. Respondents City of Cleveland, et al., were represented by John D. Maddox (current address unknown).

26. Local 28 of the Sheet Metal Workers' Intel Ass'n v. E.E.O.C., 478 U.S. 421 (1986). This case arose out of a Title VII lawsuit brought by the United States against Local 28 to enjoin a pattern of discrimination against nonwhites in union membership. After finding a violation, the district court entered a remedial order requiring, among other things, that the union take steps to recruit more nonwhite members, and to achieve a 29.23% nonwhite membership goal. After the Union failed to comply, the district court held it in civil contempt. The Union's challenge to that contempt order led to this appeal. The appeal implicated the potential limitations on the remedies allowed pursuant to Title VII of the Civil Rights Act of 1964. The principal question presented was whether the remedial provision of Title VII allows a district court to order race-based relief that may benefit persons who are not identified victims of unlawful discrimination.

On behalf of the EEOC, our principal argument was that the set-percentage membership goal was a race-based quota, and therefore improper. We based our analysis on the Supreme Court's prior decision in Firefighters Local Union No. 1784 v. Stotts, 457 U.S. 561 (1984), which

held that Section 706(g) of Title VII prohibits the award of relief such as union membership to individuals who were never the actual victims of illegal discrimination. Because there was no showing that the beneficiaries of the membership quota had been victimized by the unions, we argued that the remedy was unconstitutional. The Supreme Court, in an opinion by Justice Brennan, disagreed. Six justices agreed that a district court may, in appropriate circumstances, order relief for a class, which may include individuals who are not the actual victims of discrimination as a remedy for violations of Title VII. In addition, five justices determined that the membership goal required of the Union in this case did not violate either Title VII or the Constitution.

I participated in drafting the government's brief on behalf of respondent the Equal Employment Opportunity Commission. Appearing with me on the government's brief were Charles Fried, then-Solicitor General, Harvard Law School, 1563 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4636; William Bradford Reynolds, then-Assistant Attorney General, Howrey LLP, 1299 Pennsylvania Avenue NW, Washington, DC 20004, (202) 383-6912; The Honorable Carolyn B. Kuhl, then-Assistant Attorney General, Superior Court of California, 111 North Hill Street, Los Angeles, CA 90012, (213) 974-5707; Brian K. Landsberg, McGeorge School of Law, 3200 5th Avenue, Sacramento, CA 95817, (916) 739-7101; Dennis J. Dimsey, United States Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, (202) 514-2195; David K. Flynn, United States Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, (202) 514-2195; and Johnny J. Butler, then-Acting General Counsel of Equal Employment Opportunity Commission, Booth & Tucker, LLP, 1617 JFK Boulevard, Suite 1700, Philadelphia, PA 19103, (215) 875-0609. Appearing for respondent the New York State Division of Human Rights were O. Peter Sherwood, then-Deputy Solicitor General of New York, Manatt, Phelps & Phillips, LLP, 7 Times Square, New York, NY 10036, (212) 830-7288; Robert Abrams, then-Attorney General of New York, Stroock & Stroock & Lavan LLP, 180 Maiden Lane, New York, NY 10038, (212) 806-5400; Robert Hermann, then-Solicitor General of New York, Thacher Proffitt & Wood LLP, 2 World Financial Center, New York, NY 10281, (212) 912-7400; Lawrence S. Kahn, New York City Law Department, 100 Church Street, New York, NY 10007, (212) 788-0600; Colvin W. Grannum, Bedford Stuyvesant Restoration Corporation, 1360 Fulton Street, Brooklyn, NY 11216, (718) 638-5705; Jane Levine, United States Attorney's Office for the Southern District of New York, 1 Street Andrews Plaza, New York, NY 10007, (212) 637-2200; and Martha J. Olson, Law Office of Martha Olson, 317 Madison Ave, Suite 1708, New York, NY 10017, (212) 867-8455. Appearing for respondent the City of New York were Frederick A. O. Schwarz, Jr., Cravath, Swaine & Moore LLP, Worldwide Plaza, 825 Eighth Avenue, New York, NY 10019, (212) 474-1000; Leonard Koerner, New York City Law Department, 100 Church Street, New York, NY 10007, (212) 788-1010; Stephen J. McGrath, New York City Law Department, 100 Church Street, New York, NY 10007, (212) 788-1056; Lorna B. Goodman, Office of the Nassau County Attorney, 1 West Street, Mineola, NY 11501, (516) 571-3056; and Lin B. Saberski, (current address unknown). Appearing for the petitioners were Martin R. Gold, Sonnenschein Nath & Rosenthal LLP, 1221 Avenue of the Americas, New York, NY 10020, (212) 768-6700; Robert P. Mulvey, Sonnenschein Nath & Rosenthal LLP, 1221 Avenue of the Americas, New York, NY 10020, (212) 768-6700; and William Rothberg, Sheet Metal & Air Conditioning Contractors Association of New York City, Inc., 16 Court Street, Brooklyn, NY 11241, (212) 624-2200.

27. Exxon Corporation v. Hunt, 475 U.S. 355 (1986). This case presented the question whether a particular provision of CERCLA, the federal act that established Superfund, preempted the previously enacted New Jersey Spill Act. On behalf of the United States, we argued in an *amicus* brief that the Spill Act was partially preempted. Whereas the excise tax imposed by the Spill Act could be used to compensate third parties for certain economic losses sustained as a result of hazardous substance releases, the Superfund statute provided: "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter." We argued that the phrase "compensation for claims" should be given its customary, literal meaning, and thus was not a synonym for broader terms such as payments or expenditures.

The Supreme Court agreed in an opinion by Justice Marshall, holding that the New Jersey Spill Act was preempted in part. The Court concluded that Congress intended to ban state funds to the extent that they covered Superfund-eligible expenses. To the extent that the New Jersey fund had purposes that went beyond the scope of CERCLA, it was not preempted by federal law.

I was responsible in part for drafting the government's *amicus* brief. Also on the brief were: Rex E. Lee, then-Solicitor General (deceased); F. Henry Habicht II, then-Assistant Attorney General, Safety-Kleen Corporation, 2900 South Quincy Street, Suite 410, Arlington, VA 22206, (703) 379-2713; Louis F. Claiborne, then-Deputy Solicitor General, (deceased); Robert L. Klarquist, (current address unknown); and Dirk D. Snel, (deceased). Appearing for the petitioner were Daniel M. Gribbon, (deceased); John J. Carlin, Jr., Carlin & Ward, P.C., 25A Vreeland Road, Florham Park, NJ 07932, (973) 377-3350; and E. Edward Bruce, Covington & Burling, 1201 Pennsylvania Avenue NW, Washington, DC 20004, (202) 662-6000. Appearing for the respondent were the Honorable Mary C. Jacobson, then-Deputy Attorney General of New Jersey, Mercer County Civil Courts, 175 South Broad Street, Trenton, NJ 08650, (609) 571-4861; The Honorable Irwin I. Kimmelman, then-Attorney General of New Jersey, Superior Court of New Jersey, 155 Morris Avenue, Springfield, NJ 08625, (609) 292-4822; and Michael R. Cole, DeCotiis, FitzPatrick, Cole & Wisler, LLP, 500 Frank W. Burr Boulevard, Teaneck, NJ 07666, (201) 928-1100.

28. Young v. Community Nutrition Inst., 476 U.S. 974 (1986). The question presented in this case was whether the U.S. Court of Appeals for the District of Columbia Circuit correctly concluded that the Food and Drug Administration's interpretation of a particular provision of the Federal Food, Drug, and Cosmetic Act was in conflict with the plain language of that provision. The respondents had alleged that the Act required the FDA to set a tolerance level for a poisonous substance, aflatoxin, before allowing interstate shipment of food containing the substance. On behalf of the FDA, we argued that the agency's construction of the relevant provision – which did not require it to set a tolerance level – was fully consistent with the overall structure and legislative history of the Act, with the role that the provision plays in the enforcement process, and with both the Supreme Court's and Congress's current understanding. The Supreme Court, in an opinion authored by Justice O'Connor, agreed. The analysis began with the framework set out by the Supreme Court in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), determining as an initial matter that Congress had

not unambiguously expressed its intent through the plain language of the statute. Because the view of an agency charged with administering an ambiguous statute is entitled to considerable deference from the courts, the Supreme Court concluded that the FDA's interpretation was "sufficiently rational" to preclude a court from substituting its own judgment for that of the FDA.

I worked on the government's brief in this matter. Appearing with me on the brief were Charles Fried, then-Solicitor General, Harvard Law School, 1563 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4636; Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154-0037, (212) 546-4000; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street NW, Washington, DC 20006, (202) 263-3225; Paul J. Larkin, Jr., then-Assistant to the Solicitor General, Verizon Communications, 1515 North Courthouse Road, Arlington, VA 22201, (703) 351-3845; Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, (202) 514-3441; Marleigh D. Dover, United States Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, (202) 514-3511; Thomas Scarlett, then-Chief Counsel, Food and Drug Administration, Hyman, Phelps & McNamara, P.C., 700 Thirteenth Street NW, Suite 1200, Washington, DC 20005, (202) 737-5600; and Michael M. Landa, then-Associate Chief Counsel for Enforcement Food and Drug Administration, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, (301) 827-1137. Appearing for the respondent were William B. Schultz, Zuckerman Spaeder LLP, 1800 M Street NW, Suite 1000, Washington, DC 20036, (202) 778-1800; Alan B. Morrison, Public Citizen Litigation Group, 1600 20th Street NW, Washington, DC 20009, (202) 588-1000; and Katherine A. Meyer, Meyer & Glitzenstein, 1601 Connecticut Avenue NW, Suite 700, Washington, DC 20009, (202) 588-5206.

29. United States v. Morton, 467 U.S. 822 (1984). The question presented in this case was whether the United States is liable for sums withheld from the pay of one of its employees because it complied with a writ of garnishment issued by a court without personal jurisdiction over the employee. On behalf of the United States, we argued that the government was not liable for three reasons: (1) the federal garnishment statute, 42 U.S.C. § 659(f), expressly insulates the government from liability for a payment made pursuant to proper legal process; (2) regulations implementing the statute do not allow any discretion to federal disbursing officers on the ground of latent jurisdictional defects; and (3) governmental liability would be contrary to congressional intent. In a unanimous opinion by Justice Stevens, the Court held that the government could not be held liable for honoring a writ of garnishment that was "regular on its face" and that had been issued by a court with subject-matter jurisdiction.

I worked on the petition for certiorari on behalf of the United States, but did not assist with the brief on the merits. Michael W. McConnell, then-Assistant to the Solicitor General, Chambers of Circuit Judge Michael W. McConnell, 125 South State Street, Suite 5402, Salt Lake City, UT 84138, (801) 524-5145, argued for the United States. Appearing on the briefs were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154-0037, (212) 546-4000; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3000; Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington,

DC 20530, (202) 514-3441; Wendy M. Keats, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-0265; and Mary S. Mitchelson, United States Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202-1500, (202) 245-6987. Counsel for the respondent was Kaletah N. Carroll (deceased).

30. F.C.C. v. ITT World Communications, Inc., 466 U.S. 463 (1984). The primary question presented in this case was whether the Government in the Sunshine Act, 5 U.S.C. § 552(b), mandating that federal agencies hold their meetings in public, applies to international conferences attended by members of the Federal Communications Commission.

On behalf of the FCC, we argued that both the language and the legislative history of the Act support the view that the Act's open meeting rules should apply only to formal sessions where agency members with decisionmaking power deliberate over concrete proposals for action. The Supreme Court unanimously agreed in an opinion by Justice Powell, holding that the statute, according to its language, could not apply unless the FCC was deliberating upon matters within its formally delegated authority to take official action. Congress, the Court concluded, did not contemplate the broad restraint on agency processes that would necessarily result from applying the Act's open meeting rules to informal meetings, particularly those not run by the agency itself.

I worked on the petition for certiorari, which was filed on behalf of the Federal Communications Commission, but did not assist with the brief on the merits. Albert G. Lauber, Jr., then-Assistant to the Solicitor General, Caplin & Drysdale, Chartered, One Thomas Circle, NW, Washington, DC 20005, (202) 862-5000, argued the case for the United States. Appearing with him on the briefs were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154-0037, (212) 546-4000; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3000; Bruce E. Fein, then-General Counsel, Federal Communications Commission, The Lichfield Group, 910 17th Street, NW, Suite 800, Washington, DC 20006, (202) 775-1787; Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, (202) 418-1740; Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-3441; Frank A. Rosenfeld, (current address unknown); and C. Grey Pash, Jr., Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, (202) 418-1751. Counsel for respondents was Grant S. Lewis (deceased).

31. United States Dept. of Justice v. Falkowski, (83-2034), April 1, 1985, 471 U.S. 1001 (1985). This case concerned the proper scope of judicial review of agency decisionmaking. On behalf of the United States, we sought Supreme Court review of two questions: first, whether the Administrative Procedure Act authorized judicial review of the Department of Justice's decision not to provide legal representation for an employee sued in her individual capacity for actions taken while on the job; and second, if so, whether the court below applied the proper scope of review in overturning the Department's decision. The Supreme Court granted, vacated, and remanded the case for further consideration in light of its decision in Heckler v. Chaney, 470 U.S. 821 (1985).

I worked on the government's petition. With me on the petition were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154, (212) 546-4000; and Paul M. Bator, then-Deputy Solicitor General (deceased).

32. United States v. Doe, (84-0823), April 1, 1985, 471 U.S. 1001 (1986). This case concerned the scope of the Fifth Amendment privilege against self-incrimination with respect to the compelled production of personal documents pursuant to grand jury subpoena. While the Supreme Court granted certiorari, during the briefing period the respondent waived his privilege, voluntarily provided the subpoenaed documents, and entered into a plea agreement with the government. At the request of all the parties, the Supreme Court vacated the lower court decisions, and remanded the case to be dismissed as moot.

I was partially responsible for drafting the government's petition. With me on the petition was Rex E. Lee, then-Solicitor General (deceased).

33. Moore v. Kenyatta (84-1445), March 12, 1985, 471 U.S. 1066 (1985). This case involved a civil claim alleging that defendant police officers committed state torts and violated plaintiff's federal constitutional rights. The Court of Appeals held that the police officers were not entitled to absolute immunity and that the denial of qualified immunity, unlike the denial of absolute immunity, was not immediately appealable under the collateral order doctrine. Although the Supreme Court denied cert in this case, it accepted our argument that a denial of qualified immunity is subject to interlocutory review in Mitchell v. Forsyth, 472 U.S. 511 (1985).

I was partially responsible for drafting the government's petition. With me on the petition were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154, (212) 546-4000; Barbara Herwig, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20004, (202) 514-1201; and Freddi Lipstein (current address unknown).

34. Adams v. Jasinki (84-1324), February 19, 1985, 473 U.S. 901 (1985). This case presented the question whether an order denying a motion to dismiss a complaint on the basis of qualified immunity may be appealed under the collateral order doctrine. On behalf of the United States, we submitted a petition for certiorari arguing that the district court's rejection of the defendant's immunity defense was immediately appealable. The Supreme Court granted, vacated, and remanded for further consideration in light of Mitchell v. Forsyth, 472 U.S. 511 (1985), which had accepted the government's contention that a district court's denial of qualified immunity is an appealable final decision.

I was partially responsible for drafting the government's petition. With me on the petition were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154, (212) 546-4000; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3225; Barbara L. Herwig,

United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20004, (202) 514-1201; and William G. Cole, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20004, (202) 514-1201.

16. **Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case, identifing the party or parties who you represented, and describing in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

    a. **the date of representation;**

    b. **the name of the court and the name of the judge or judges before whom the case was litigated; and**

    c. **the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.**

If any of these cases has already been described in 15.f. above, it need not be repeated here.

I have described the following cases in response to question 15.f. Please see the response to 15.f. for the full description of the case.

1. Oregon v. Kennedy, 456 U.S. 667 (1982)
2. Russello v. United States, 464 U.S. 16 (1983)
3. United States v. Villamonte-Marquez, 462 U.S. 579 (1983)
4. United States v. Weber Aircraft Corp., 465 U.S. 792 (1983)
5. United States v. Doe, 465 U.S. 605 (1984)
6. Community Television of Southern California v. Gottfried, 459 U.S. 498 (1983)
7. Federal Communications Commission v. League of Women Voters of California, 468 U.S. 364 (1984)
8. Chemical Manufacturers Association v. Natural Resources Defense Council, 470 U.S. 116 (1985)
9. Atkins v. Parker, 472 U.S. 115 (1985)

The following case is not described in the response to 15.f.

10. United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990). See also United States v. Kikumura, 698 F. Supp. 546 (D.N.J. 1988), and United States v. Kikumura, 706 F. Supp. 331 (D.N.J. 1989). This was a prosecution of a suspected member of a terrorist group who assembled bombs for use in carrying out a terrorist attack in this country. The evidence showed that the defendant entered the United States using a forged passport and then traveled around the country acquiring the components used in making the bombs. After completing the construction of the bombs, he was apprehended in New Jersey. I

was the United States Attorney for the District of New Jersey, and together with an Assistant United States Attorney, I handled the extensive pretrial motions and prepared the prosecution of the case. On the morning of the scheduled trial, the defendant stipulated to the facts alleged in the indictment and was convicted in a bench trial. I then was principally responsible for presenting the government's case at the sentencing hearing at which we successfully argued for a substantial upward departure from the low sentence prescribed by the Sentencing Guidelines. I was principally responsible for briefing the appeal, and I presented the oral argument in the Third Circuit on behalf of the government. The Third Circuit affirmed the conviction and sustained most of the upward departures imposed by the district court while remanding the case for resentencing. Specifically, the court found that under the circumstances in this case, an upward departure to 360 months was unreasonable, but an upward departure to 262 months would not be unreasonable.

I tried the matter before United States District Court Judge Alfred J. Lechner and argued the case for the United States in the Third Circuit Court of Appeals before Judges Becker, Cowen, and Rosenn. Appearing with me as co-counsel was John P. Lacey, then-Assistant United States Attorney, Connell Foley LLP, 85 Livingston Avenue, Roseland, NJ 07068, (973) 535-0500. Appearing for the defendant were William M. Kuntsler (deceased); and Ronald L. Kuby, Kuby & Perez LLP, 119 West 23rd Street, Suite 900, New York, NY 10011, (212) 529-0223.

17. **Citations: From your time as a judge, please provide:**

    a. **citations for all opinions you have written (including concurrences and dissents);**

    b. **citations to all cases in which you were a panel member;**

    c. **a list of cases in which appeal or certiorari has been requested or granted;**

    d. **a list of all appellate opinions where your decision was reversed or where your judgment was affirmed;**

    e. **a list of and copies of all your unpublished opinions.**

    See attached appendix for responses to questions 17.a. through 17.e.

18. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe these activities in detail.**

During most of my legal career, my work has related exclusively or almost exclusively to litigation. From late 1985 until early 1987, however, while serving as a

Deputy Assistant Attorney General in the Office of Legal Counsel, I assisted in providing advice to the Attorney General and to components of the Executive Branch on legal issues that arose outside the context of litigation. I was one of three Deputies in the office at that time. One of the Deputies concentrated on matters involving foreign relations and international law, and the other was responsible for, among other things, reviewing proposed legislation for possible constitutional problems. I was responsible for a broad range of matters not falling into either of the above categories. At times, I responded to oral requests for expedited advice, but most of the work involved written requests for an opinion on a constitutional or legal question. Some requests grew out of disputes between government agencies, and OLC, acting on behalf of the Attorney General, was responsible for providing a resolution of the dispute. For the most part, I was responsible for providing the first level of supervision and review on work done by the Attorney Advisers. A list of the publicly released OLC opinions bearing my name has been provided, and these opinions are representative of much of my work during that time.

From March 1987 until June 1990, while serving as the United States Attorney for the District of New Jersey, I supervised an office of more than 60 attorneys. Most of my work during that time related directly to court cases, but a significant portion of the work did not. Within the parameters set by Department of Justice policies, I was responsible for developing and implementing the priorities of the United States Attorney's office. This required extensive consultation with the various federal investigative agencies and coordination with the state attorney general, the New Jersey state police, and the county prosecutors. Close federal-state cooperation permitted the United States Attorney's office to address the state's full range of federal law enforcement needs. We were able to reinvigorate the unit responsible for public corruption cases and to increase the resources devoted to the prosecution of white collar crime. I also brought about closer cooperation between the Untied States Attorney's office and the Organized Crime Strike Force, which was then under the supervision of Washington.

Other major responsibilities not directly related to litigation included assembling a supervisory staff, supervising the hiring of numerous Assistant United States Attorneys, and working with the responsible federal investigative agencies to ensure that the most important and promising criminal investigations received the investigative and legal support that was needed.

19. <u>Teaching</u>: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, please provide four (4) copies to the committee.

In 1999 – 2000, I taught a two-semester course entitled "Constitutional Law I" at Seton Hall Law School. I do not have a copy of the syllabus, which consisted of a list of the planned reading for each week. I used Stone, Seidman, and Tushnet, *Constitutional Law* (3d ed. 1996), and the class read and discussed almost the entire book.

In 2002 – 2003 and 2003 – 2004, I taught a one-semester seminar called "Terrorism and Civil Liberties" at Seton Hall Law School. Copies of the syllabus and reading list for 2003 – 2004 are attached. The syllabus and reading list for the prior year were very similar, but I am unable to locate copies.

20. **Party to Civil Legal or Administrative Proceedings: State whether you, or any business of which you are or were an officer, or any partnership, trust, or other business entity with which you are or were involved, have ever been a party or otherwise involved as a party in any civil, legal, or administrative proceedings. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest.**

Lawsuits in which I was named in my official capacity:

In Grompone, et al. v. Alito, et al. (District of New Jersey. Case No. 2:02-cv-04594-WHW), I was named along with two other Third Circuit judges in a pro se civil complaint alleging civil rights violations. The action was dismissed on defendants' motion on May 13, 2003.

In Dinorscio, et al. v. Greelish, et al. (District of New Jersey, Case No. 2:91-cv-00667-JWB), in my capacity as United States Attorney I was one of more than 20 defendants, named in a prisoner civil rights complaint. The action was dismissed on September 18, 1991.

In Watson v. Baker, et al. (District of New Jersey, Case No. 2:88-cv-02899-JFG), in my capacity as United States Attorney I was one of 10 named defendants. The action was terminated on March 13, 1990.

In Guyer v. Kunz, et al. (District of Delaware, Case No. 1:99-cv-00923-GMS), I was one of approximately 70 named defendants, including 17 other current and former Third Circuit judges, in a civil rights suit brought by a pro se frequent litigant. The district court dismissed the action and denied plaintiff's subsequent motions. The Court of Appeals affirmed on July 29, 2002.

In Noble v. Becker, et al. (District of Delaware, Case No. 1:03-cv-00906-KAJ), I was one of nearly 100 named defendants, including dozens of current and former federal judges serving within the Third Circuit, in a pro se suit brought by the same individual who brought *Guyer v. Kunz, et al.*, listed above. The action was dismissed as frivolous on January 15, 2004.

In Blackstone v. Becker, et al. (Eastern District of Pennsylvania, Case No. 2:94-cv-04080-JF), I was one of 17 named defendants, including five other Third Circuit judges, a district court judge, and a magistrate judge, in a pro se civil rights suit. The complaint

was dismissed as frivolous on July 7, 1994, and the Court of Appeals dismissed plaintiff's appeal as frivolous on January 31, 1995.

In Nickelson v. United States, et al. (Eastern District of Pennsylvania, Case No. 2:97-cv-03942-LR), I was one of 18 named defendants, including 11 other Third Circuit judges, in a pro se civil rights action. The complaint was dismissed on defendants' motion on January 8, 1998, and plaintiff's appeal was dismissed for lack of legal merit on May 8, 1998.

In Thompson v. Kramer, et al. (Eastern District of Pennsylvania, Case No. 2:95-cv-02003-RC), I was one of more than 30 named defendants, including 12 other Third Circuit judges, in a pro se civil rights action. On January 7, 1997, the court ordered that all pleadings and other papers filed after August 31, 1994 (encompassing all filings in this case) by the plaintiffs that name any federal judge, employee of the federal judiciary, judicial body, federal government employee, or agency, be stricken.

In Sassower v. Sisk, et al. (Eastern District of Pennsylvania, Case No. 2:91-cv-04047-JG), I was one of 22 named defendants in a pro se civil rights suit. The district court denied the plaintiff's motion to proceed in forma pauperis and closed the case on July 3, 1991. The Court of Appeals dismissed the plaintiff's appeal on September 23, 1991.

In Barlow v. Shanklin, et al. (Eastern District of Pennsylvania, Case No. 2:93-cv-00608-WD), I was one of five named defendants in a pro se civil rights suit. The complaint was dismissed as frivolous on May 12, 1993.

In Gaudelli v. Eisner, et al. (Western District of Pennsylvania, Case No. 00-CV-437), I was one of 25 named defendants, including 18 other current and former Third Circuit judges, in this pro se civil suit. The district court dismissed the complaint on defendants' motion on March 30, 2001; the Court of Appeals affirmed on September 17, 2001; and the Supreme Court denied certiorari on January 7, 2002.

Lawsuit in which I was named in my personal capacity:

Gerish v. Alito (Superior Court of New Jersey, Essex County, Docket No. L-672-03). My wife and another motorist were involved in a minor traffic accident on June 9, 2000. The other motorist and her husband brought suit against my wife and me on January 15, 2003. The parties reached a settlement, and the case was dismissed on August 9, 2004.

21. Deferred Income/ Future Benefits: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts, and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I do not expect to receive any deferred income as described in this question.

22. **Potential Conflicts of Interest: Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

If confirmed, in matters involving recusal I would seek to follow the Code of Conduct for United States Judges (although it is not formally binding on justices of the Supreme Court of the United States), the Ethics Reform Act of 1989, 28 U.S.C. § 455, and any other relevant guidelines. As I do currently, I would look to the letter and spirit of the rules and guidelines. Specifically, I would recuse myself from any cases in which I participated as a judge on the U.S. Court of Appeals for the Third Circuit.

23. **Recusal:**

a. **Please provide a list of any instance during your tenure on the Third Circuit that there has been a request for you to recuse yourself from a case, motion, or matter, or when you have otherwise considered recusing yourself from a case, motion, or matter. For each, please provide the following information:**

i. **whether you considered recusal in response to a motion or other suggestion by a litigant or a party to the proceeding; in response to a suggestion by any other person or interested party; or sua sponte;**

ii. **a brief description of the real, apparent, or asserted conflict of interest or other matter which you considered as a potential ground for recusal;**

iii. **the procedure you followed in determining whether to recuse yourself;**

iv. **your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent, or asserted conflict of interest or to cure any other ground for recusal.**

Cases involving the U.S. Attorney's Office:

On May 19, 1994, I wrote the following in a letter to the clerk, Mr. P. Douglas Sisk: "As you know, since becoming a judge on June 15, 1990, I have recused myself in all cases in which the United States Attorney's Office for the District of New Jersey has appeared. I am writing to inform you that, as of June 15, 1994, the fourth anniversary of my swearing in, I am ending this blanket recusal. I will, however, continue to recuse myself in any cases that were handled by the United States Attorney's Office for the District of New Jersey during the period when I was United States Attorney, i.e., from March 23, 1987, to June 15, 1990." The letter continued: "Because of the passage of time, I believe that most cases in which the United States Attorney's

Office for the District of New Jersey now appears began after I became a judge. There may, however, be some cases that were in the United States Attorney's Office during my tenure there. Unfortunately, because there were thousands of cases in the United States Attorney's Office during that period, because I do not have a list of all these cases, and because I cannot possibly remember them all, I will have to rely on counsel to a large degree to bring to my attention any cases that were in the United States Attorney's Office during the period in question. For that reason, I have written to the United States Attorney's Office and the Federal Public Defender's Office, to alert them to the fact that I am ending my blanket recusal. In those letters, I have also requested that, pursuant to Local Appellate Rule 26.1.2, they notify your office whenever an appeal in which they appear was pending in the United States Attorney's Office during the indicated period."

I do not have a record of all instances in which the United States Attorney's Office or the Federal Public Defender's Office may have notified the Court regarding the pendency of a case or investigation during my tenure as U.S. Attorney. The following list includes any case in which my records indicate that any party or person brought such a matter to my attention.

Cases in which a motion or other request or suggestion that I recuse was made by a litigant, party, or other person:

1. Delta Traffic Service, Inc. v. The Mennen Co., No. 90-5063. On September 12, 1990, approximately one month before the scheduled date of argument, I recused myself *sua sponte* from this case after noticing that my name appeared on the ICC's brief. The ICC had intervened in the action in late 1989. The ICC seems to have handled the district court litigation entirely on its own, and I had no reason to think that the U.S. Attorney's Office was even aware of the case. No one from the U.S. Attorney's Office was listed as counsel on either the district court docket sheets or the clearance sheet. Likewise, the appellate brief was apparently prepared entirely in Washington. It appeared that, after the brief was prepared, someone in Washington simply inserted the U.S. Attorney's name. Although the U.S. Attorney's Office apparently had no substantive involvement in the case, I did not think I could serve on the panel when my name appeared on a party's briefs. Hence, I recused myself and took no part in either the argument or the decision.

2. Borchers v. United States, Nos. 90-5937 and 90-5939. I was recused from this matter on November 11, 1990, because it involved allegations concerning the conduct of the U.S. Attorney's Office for the District of New Jersey during my tenure as U.S. Attorney. The recusal appears to have been automatic, as the U.S. Attorney's Office was on my automatic recusal list and the recusal was entered on the same day of the clerk's recusal check. On November 30, 1990, the appellant made a motion for my recusal. He alleged misconduct on the part of one or more representatives of the office of the U.S. Attorney for the District of New Jersey before, during, and after my tenure as U.S. Attorney. No action was taken on the appellant's motion as I already was recused.

3. Martin v. Delaware Law School, No. 91-1761. On October 8, 1991, James L. Martin, the appellant, moved to recuse 15 judges on the Third Circuit, myself included. Mr. Martin's motion offered different reasons for seeking to recuse different judges. As to me, his

motion alleged: "Justice Alito worked as a US Attorney in NJ for several years before beginning his tenure as a judge. Because the US Attorney's Office in NJ has been retained to represent parties in related cases involving similar issues, Justice Alito should be recused and disqualified." The motion did not allege specific facts in support of this claim. I was not assigned to the merits panel, but I did participate in the vote to deny rehearing en banc. I did not recuse myself from the vote because Mr. Martin's case did not involve the U.S. Attorney's Office for the District of New Jersey, and because he presented no other basis for recusal.

4. Martin v. Sparks, No. 91-3596. On August 25, 1992, the appellant, moved to recuse 11 judges on the Third Circuit, including me. As was the case in Martin v. Delaware Law School, the appellant's motion alleged that I should be recused because "the US Attorney's Office in NJ has been retained to represent parties in this case and in the related cases." This motion also did not allege specific facts in support of his claim. In an order issued on September 10, 1992, Judge Becker denied the appellant's motion. I was not a member of the panel in this case, but I did participate in the decision to deny rehearing en banc. I did not recuse myself from the vote because the appellant's case did not involve the U.S. Attorney's Office for the District of New Jersey, and because he presented no other basis for recusal.

5. Hammond v. Creative Financial, No. 92-2035. On April 7, 1993, appellants Lucinda Hammond and James L. Martin moved to recuse and disqualify 11 judges on the Third Circuit, including me. As with Mr. Martin's previous cases, the motion alleged that I should be recused because "the US Attorney's Office in NJ has been retained to represent parties in the related cases." This motion likewise did not allege specific facts in support of the claim. On June 18, 1993, the court, in an order issued by Judge Becker, denied appellant's motion. I did not serve on the merits panel, and the court's records do not indicate whether I participated in a decision to deny rehearing en banc. However, as with previous cases filed by Mr. Martin, I did not need to recuse myself because the case did not involve the conduct of the U.S. Attorney's Office for the District of New Jersey while I was U.S. Attorney, and because no other basis for recusal was offered.

6. Martin v. Francis, No. 92-5276. On August 25, 1992, James L. Martin, the appellant, moved to recuse 11 judges on the Third Circuit, myself included. As to me, the appellant's motion, like previous motions described above, alleged only that "the US Attorney's Office in NJ has been retained to represent parties in the related cases." The Court denied the motion in an order issued by Judge Becker on November 27, 1992. I did not serve on the merits panel, and the court's records do not indicate whether I participated in a decision to deny rehearing en banc. However, as with previous cases filed by Mr. Martin, I did not need to recuse myself because the case did not involve the conduct of the U.S. Attorney's Office for the District of New Jersey while I was U.S. Attorney, and because no other basis for recusal was offered.

7. United States v. Grewal, No. 95-3362. On May 2, 1996, I received a fax from Ronald Kuby, counsel for respondent Amarjit Grewal, informing me of "a possible basis for [my] recusal in the above-entitled matter." Mr. Kuby's fax informed me that the respondent

was one of the Sikh leaders involved in an extradition proceeding handled by Special Assistant U.S. Attorney Judy G. Russell during my tenure as U.S. Attorney. While handling that matter, Ms. Russell reported that she had received various threatening communications. After some investigation, the FBI determined that the typewritten letters containing those threats had been typed on Ms. Russell's own typewriter. Although I was U.S. Attorney at the time, I had no involvement in the substance of the extradition proceeding, which was handled thereafter by attorneys from the Department of Justice in Washington, DC. I had no recollection of the respondent until I received Mr. Kuby's fax, and I do not think I had any basis for realizing who the respondent was prior to receiving the fax. Although I did not believe that the facts called to my attention mandated my recusal, my practice is to err on the side of caution in such matters, and I therefore recused myself from the case.

8. Vey v. Colville, No. 93-3422. On September 20, 1993, Eileen Vey, the appellant, moved to recuse all judges on the Third Circuit. The motion stated that I should be disqualified because I had served on a panel assigned to a related habeas corpus case, Vey v. Wolfe, No. 92-3362. The Court denied the motion in an order authored by Judge Becker and issued on February 28, 1994. I was not assigned to the merits panel, but I did participate in a vote to deny an initial hearing en banc. I did not need to recuse myself from the case because my role in Vey v. Wolfe did not create any actual or apparent conflict of interest.

9. Gay v. Stockdale, No. 95-3718. On March 4, 1996, Wilmer B. Gay, the petitioner, requested that Judge Becker and I, along with all but one of the other judges on the Third Circuit, be disqualified. The petition accused all judges in question of corruption. On November 8, 1996, the Court denied petitioner's request for a writ of mandamus; the order, authored by Judge Mansmann, did not specifically address the request for recusal. I did not serve on the panel, but I did participate in the vote to deny rehearing en banc, as no plausible basis for recusal was set forth in the motion.

10. Martin v. Walmer, No. 97-1572. On August 7, 1997, James L. Martin, the appellant, moved to recuse and disqualify 11 judges on the Third Circuit, myself included. As with the appellant's previous motions, this one alleged only that "the US Attorney's Office in NJ has been retained to represent parties in the related cases." The Court denied the motion on November 20, 1997, in an order authored by Judge Greenberg. I was not on the merits panel, but I did participate in the decision to deny rehearing en banc. I did not recuse myself from the vote because the appellant's case did not involve the U.S. Attorney's Office for the District of New Jersey, and because he presented no other basis for recusal.

11. Martin v. PA Real Estate Commission, No. 99-1168. On May 3, 1999, James L. Martin, appellant, moved to disqualify 12 judges on the Third Circuit, myself included. As to me, the motion alleged only that "the US Attorney's Office in NJ has been retained to represent parties in the related cases." The Court denied the motion in an order issued on December 7, 1999, and authored by Chief Judge Scirica. I did not serve on the merits panel, but I participated in the vote to deny the petition for rehearing en banc. I did not recuse myself from the vote because the appellant's case did not involve the U.S.

Attorney's Office for the District of New Jersey, and because he presented no other basis for recusal.

12. Martin v. Walmer, No. 00-2333. On September 27, 2000, James L. Martin, appellant, moved to disqualify 15 judges on the Third Circuit, myself included. As to me, the motion alleged only that "the US Attorney's Office in NJ has been retained to represent parties in the related cases." The Court denied the motion in an order authored by Judge Nygaard and issued on October 16, 2001. I did not serve on the merits panel, but I participated in the vote to deny the petition for rehearing en banc. I did not recuse myself from the vote because the appellant's case did not involve the U.S. Attorney's Office for the District of New Jersey, and because he presented no other basis for recusal.

13. Reilly v. Weiss, No. 00-3634. On August 7, 2001, Paul Reilly, appellant, moved to disqualify all three judges assigned to the merits panel for his appeal, including myself. Reilly claimed that the entire Third Circuit had violated the Constitution by delegating judicial duties to staff attorneys, and that the entire court was disqualified because a judge may not decide the constitutionality of his own conduct. The motion was denied on August 23, 2001, in an order authored by Judge Weis, because appellant had failed to present any legitimate basis for recusal. On October 25, 2001, I issued an order denying Reilly's petition for rehearing en banc.

14. Foster v. NJ Mfg. Ins. Co., Nos. 01-1533 and 01-2876. On October 1, 2003, Ivan Foster moved to vacate a previous order of the Court and to recuse 14 judges on the Third Circuit, myself included. Mr. Foster alleged that the named judges had perpetrated a fraud on the court by either denying his request for relief in a previous case or by denying review en banc. I did not serve on the merits panel but did participate in the vote regarding en banc review. I opted not to recuse myself from the vote because the allegations set forth in the motion were not true.

15. Monga v. Ottenberg, No. 01-1827. On November 24, 2003, appellant Monga made a motion to disqualify me from participating in his appeal. As I explained in a letter to Senator Specter: "I sat on the original panel that heard the appeal. Due to an oversight, it did not occur to me that Vanguard's status in the matter might call for my recusal. After the court's unanimous decision was issued affirming the district court ruling, the appellant raised the issue of my interest in Vanguard. My principal financial interest in Vanguard is in the mutual funds I own, which were not at issue in this lawsuit. After the issue was raised, I reviewed the applicable ethical rules and guidelines. According to the Code of Conduct and parallel language in 28 U.S.C. section 455, I did not have a financial interest in the outcome of the case. This law states that a financial interest exists in this type of case only 'if the outcome of the proceeding could substantially affect the value of the interest.' (Canon 3C.(3)(c)(iii) and 28 U.S.C. 455(d)(4)(iii)). Nevertheless, my personal practice is to recuse myself once my participation was called into question. Moreover, notwithstanding the fact that my vote on the unanimous panel did not affect the outcome, I took the extra and unnecessary step of requesting that a new panel of judges be appointed to rehear the case. The new panel of judges reached the same unanimous conclusion as the prior panel."

16. Guyer v. Kunz, No. 01-2012. On June 6, 2011, Thomas D. Guyer, appellant, requested the recusal of all Third Circuit judges. The appellant filed suit against fifty different judges sitting in the state court, the Eastern District of Pennsylvania, and the Third Circuit; he alleged that the defendants had conspired to wrongfully imprison him for over fifteen years in a Pennsylvania state prison on state burglary charges. In affirming the decision of the district court, the court, addressing the appellant's request for recusal, stated: "Recusal is not mandated upon the merest unsubstantiated suggestion of personal bias or prejudice, and we will not allow Guyer to impede the administration of justice by suing every judge within the jurisdiction of this circuit in an effort to have his case transferred out of the Third Circuit." I did not serve on the merits panel but did participate in the vote on the petition for rehearing en banc. I opted not to recuse myself for the same reason set forth in the court's opinion.

17. Chapman v. Commonwealth of PA, No. 01-3815. On October 12, 2001, Chapman moved for recusal of the entire en banc panel of judges of the Third Circuit. He argued that the entire panel was disqualified as a matter of law from considering his request for a writ of mandamus because the court had decided against rehearing in a prior case – and had thus "tried" the case previously for purposes of 28 U.S.C. § 47. I did not serve on the merits panel but did participate in the vote on the petition for rehearing en banc. I decided not to recuse myself from the vote because petitioner's argument incorrectly stated the law.

18. Reynolds v. USX Corp., No. 01-3941. On June 6, 2002, appellant Reynolds moved to strike the opposing party's brief and to recuse any panel member who had viewed the brief. Reynolds argued that the appellee's brief contained "impertinent material regarding appellee's counsel's recollection of settlement conversations, including settlement offers, between counsel involved in this appeal in violation of L.A.R. 33.5(c) and F.R.E. 408." The merits panel, on which I sat, granted the motion to strike but denied the motion to recuse in an order authored by Chief Judge Scirica and issued on July 22, 2002. I declined to recuse myself because the brief had not compromised my ability to consider the case.

19. Reilly v. Weiss, Nos. 02-1382, 02-2821, 02-3261 and 03-1402. On November 6, 2003, appellant Reilly moved to disqualify all Third Circuit Judges. The appellant alleged that the entire court was disqualified because, among other reasons, the judges were all biased against pro se litigants and had "abdicated critical judicial functions to staff attorneys." I was not on the merits panel but did participate in the vote denying a rehearing en banc. I did not recuse myself because the appellant made no plausible argument for recusal.

20. Martin v. Delaware Law School, No. 02-1424. On March 22, 2002, appellant, James L. Martin, moved to recuse and disqualify 15 judges on the Third Circuit, myself included. As with previous cases filed by the appellant, his motion in this case alleged that I should be recused because "the US Attorney's Office in NJ has been retained to represent parties in related cases involving similar issues." The Court denied the motion on October 23, 2002, in an order issued by Judge Nygaard. I was not a member of the merits panel, but

participated in the vote to deny rehearing en banc. I opted not to recuse myself because the appellant's case did not involve the U.S. Attorney's Office for the District of New Jersey, and because he presented no other basis for recusal.

21. Manna v. United States, No. 04-4282. In this habeas case, Louis A. Manna, the appellant, filed a motion on November 30, 2004, to recuse Judge Barry, Judge Chertoff, and me. On December 14, 2004, the U.S. Attorney for the District of New Jersey, George S. Leone, also requested that all three judges be recused. At the time of the appellant's original trial, I was the United States Attorney for the District of New Jersey. The appellant alleged that Judge Chertoff and I were "relentless adversaries" with a "win at all cost" mentality. He also claimed that Judge Chertoff and I conspired to deny him due process of law. On December 14, 2004, in keeping with my standard practice, I recused because of my involvement in the original prosecution.

22. In re Shemonsky, No. 05-1736. In this case Michael R. Shemonsky moved to recuse the entire Third Circuit Court of Appeals, and also "move[d] under the theory of King's Bench under the Magna Carta to act as the Court." Mr. Shemonsky claimed that the Judicial Council for the Third Circuit had been sued in the Court of Common Pleas for the County of Monroe, and that the Third Circuit Judicial Council controls the activity of the Third Circuit Court of Appeals. He also claimed that "numerous fraudulent orders were entered under the bogus facsimile signature" of the Clerk. On July 13, 2005, Chief Judge Scirica issued an order denying the motion to recuse the entire court but allowing each judge to choose whether to recuse. On July 14, 2005, I recused myself solely to avoid any appearance of impropriety arising from the fact that I had been named as a defendant in Mr. Shemonsky's suit against the Third Circuit Judicial Council.

23. D'Amario v. Bailey, No. 05-4333. On Oct. 6, 2005, the appellant in this case, Arthur D'Amario III, moved to recuse the entire Third Circuit because U.S. Marshals had identified him as "a 'security concern,' resulting in his banishment from all federal courtrooms in Philadelphia." This designation, the appellant argued, gives the entire court a vested interest in maintaining his allegedly illegal custody. The appellant's underlying conviction was for threatening to assault and murder a federal judge, in violation of 18 U.S.C. § 115(a)(1)(B). See United States v. D'Amario, 350 F.3d 348 (3d Cir. 2003) (Alito, J.). This motion is pending before a panel of the Third Circuit. I was not assigned to the panel, and have not considered the motion.

Appendix 3, attached, includes, to the best of my knowledge, all cases from which I was recused during my tenure as a judge on the Third Circuit, regardless of whether the recusal was automatic. The Office of the Clerk assisted me in compiling the list. I have done my best to state the apparent reason for recusal for each case listed. Because the court's records only note the fact of recusal, however, I cannot be absolutely sure that the stated reason was the only or the actual reason for recusal. Where the explanation seems reasonably apparent, I have listed it. I have not offered any explanation for cases in which I could not recall the basis for recusal from my review of the parties and the attorneys involved in the case.

24. **Outside Commitments During Court Service: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the Court? If so, please explain.**

I have no plans, commitments, or agreements to pursue outside employment in the future.

25. **Sources of Income: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (Copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

Please see attached financial disclosure report.

26. **Statement of Net Worth: Please complete the attached financial net worth statement in detail (add schedules as called for).**

Please see attached statement of net worth.

27. **Pro Bono Work: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

Since my clerkship, I have spent my entire legal career as an employee or officer of the Department of Justice or a judge and have thus been precluded from representing private clients. As a judge, I have worked, together with the other members of my court, to provide parties appearing before us with high quality pro bono representation. We have encouraged lawyers to place their names on the list of attorneys who are willing to undertake pro bono appellate representation, and we regularly appoint pro bono attorneys in pro se cases in which it appears that such representation would be beneficial. We have recently sought to encourage attorneys to accept pro bono assignments in asylum and other immigration cases and have agreed to hear oral argument in all such cases.

28. **Selection Process:**

    a. **Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). List all interviews or communications you had with anyone in the Executive Office of the President or the Justice Department regarding this nomination, or any other judicial nomination for which you have been considered, the dates of such**

interviews or communications, and all persons present or participating in such interviews or communications.

A short time before June 24, 2001, I was invited to an interview with then-Counsel to the President Alberto Gonzales and then-Deputy Counsel to the President, Timothy Flanigan. I was told that the interview concerned a possible future Supreme Court vacancy. I was interviewed by Judge Gonzales and Mr. Flanigan on June 24, 2001.

Some time before May 5, 2005, I was invited to another interview about a possible future Supreme Court vacancy. I was interviewed on May 5, 2005, by Vice President Cheney, Attorney General Gonzales, Andrew Card, Karl Rove, Harriet Miers, and I. Lewis Libby. A few weeks later, I was interviewed by Ms. Miers.

In July 2005, I was invited to an interview with the President and was interviewed by the President on July 15, 2005; Ms. Miers was present.

On October 28, 2005, I was telephoned by Mr. Card and told that I might receive a call from the President. The President telephoned me on that date and we discussed the possibility of my nomination. I met with the President on the morning of October 31, 2005, and he formally offered to nominate me and I accepted.

b. **Has anyone involved in the process of selecting you as a judicial nominee (including, but not limited to anyone in the Executive Office of the President, the Justice Department, or the Senate and its staff) ever discussed with you any specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully. Please identify each communication you had prior to the announcement of your nomination with anyone in the Executive Office of the President, the Justice Department or the Senate or its staff referring or relating to your views on any case, issue or subject that could come before the Supreme Court of the United States, state who was present or participated in such communication, and describe briefly what transpired.**

No one involved in the process of selecting or recommending me as a judicial nominee has ever discussed with me any specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

c. **Did you make any representations to any individuals or interest groups as to how you might rule as a Justice, if confirmed? If you know of any such representations made by the White House or individuals acting on behalf of**

the White House, please describe them, and if any materials memorializing those communications are available to you, please provide four (4) copies.

I have made no representations to any individuals or interest groups as to how I might rule as a justice, if confirmed. I am not aware of any such representations made by the White House or any individuals acting on behalf of the White House

29. Judicial Activism: Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society, generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- **a. a tendency by the judiciary toward problem-solution rather than grievance-resolution;**
- **b. a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**
- **c. a tendency by the judiciary to impose broad, affirmative duties upon governments and society;**
- **d. a tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**
- **e. a tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

The Constitution sets forth a limited role for the judicial branch. As the question notes, in recent years there have been charges that the federal judiciary has exceeded the proper bounds of judicial authority through court decisions. My experience has taught me that any such criticism should be informed by a balanced understanding of the role that the federal courts should play.

The Constitution charges the federal courts with the duty to exercise "[t]he judicial Power of the United States," Art. III, sec.1, and as Alexander Hamilton aptly put it in Federalist 78, the courts should carry out that role with "firmness and independence." "Without this," he observed, "all the reservations of particular rights or privileges [in the Constitution] would amount to nothing." But while the federal courts should act firmly and independently within their proper sphere, they must always keep in mind that their proper sphere is circumscribed. The "judicial Power" is distinct from the "legislative Powers" given to Congress and from "the executive Power," and the federal courts must engage in a constant process of self-discipline to ensure that they respect the limits of their authority.

Judicial self-discipline is especially important when federal courts are interpreting the

Constitution. In non-constitutional cases, the political branches can check what they perceive to be erroneous judicial decisions by enacting corrective legislation. Decisions based on an interpretation of the Constitution, by contrast, cannot be checked in this manner, and a thoughtful appreciation of the nature and essential limits of the judicial function is therefore acutely necessary to protect the democratic values that underlie our Constitution.

Article III of the Constitution, which is the source of the federal courts' power, simultaneously limits that power. Most importantly, Article III, section 2 restricts the jurisdiction of the federal courts to actual "Cases" and "Controversies," and this limitation necessarily means that the federal courts lack jurisdiction unless the constitutional elements of "standing" and "ripeness" are met. These elements serve to ensure that the federal courts stay within the role that courts have traditionally performed and that they are trained and equipped to perform – entertaining and adjudicating real disputes that are brought before them by real parties. By restraining the courts from reaching out to decide abstract issues and nascent disputes that may not need judicial resolution, these doctrines promote better decision making, serve democratic values, and work to prevent clashes with the authority of Congress and the Executive by reserving to the political process issues that rightly belong there. In recent decades, Supreme Court decisions have stressed the importance of these constitutional restrictions on the power of the federal courts, and as a judge of the court of appeals I have applied these precedents.

Other valuable statutory and judge-made limitations on the exercise of judicial power serve similar purposes. These limitations include prudential standing and ripeness requirements, statutory and non-statutory limitations on the scope of review that courts may properly exercise in particular contexts, and the doctrine of stare decisis, which supplies essential stability to the law and is a fundamental feature of our legal system. My experience as a court of appeals judge for the past 15 years has fortified my appreciation of the value of these important limitations.

A criticism of the federal courts cited in the question concerns the overreaching in crafting and implementing remedies, an area that highlights the tension between the federal courts' obligation to discharge their proper role firmly and independently and the need to avoid inappropriate encroachment on the authority of other government institutions. When a constitutional or statutory violation has been proven, a court should not hesitate to impose a strong and lawful remedy if that is what is needed to provide full redress. Some of the finest chapters in the history of the federal courts have been written when federal judges, despite resistance, have steadfastly enforced remedies for deeply rooted constitutional violations. At the same time, however, judges must always be sensitive to the need to avoid unnecessary interference with the authority and competence of the political branches. In addition, courts should recognize that their legitimacy is tested when they undertake in the remedial context to perform functions that are ordinarily the province of the political branches.

A paradox is inherent in our constitutional structure. The framers of the Constitution generally did not think that government institutions and actors could be trusted to refrain from unduly extending their own powers, but our constitutional system relies heavily on the judiciary to restrain itself. To do this, judges must engage in a continual process of self-questioning about the way in which they are performing the responsibilities of their offices. Judges must also have faith that the cause of justice in the long run is best served if they scrupulously heed the limits of

their role rather than transgressing those limits in an effort to achieve a desired result in a particular case. Judges must maintain a deep respect for the authority of the other branches of government – based on their democratic legitimacy – and a keen appreciation of the comparative advantages that other government institutions and actors have in making empirical judgments, devising comprehensive solutions for social problems, and administering complex programs and institutions. In addition, judges must be appropriately modest in their estimation of their own abilities; they must respect the judgments reached by predecessors; and they must be sensibly cautious about the scope of their decisions. And judges should do all these things without shirking their duty to say what the law is and to carry out their proper role with energy and independence.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		243	700	Notes payable to banks-secured			
U.S. Government securities-add schedule		60	000	Notes payable to banks-unsecured			
Listed securities-add schedule		788	750	Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule			
Real estate owned-add schedule		869	550	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		150	000				
Cash value-life insurance							
Other assets itemize:							
				Total liabilities			0
				Net Worth	2	112	000
Total Assets	2	112	000	Total liabilities and net worth	2	112	000
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

U.S. Government Securities	
Series EE Bonds	$ 60,000
Listed Securities	
Vanguard Small Cap Index Fund	$ 96,000
Vanguard Total Stock Market Index Fund	86,000
Windsor II Fund	25,500
XOM Common Stock	161,000
Wellington Fund	101,000
Vanguard Intermediate Term Tax Exempt Fund	90,000
Vanguard Insured Long Term Tax Exempt Fund	26,000
Vanguard N.J. Long Term Tax Exempt Fund	30,000
Star Fund	25,000
Windsor II Fund	51,000
Vanguard Intermediate Term bond Index Fund	18,000
INTC Common Stock	13,800
Fidelity Equity II Income Fund	29,400
MCD Common Stock	25,200
BMY Common Stock	8,400
DIS Common Stock	2,450
Total Listed Securities	$788,750
Real Estate Owned	
Personal residence	$ 869,550

Appendix 1 Question 13.d.

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Appendix 2

Question 14.b.

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Memorandum to _____, Office of the Solicitor General, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, "Your Participation in a Pending Case in light of 18 U.S.C. 208" (Feb. 13, 1987)

Memorandum to John N. Richardson, Jr., Assistant to the Attorney General and Chief of Staff, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, "Release Forms for Attorney General Speeches" (Feb. 19, 1987)

Letter to MaryEllen A. Brown, Board Ethics Official, Board of Governors of the Federal Reserve System, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel (Feb. 19, 1987)

Memorandum to Thomas J. Stanton, Director and Counsel, Executive Office for United States Trustees, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, "Conversion of Bankruptcy Cases Pending on the Effective Date of the Family Farmer Amendments" (Feb. 25, 1987)

Letter to James P. Corcoran from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel (Feb 26, 1987)

Letter to Laurie A. Lipper, The Nation Institute, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel (Feb. 26, 1987)

Memorandum to Jim Byrnes, Associate Deputy Attorney General, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, "Luoma request" (Mar. 6, 1987)

Letter to J. Thomas Johnson, Director, Illinois Department of Revenue, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel (Mar. 6, 1987)

Memorandum for Dennis F. Hoffman, Chief Counsel, Drug Enforcement Administration, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, "Use of 'Trafficker-Directed' Funds" (Mar. 11, 1987)

Letter to Gary H. Sampliner from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel (Mar. 11, 1987)

Memorandum to Joe Casper, Vice President's Office, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, "Summary of *Smith v. Board of School Commissioners*" (Mar. 12, 1987)

Letter to ____ from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, Re: Interpretation of 18 U.S.C. 207(c) (Mar. 13, 1987)

Memorandum to Floyd I. Clarke, Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, "Federal Bureau of Investigation Background Investigations of Candidates for Position of Postmaster General (Mar. 13, 1987)

Letter to J. Clayton Undercofler, III, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, Re: Federal Form FD-645 (Mar. 20, 1987)

Memorandum for Clyde C. Pearce, Jr., General Counsel, General Services Administration, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel (Mar. 27, 1987)

Memorandum for Alan Raul, Associate Counsel to the President, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, "White House Use of Volunteers in the Pay of National Political Organizations" (Mar. 27, 1987)

Memorandum for Terry S. Coleman, General Counsel, Department of Health and Human Services, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, "Application of 202(x)(1) of the Social Security Act to Beneficiaries Incarcerated in Foreign Prisons" (Apr. 24, 1987)

Appendix 3

Questions 17.a. through 17.e.

17. Citations: From your time as a judge, please provide:

a. citations for all opinions you have written (including concurrences and dissents);

The Third Circuit issues both "precedential" and "non-precedential" opinions. In parts "a." and "b." of this question I list precedential opinions. In part "e." I list non-precedential opinions I authored or joined. [Citations are current through November 11, 2005.]

MBIA Ins. Corp. v. Royal Indem. Co., 426 F.3d 204 (3d Cir. 2005)
Forrest v. Beloit Corp., 424 F.3d 344, 362–63 (3d Cir. 2005) (concurring)
McDowell v. Philadelphia Hous. Auth., 423 F.3d 233 (3d Cir. 2005)
Digiacomo v. Teamsters Pension Trust Fund, 420 F.3d 220, 228–31 (3d Cir. 2005) (dissenting)
Oyebanji v. Gonzales, 418 F.3d 260 (3d Cir. 2005)
Partyka v. Attorney Gen., 417 F.3d 408, 417–18 (3d Cir. 2005) (concurring in the judgment in part and dissenting in part)
Overall v. Univ. of Pa., 412 F.3d 492 (3d Cir. 2005)
Zhang v. Gonzales, 405 F.3d 150 (3d Cir. 2005)
Bronshtein v. Horn, 404 F.3d 700 (3d Cir. 2005)
Trippe Mfg. Co. v. Niles Audio Corp., 401 F.3d 529 (3d Cir. 2005)
Banks v. Beard, 399 F.3d 134, 148–50 (3d Cir. 2005) (dissenting)
Brinson v. Vaughn, 398 F.3d 225 (3d Cir. 2005)
Yang v. Odom, 392 F.3d 97, 112–14 (3d Cir. 2004) (concurring and dissenting)
Southco, Inc. v. Kanebridge Corp., 390 F.3d 276 (3d Cir. 2004) (en banc)
Pascack Valley Hosp. v. Local 464A UFCW Welfare Reimbursement Plan, 388 F.3d 393, 404–05 (3d Cir. 2004) (concurring in the judgment)
Child Evangelism Fellowship v. Stafford Twp. Sch. Dist., 386 F.3d 514 (3d Cir. 2004)
In re G-I Holdings, Inc., 385 F.3d 313 (3d Cir. 2004)
Soltane v. U.S. Dept. of Justice, 381 F.3d 143 (3d Cir. 2004)
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Chen v. Ashcroft, 381 F.3d 221 (3d Cir. 2004)
Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004)
Fielder v. Varner, 379 F.3d 113 (3d Cir. 2004)
Pitt News v. Pappert, 379 F.3d 96 (3d Cir. 2004)
Khodara Envtl., Inc. v. Blakey, 376 F.3d 187 (3d Cir. 2004)
United States v. Pray, 373 F.3d 358 (3d Cir. 2004)
Liu v. Ashcroft, 372 F.3d 529 (3d Cir. 2004)
Benn v. Universal Health Sys., Inc., 371 F.3d 165 (3d Cir. 2004)
Penn W. Assocs., Inc. v. Cohen, 371 F.3d 118, 130–34 (3d Cir. 2004) (dissenting)
White v. Commc'ns Workers of Am., 370 F.3d 346 (3d Cir. 2004)
Jansen v. United States, 369 F.3d 237, 250 (3d Cir. 2004) (concurring)
Poole v. Family Court, 368 F.3d 263 (3d Cir. 2004)
Lee v. Ashcroft, 368 F.3d 218, 225–28 (3d Cir. 2004) (dissenting)
Sabree v. Richman, 367 F.3d 180, 194 (3d Cir. 2004) (concurring)
United States v. Wright, 363 F.3d 237 (3d Cir. 2004)
Doe v. Groody, 361 F.3d 232, 244–29 (3d Cir. 2004) (dissenting)

United States v. Lloyd, 361 F.3d 197 (3d Cir. 2004)
Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004)
Rompilla v. Horn, 359 F.3d 310 (3d Cir. 2004) (en banc)
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Acosta v. Ashcroft, 341 F.3d 218 (3d Cir. 2003)
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Official Comm. of Unsecured Creditors of Cybergenics Corp., 330 F.3d 548, 580–87 (3d Cir. 2003) (en banc) (joining dissent)
Artz v. Barnhart, 330 F.3d 170 (3d Cir. 2003)
LePage's Inc. v. 3M, 324 F.3d 141, 169–82 (3d Cir. 2003) (en banc) (joining dissent)
Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411 (3d Cir. 2003)
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United Artists Theatre Co. v. Walton, 315 F.3d 217, 235 (3d Cir. 2003) (concurring)
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Lawson v. Fortis Ins. Co., 301 F.3d 159 (3d Cir. 2002)
United States v. Tiller, 302 F.3d 98 (3d Cir. 2002)
Chadwick v. Janecka, 302 F.3d 107 (3d Cir.), *amended and superseded by* 312 F.3d 597 (2002)
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New Jersey Payphone Ass'n, Inc. v. Town of W. New York, 299 F.3d 235, 247–50 (3d Cir. 2002) (concurring in judgment)
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In re Hechinger Inv. Co., 298 F.3d 219 (3d Cir. 2002)
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Carpenter v. Vaughn, 296 F.3d 138 (3d Cir. 2002)
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Neonatology Assocs., P.A. v. C.I.R., 293 F.3d 128 (3d Cir. 2002)
Truesdell v. Philadelphia Hous. Auth., 290 F.3d 159 (3d Cir. 2002)

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Fraise v. Terhune, 283 F.3d 506 (3d Cir. 2002)
Bovkun v. Ashcroft, 283 F.3d 166 (3d Cir. 2002)
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United States v. Zimmerman, 277 F.3d 426, 438–41 (3d Cir. 2002) (dissenting)
United States v. Gricco, 277 F.3d 339 (3d Cir. 2002)
Riley v. Taylor, 277 F.3d 261, 317–31 (3d Cir. 2001) (en banc) (dissenting)
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Wenger v. Frank, 266 F.3d 218 (3d Cir. 2001)
Acceptance Ins. Co. v. Sloan, 263 F.3d 278 (3d Cir. 2001)
Leckey v. Stefano, 263 F.3d 267 (3d Cir. 2001)
Abramson v. William Paterson Coll. of New Jersey, 260 F.3d 265, 289–90 (3d Cir. 2001) (concurring)
Einhorn v. Fleming Foods of Pa., Inc., 258 F.3d 192 (3d Cir. 2001)
Nordhoff Invs., Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 191–92 (3d Cir. 2001) (concurring in the judgment)
Leveto v. Lapina, 258 F.3d 156 (3d Cir. 2001)
Southco, Inc. v. Kanebridge Corp., 258 F.3d 148 (3d Cir. 2001)
Eddy v. V.I. Water & Power Auth., 256 F.3d 204 (3d Cir. 2001)
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Pa. Prot. & Advocacy, Inc. v. Houstoun, 228 F.3d 423 (3d Cir. 2000)
Nicholas v. Pa. State Univ., 227 F.3d 133 (3d Cir. 2000)
Oran v. Stafford, 226 F.3d 275 (3d Cir. 2000)
Applebaum v. Nissan Motor Acceptance Corp., 226 F.3d 214 (3d Cir. 2000)
Chittister v. Dept. of Cmty. & Econ. Dev., 226 F.3d 223 (3d Cir. 2000)
C.H. v. Oliva, 226 F.3d 198, 203–14 (3d Cir. 2000) (en banc) (dissenting)
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United States v. Coates, 178 F.3d 681 (3d Cir. 1999)
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United States v. Shoupe, 35 F.3d 835, 839–40 (3d Cir. 1994) (dissenting)
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c. a list of cases in which appeal or certiorari has been requested or granted;

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Lowenschuss v. Resorts Int'l, Inc., 181 F.3d 505 (3d Cir. 1999), *cert. denied,* 528 U.S. 1021 (2000)
United States v. Locskai, 181 F.3d 85 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 1177 (2000)
Fioriglio v. City of Atl. City, 185 F.3d 861 (3d Cir. 199) (table), *cert. denied,* 528 U.S. 1075 (2000)
Doe v. Constantine, 182 F.3d 903 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 1038 (1999)
Price v. Mazurkiewicz, 182 F.3d 904 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 1008 (1999)
Collins v. Montgomery County Bd. of Prison Inspectors, 176 F.3d 679 (3d Cir. 1999) (en banc), *cert. denied,* 528 U.S. 1115 (2000)
Connecticut Gen. Life Ins. Co. v. Comm'r, 177 F.3d 136 (3d Cir. 1999), *cert. denied,* 528 U.S. 1003 (1999)
United States v. Schwyhart, 187 F.3d 627 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 895 (2000)
United States v. Cruz, 187 F.3d 627 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 896 (1999)

Loftus v. Se. Pa. Transp. Auth., 187 F.3d 626 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 1047 (1999)
United States v. Dorsey, 174 F.3d 331 (3d Cir. 1999), *cert. denied,* 528 U.S. 885 (1999)
Sullivan v. Snyder, 187 F.3d 626 (3d Cir. 1999) (table), *cert. denied,* 527 U.S. 1065 (1999)
Allah v. Stachelek, 178 F.3d 1278 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 1141 (2000)
United States v. Rojas-Ortiz, 178 F.3d 1281 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 855 (2000)
Matteo v. Superintendent, SCI Albion, 171 F.3d 877 (3d Cir. 1999) (en banc), *cert. denied,* 528 U.S. 824 (1999)
United States v. Bacchus, 178 F.3d 1280 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 861 (1999)
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FOP Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999), *cert. denied,* 528 U.S. 817 (1999)
Guidish v. Lehman, 175 F.3d 1010 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 824 (1999)
Newhard v. Philadelphia, Bethlehem & New Eng. R.R., 175 F.3d 1011 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 812 (1999)

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Balliet v. Heydt, 176 F.3d 471 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 877 (1999)
Jackson v. The Right Stuff, 176 F.3d 472 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 824 (1999)
Nelson v. Barbo, 176 F.3d 472 (3d Cir. 1999) (table), *cert. denied,* 528 U.S. 989 (1999)
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Buehl v. Vaughn, 166 F.3d 163 (3d Cir.1999), *petition for cert. dismissed* 527 U.S. 1050 (1999)
United States v. Kole, 164 F.3d 164 (3d Cir. 1998) (joining the opinion of the Court, except as explained in footnote 4), *cert. denied,* 526 U.S. 1079 (1999)
Walden v. Hines, 164 F.3d 621 (3d Cir. 1998) (table), *motion denied* 525 U.S. 1137 (1999)
Fultz v. Dunn, 165 F.3d 215 (3d Cir. 1998), *cert. denied,* 527 U.S. 1006 (1999)
Torres v. McLaughlin, 163 F.3d 169 (3d Cir. 1998), *cert. denied,* 528 U.S. 1079 (2000)
United States v. Tyler, 164 F.3d 150, 159-63 (3d Cir. 1998) (concurring), *cert. denied,* 526 U.S. 1077 (1999)
Burks v. Green, 173 F.3d 420 (3d Cir. 1998) (table), *cert. denied,* 527 U.S. 1008 (1999)
Fisher v. ADT Sec. Sys., 173 F.3d 420 (3d Cir. 1998) (table), *cert. denied,* 528 U.S. 846 (1999)
Rives v. County of Monmouth, 172 F.3d 41 (3d Cir. 1998) (table), *cert. denied,* 527 U.S. 1024 (1999)
United States v. Oblea-Gonzalez, 172 F.3d 41 (3d Cir. 1998) (table), *cert. denied,* 526 U.S. 1032 (1999)
Fleming v. Cape May County Courthouse, 172 F.3d 859 (3d Cir. 1998) (table), *cert. denied,* 528 U.S. 845 (1999)
Bryant v. Morton, 172 F.3d 859 (3d Cir. 1998) (table), *cert. denied,* 526 U.S. 1150 (1999)
United States v. Lonergan, 172 F.3d 861 (3d Cir. 1998) (table), *cert. denied,* 528 U.S. 1060 (1999)
United States v. Clayton, 168 F.3d 480 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 1185 (1999)
United States v. Perez, 168 F.3d 480 (3d Cir. 1998) (table), *cert. denied,* 528 U.S. 879 (1999)
United States v. Rodriguez, 168 F.3d 480 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 1163 (1999)
Hassine v. Zimmerman, 160 F.3d 941 (3d Cir. 1998), *cert. denied,* 526 U.S. 1065 (1999)
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United States v. Brown, 159 F.3d 147 (3d Cir. 1998), *cert. denied,* 525 U.S. 1184 (1999)
ACM Partnership v. Comm'r, 157 F.3d 231 (3d Cir. 1998), *cert. denied,* 526 U.S. 1017 (1999)
Williams v. Brown, 166 F.3d 1207 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 1047 (1998)
United States v. Fisher, 1998 U.S. App. LEXIS 17357 (3d Cir. 1998), *cert. denied,* 525 U.S. 954 (1998)
United States v. Jackson, 166 F.3d 1206 (3d Cir. 1998) (table), *cert. denied,* 526 U.S. 1100 (1999)
United States v. Samuels, 166 F.3d 1206 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 1086 (1999)
United States v. Tobin, 155 F.3d 636 (3d Cir. 1998), *cert. denied,* 525 U.S. 1171 (1999)
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United States v. Borrome, 166 F.3d 1206 (3d Cir. 1998) (table), *cert. denied,* 526 U.S. 1033 (1999)

In re Fesq, 153 F.3d 113 (3d Cir. 1998), *cert. denied,* 526 U.S. 1018 (1999)
Edwards v. California Univ. of Pa., 156 F.3d 488 (3d Cir. 1998), *cert. denied,* 525 U.S. 1143 (1999)
Collins v. Apfel, 164 F.3d 621 (3d Cir. 1998) (table), *cert. denied,* 526 U.S. 1056 (1999)
United States v. Telleria, 162 F.3d 1153 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 906 (1998)
Jackson v. White, 159 F.3d 1351 (3d Cir. 1998) (table), *cert. denied,* 526 U.S. 1125 (1999)
Fiore v. White, 149 F.3d 221 (3d Cir. 1998), *cert. granted* 526 U.S. 1038, *question certified* 528 U.S. 23 (1999), *certified question answered* 562 Pa. 634 (2000), *and rev'd* 531 U.S. 225 (2001)
United States v. Lake, 150 F.3d 269 (3d Cir. 1998), *cert. denied,* 525 U.S. 1088 (1999)
United States v. Richman, 159 F.3d 1354 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 1087 (1999)
United States v. Hall, 159 F.3d 1354 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 1009 (1998)
Knox v. Vaughn, 159 F.3d 1351 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 989 (1998)
United States v. Moses, 148 F.3d 277 (3d Cir. 1998), *cert. denied,* 525 U.S. 1148 (1999)
Gibson v. Pa. Nat'l Gaurd, 159 F.3d 1351 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 986 (1998)
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Williams v. McLaughlin, 159 F.3d 1354 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 1079 (1999)
Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998) (concurring in the judgment), *cert. denied,* 525 U.S. 1093 (1999)
United States v. Lena, 151 F.3d 1027 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 1166 (1999)
Fritz v. Lancaster County, 151 F.3d 1025 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 983 (1998)
Melody v. Borough of Eatontown, 151 F.3d 1026 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 963 (1998)
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Lee v. Kyler, 142 F.3d 428 (3d Cir. 1998) (table), *cert. denied,* 523 U.S. 1084 (1998)
Byrd v. Robison, 149 F.3d 1163 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 893 (1998)
Fernandes v. EPA, 142 F.3d 428 (3d Cir. 1998) (table), *cert. denied,* 525 U.S. 869 (1998)
Sabo v. Metro. Life Ins. Co., 137 F.3d 185 (3d Cir. 1998), *cert. denied,* 525 U.S. 1129 (1999)
United States v. Okoro, 142 F.3d 430 (3d Cir. 1998) (table), *cert. denied,* 523 U.S. 1102 (1998)
United States v. Rothwell, 142 F.3d 430 (3d Cir. 1998) (table), *cert. denied,* 523 U.S. 1131 (1998)
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Castaphney v. White, 142 F.3d 427 (3d Cir. 1998) (table), *cert. denied,* 524 U.S. 931 (1998)
Newton v. Merrill, Lynch, Pierce, Fenner & Smith, 135 F.3d 266 (3d Cir. 1998) (en banc), *cert. denied,* 525 U.S. 811 (1998)
United States v. Pizza, 141 F.3d 1155 (3d Cir. 1998) (table), *cert. denied,* 523 U.S. 1112 (1998)

Laessig v. City of Philadelphia, 141 F.3d 1154 (3d Cir. 1998) (table), *cert. denied,* 524 U.S. 944 (1998)
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In re Prudential Ins. Co. of Am. Sales Practice Litig., 133 F.3d 225 (3d Cir. 1998), *cert. denied,* 525 U.S. 817 (1998)
United States v. Briggs, 135 F.3d 767 (3d Cir. 1997) (table), *cert. denied,* 523 U.S. 1131 (1998)
Shawley v. Kyler, 135 F.3d 766 (3d Cir. 1997) (table), *cert. denied,* 525 U.S. 834 (1998)
Craw v. Horn, 1998 U.S. App. LEXIS 2514 (3d Cir. 1998), *cert. denied,* 524 U.S. 931 (1998)
Weissman v. Cohn, Lifland, Perlman, Hermann & Knopf, 133 F.3d 912 (3d Cir. 1997) (table), *cert. denied,* 523 U.S. 1122 (1998)
United States v. Johnson, 133 F.3d 911 (3d Cir. 1997) (table), *cert. denied,* 523 U.S. 1033 (1998)
Messam v. Morton, 133 F.3d 910 (3d Cir. 1997) (table), *cert. denied,* 523 U.S. 1074 (1998)
Deblase v. Roth, 1997 U.S. App. LEXIS 30238 (3d Cir. 1997) (en banc), *cert. denied,* 523 U.S. 1083 (1998)
Ryder v. Westinghouse Elec. Corp., 128 F.3d 128 (3d Cir. 1997), *cert. denied,* 522 U.S. 1116 (1998)
United States v. Pevarnik, 129 F.3d 1257 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 1082 (1998)
United States v. Marr, 129 F.3d 1257 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 1067 (1998)
Gagliardi v. United States, 129 F.3d 1255 (3d Cir. 1997) (table), *cert. denied,* 524 U.S. 955 (1998)
Jones v. Bernstein, 129 F.3d 1255 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 1135 (1998)
United States v. Green, 129 F.3d 1256 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 1067 (1998)
Queen City Pizza v. Domino's Pizza, 124 F.3d 430 (3d Cir. 1997), *cert. denied,* 523 U.S. 1059 (1998)
United States v. Williams, 124 F.3d 411 (3d Cir. 1997), *cert. denied,* 522 U.S. 1051 (1998)
United States v. Igbonwa, 120 F.3d 437, 444-46 (3d Cir. 1997) (dissenting), *cert. denied,* 522 U.S. 1119 (1998)
United States v. Palma-Ruedas, 121 F.3d 841, 859-865 (3d Cir. 1997) (concurring and dissenting), *cert. granted* 524 U.S. 915, *and rev'd* 526 U.S. 275 (1999)
Smith v. Horn, 120 F.3d 400, 419-26 (3d Cir. 1997) (dissenting), *cert. denied,* 522 U.S. 1109 (1998)
Benjamin v. EEOC, 124 F.3d 185 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 923 (1997)
Duarte v. United States, 124 F.3d 186 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 938 (1997)
Griffin v. Lehman, 124 F.3d 187 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 1003 (1997)
Tucker v. Bayside State Prison, 124 F.3d 189 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 1007 (1998)
United States v. Hawkins, 124 F.3d 189 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 1005 (1997)
Delor v. ATX Telecom Servs., 124 F.3d 186 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 1019 (1997)
United States v. Sanders, 124 F.3d 189 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 1006 (1997)

Clinton County Comm'rs v. EPA, 116 F.3d 1018 (3d Cir. 1997) (en banc), *cert. denied,* 522 U.S. 1045 (1998)
Alexander v. Whitman, 114 F.3d 1392, 1409 (3d Cir. 1997) (concurring), *cert. denied,* 522 U.S. 949 (1997)
United States v. Kaczmarski, 114 F.3d 1173 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 901 (1997)
United States v. Bell, 113 F.3d 1345 (3d Cir. 1997), *cert. denied,* 522 U.S. 984 (1997)
United States v. Lewis, 113 F.3d 487 (3d Cir. 1997), *cert. denied,* 523 U.S. 1108 (1998)
United States v. Powell, 113 F.3d 464 (3d Cir. 1997), *cert. denied,* 522 U.S. 987 (1997)
Konstantopoulos v. Westvaco Corp., 112 F.3d 710 (3d Cir. 1997), *cert. denied,* 522 U.S. 1128 (1998)
United States v. Thompson, 1997 U.S. App. LEXIS 33395 (3d Cir. 1997), *cert. denied,* 522 U.S. 1138 (1998)
United States v. Doe #1, 1997 U.S. App. LEXIS 33409 (3d Cir. 1997), *cert. denied,* 522 U.S. 1138 (1998)
United States v. Kelly, 116 F.3d 470 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 891 (1997)
United States v. Lisk, 114 F.3d 1173 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 885 (1997)
Chapman v. Kozakiewicz, 111 F.3d 125 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 986 (1997)
Williams v. Stone, 109 F.3d 890 (3d Cir. 1997), *cert. denied,* 522 U.S. 956 (1997)
Parker v. Wertenberger, 111 F.3d 127 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 849 (1997)
Ramos v. Nemetz, 111 F.3d 127 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 819 (1997)
Brown v. Am. Motorists Ins. Co., 111 F.3d 125 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 950 (1997)
Caterpillar, Inc. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 107 F.3d 1052, 1066-73 (3d Cir. 1997) (en banc) (dissenting), *cert. granted* 521 U.S. 1152, *and cert. dismissed* 523 U.S. 1015 (1998).
Phillips v. Borough of Keyport, 107 F.3d 164, 183-87 (3d Cir. 1997) (en banc) (dissenting), *cert. denied,* 522 U.S. 932 (1997)
In re Yuhas, 104 F.3d 612 (3d Cir. 1997), *cert. denied,* 521 U.S. 1105 (1997)
United States v. O'Neal, 107 F.3d 9 (3d Cir. 1997) (table), *cert. denied,* 520 U.S. 1236 (1997)
United States v. Mathis, 107 F.3d 9 (3d Cir. 1997) (table), *cert. denied,* 522 U.S. 825 (1997)
Klingensmith v. Roy, 107 F.3d 7 (3d Cir. 1997) (table), *cert. denied,* 520 U.S. 1278 (1997)
United States v. Goins, 107 F.3d 9 (3d Cir. 1997) (table), *cert. denied,* 520 U.S. 1235 (1997)
United States v. Rybar, 103 F.3d 273, 286-294 (3d Cir. 1996) (dissenting), *cert. denied,* 522 U.S. 807 (1997)
United States v. Kennedy, 106 F.3d 387 (3d Cir. 1996) (table), *cert. denied,* 520 U.S. 1212 (1997)
United States v. Thomas, 103 F.3d 115 (3d Cir. 1996) (table), *cert. denied,* 520 U.S. 1221 (1997)
Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061, 1078-89 (3d Cir. 1996) (en banc) (concurring and dissenting), *cert. denied,* 521 U.S. 1129 (1997)
United States v. Smith, 101 F.3d 693 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 1141 (1997)
United States v. Balboa, 101 F.3d 692 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 1141 (1997)
United States v. Lopez, 101 F.3d 693 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 1138 (1997)
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United States v. Ebo, 101 F.3d 692 (3d Cir. 1996) (table), *cert. denied,* 520 U.S. 1130 (1997)
United States v. Dowell, 101F.3d 692 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 1083 (1997)
Jae v. Kessler, 101 F.3d 690 (3d Cir. 1996) (table), *cert. denied,* 520 U.S. 1159 (1997)
United States v. Simpson, 101 F.3d 693 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 1019 (1996)
United States v. Zayid, 101 F.3d 694 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 1128 (1997)
Sadowski v. NCUA, 100 F.3d 948 (3d Cir. 1996) (table), *cert. denied,* 520 U.S. 1122 (1997)
United States v. Davidson, 96 F.3d 1435 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 1021 (1996)
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Windley v. Potts Welding & Boiler Repair Co., 96 F.3d 1437 (3d Cir. 1996) (table), *cert. denied,* 510 U.S. 1078 (1997)
United States v. Salome, 96 F.3d 1436 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 1066 (1997)
CNG Transmission Corp. v. Stitt, 96 F.3d 1432 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 1112 (1997)
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In re Cont'l Airlines, 91 F.3d 553, 567-73 (3d Cir. 1996) (en banc) (dissenting), *cert. denied,* 519 U.S. 1057 (1997)
United States v. Balter, 91 F.3d 427 (3d Cir. 1996), *cert. denied,* 519 U.S. 1011 (1996)
United States v. Garcia, 92 F.3d 1173 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 1011 (3d Cir. 1996)
United States v. Martinez, 92 F.3d 1173 (3d Cir. 1996), *cert. denied,* 522 U.S. 843 (1997)
United States v. Brady, 88 F.3d 225 (3d Cir. 1996), *cert. denied,* 519 U.S. 1094 (1997)
Durkin v. Major League Baseball, 85 F.3d 611 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 825 (1996)
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Dayhoff Inc. v. HJ Heinz Co., 86 F.3d 1287 (3d Cir. 1996), *cert. denied,* 519 U.S. 1028 (1996)
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Miller v. Delaware River Port Auth., 82 F.3d 405 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 1095 (1997)
Nestler v. Chatler, 82 F.3d 406 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 984 (1996)
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Kalwaytis v. Preferred Meal Sys., 78 F.3d 117 (3d Cir. 1996), *cert. denied,* 519 U.S. 819 (1996)
United States v. Nelson, 77 F.3d 465 (3d Cir. 1996) (table), *cert. denied,* 517 U.S. 1229 (1996)
United States v. Claypool, 77 F.3d 464 (3d Cir. 1996) (table), *cert. denied,* 517 U.S. 1149 (1996)
Thompson v. BIC Corp., 77 F.3d 464 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 813 (1996)
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United States v. Titus, 77 F.3d 465 (3d Cir. 1996) (table), *cert. denied,* 516 U.S. 1181 (1996)
Exxon Shipping Co. v. Exxon Seaman's Union, 73 F.3d 1287 (3d Cir. 1996), *cert. denied,* 517 U.S. 1251 (1996)
Barbee v. Pa. Dep't of Corr., 77 F.3d 461 (3d Cir. 1996) (table), *cert. denied,* 517 U.S. 1226 (1996)
Sutton v. Gibson, 77 F.3d 464 (3d Cir. 1996) (table), *cert. denied,* 517 U.S. 1191 (1996)
United States v. Jefferson, 77 F.3d 464 (3d Cir. 1996) (table), *cert. denied,* 519 U.S. 853 (1996)
In re Hinchliffe, 77 F.3d 462 (3d Cir. 1996) (table), *cert. denied,* 517 U.S. 1209 (1996)
United States v. $184,505.01 in United States Currency, 72 F.3d 1160 (3d Cir. 1995), *cert. denied,* 519 U.S. 807 (1996)
In re Penn Cent. Transp. Co., 71 F.3d 1113 (3d Cir. 1995), *cert. denied,* 517 U.S. 1221 (1996)
Di Lauro v. Ver Strate, 74 F.3d 1226 (3d Cir. 1995) (table), *cert. denied,* 519 U.S. 864 (1996)
United States v. Terry, 72 F.3d 125 (3d Cir. 1995) (table), *cert. denied,* 517 U.S. 1158 (1996)
United States v. Casas, 72 F.3d 124 (3d Cir. 1995) (table), *cert. denied,* 517 U.S. 1148 (1996)
Arce v. Good, 72 F.3d 122 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 1132 (1996)
Tamakloe v. United States, 72 F.3d 124 (3d Cir. 1995) (table), *cert. denied,* 517 U.S. 1127 (1996)
Akech v. United States, 72 F.3d 122 (3d Cir. 1995) (table), *cert. denied,* 517 U.S. 1125 (1996)
Whitehead v. Upland Mortgages Corp., 1995 U.S. App. LEXIS 35877 (3d Cir. 1995), *cert. denied,* 516 U.S. 1176 (1996)
Flatley v. Whitman, 1995 U.S. App. LEXIS 35887 (3d Cir. 1995), *cert. denied,* 518 U.S. 1019 (1996)
Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995), *cert. denied,* 516 U.S. 1173 (1996)
Flamer v. Delaware, 68 F.3d 736 (3d Cir. 1995) (en banc), *cert. denied,* 516 U.S. 1088 (1996)
United States v. Ruffin, 70 F.3d 1258 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 1136 (1996)
English v. Mentor Corp., 67 F.3d 477 (3d Cir. 1995), *vacated and remanded* 518 U.S. 1030 (vacating and remanding for further consideration in light of Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996))
United States v. Kinney, 68 F.3d 458 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 1098 (1996)
United States v. Edelson, 68 F.3d 457 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 1181 (1996)
Mates v. OSHA, 67 F.3d 291 (3d Cir. 1995) (table), *cert. denied,* 517 U.S. 1105 (1996)
United States v. Levy, 68 F.3d 458 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 1166 (1996)
United States v. Bayron, 67 F.3d 292 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 1131 (1996)
Am. Atlas Corp. v. Allegheny County Indus. Dev. Auth., 68 F.3d 456 (3d Cir. 1995), *cert. denied,* 516 U.S. 1116 (1996)

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Parry v. Rosemeyer, 64 F.3d 110 (3d Cir. 1995), *cert. denied,* 516 U.S. 1058 (1996)
United States v. McLeggan, 66 F.3d 313 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 1062 (1996)
United States v. Battiste, 66 F.3d 313 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 1032 (1995)
United States v. Rashid, 66 F.3d 314 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 1121 (1996)
Moore v. Vaughn, 66 F.3d 311 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 949 (1995)
United States v. McIntyre, 66 F.3d 313 (3d Cir. 1995) (table), *cert. denied,* 517 U.S. 1199 (1996)
United States v. Woods, 66 F.3d 314 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 1031 (1996)
United States v. Bernas, 66 F.3d 313 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 999 (1995)
United States v. Salemo, 61 F.3d 214, 222-24 (3d Cir. 1995) (concurring), *cert. denied,* 516 U.S. 1001 (1995)
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Homar v. Gilbert, 89 F.3d 1009, 1023-31 (3d Cir. 1995) (concurring and dissenting), *cert. granted* 519 U.S. 1052, *and rev'd* 520 U.S. 924 (1997)
Jamhoury v. Matheis, 65 F.3d 162 (3d Cir. 1995) (table), *motion denied* 516 U.S. 1109 (1996)
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Hinds v. United Parcel Serv., 61 F.3d 894 (3d Cir. 1995), *cert. denied,* 516 U.S. 1078 (1996)
Resolution Trust Corp. v. Cityfed Fin. Corp., 57 F.3d 1231 (3d Cir. 1995), *cert. granted* 517 U.S. 1133 (1996), *and vacated and remanded* 519 U.S. 213 (1997)
Rauser v. Beard, 61 F.3d 896 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 883 (1995)
Osborne v. Montgomery Eng'g Co., 60 F.3d 816 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 905 (1995)
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United States v. Gonzalez, 60 F.3d 818 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 902 (1995)
United States v. Salb, 60 F.3d 819 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 1118 (1996)
Van Belle v. Atl. Equip. Eng'rs, 60 F.3d 819 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 1079 (1996)
Baijnath v. Attorney Gen., 60 F.3d 813 (3d Cir. 1995) (table), *cert. denied,* 517 U.S. 1141 (1996)
United States v. Stewart, 54 F.3d 771 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 899 (1995)
DeMauro v. Coldwell Banker & Co., 54 F.3d 767 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 978 (1995)
In re GMC Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995), *cert. denied,* 516 U.S. 824 (1995)
Johnson v. Love, 54 F.3d 768 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 884 (1995)
Giles v. Vaughn, 52 F.3d 314 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 855 (1995)
Olszewski v. Am. Tel. & Tel. Co., 52 F.3d 316 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 906 (1995)
United States v. Skandier, 52 F.3d 319 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 854 (1995)
United States v. Johnson, 52 F.3d 318 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 857 (1995)
United States v. Murcer, 52 F.3d 318 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 899 (1995)

Tabas v. Tabas, 47 F.3d 1280, 1302 (3d Cir. 1995) (en banc) (concurring), *cert. denied,* 515 U.S. 1118 (1995)
United States v. Troublefield, 1995 U.S. App. LEXIS 5013 (3d Cir. 1995), *cert. denied,* 516 U.S. 900 (1995)
United States v. McCune, 47 F.3d 1162 (3d Cir. 1995) (table), *cert. denied,* 514 U.S. 1135 (1995)
Fisher Bros. Sales, Inc. v. United States, 46 F.3d 279 (3d Cir. 1995) (en banc), *cert. denied,* 516 U.S. 806 (1995)
United States v. Devon, 47 F.3d 1162 (3d Cir. 1995) (table), *cert. denied,* 514 U.S. 1135 (1995)
United States v. Thompson, 47 F.3d 1162 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 877 (1995)
United States v. Zehrbach, 47 F.3d 1252 (3d Cir. 1995) (en banc), *cert. denied,* 514 U.S. 1067 (1995)
United States v. Educ. Dev. Network Corp., 47 F.3d 1162 (3d Cir. 1995) (table), *cert. denied,* 516 U.S. 818 (1995)
United States v. Jacobs, 44 F.3d 1219 (3d Cir. 1995), *cert. denied,* 514 U.S. 1101 (3d Cir. 1995)
United States v. Renfroe, 46 F.3d 1120 (3d Cir. 1994) (table), *cert. denied,* 515 U.S. 1166 (1995)
Bivolcic v. United States, 46 F.3d 1115 (3d Cir. 1994) (table), *cert. denied,* 514 U.S. 1075 (1995)
United States v. Courtney, 46 F.3d 1119 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1174 (1995)
United States v. Washington, 46 F.3d 1120 (3d Cir. 1994) (table), *cert. denied,* 514 U.S. 1057 (1995)
Moretti v. Dinice, 46 F.3d 1117 (3d Cir. 1994) (table), *cert. denied,* 515 U.S. 1143 (1994)
United States v. Isenburg, 43 F.3d 1463 (3d Cir. 1994) (table), *cert. denied,* 514 U.S. 1044 (1995)
Adams v. Melnick/Nickel, 43 F.3d 1460 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1177 (1995)
Moretti v. New Jersey, 43 F.3d 1462 (3d Cir. 1994) (table), *cert. denied,* 514 U.S. 1066 (1995)
United States v. Jackson, 43 F.3d 1463 (3d Cir. 1994) (table), *cert. denied,* 514 U.S. 1031 (1995)
United States v. Lombardo, 43 F.3d 1463 (3d Cir. 1994) (table), *cert. denied,* 514 U.S. 1029 (1995)
United States v. Brennan, 43 F.3d 1463 (3d Cir. 1994) (table), *cert. denied,* 514 U.S. 1029 (1995)
United States v. Michaels, 43 F.3d 1463 (3d Cir. 1994) (table), *cert. denied,* 514 U.S. 1029 (1995)
Basheer v. Stepanik, 43 F.3d 1460 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1170 (1995)
W. Virginia State Dep't of Tax & Rev. v. IRS, 37 F.3d 982 (3d Cir. 1994), *cert. denied,* 514 U.S. 1082 (2005)
United States v. Tabas, 39 F.3d 1173 (3d Cir. 1994) (table), *cert. denied,* 516 U.S. 973 (1995)
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United States v. Seligsohn, 39 F.3d 1173 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1170 (1995)

United States v. Seligsohn, 39 F.3d 1172 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1119 (1995)
United States v. Beil, 39 F.3d 1171 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1132 (1995)
United States v. Lowery, 39 F.3d 1172 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1196 (1995)
Wakefield v. Egles, 39 F.3d 1173 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1087 (1995)
Webber v. County of Franklin, 37 F.3d 1491 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 950 (1994)
St. Francis Med. Ctr. v. Shalala, 32 F.3d 805 (3d Cir. 1994), *cert. denied,* 514 U.S. 1016 (1995)
United States v. Burke, 31 F.3d 1174 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1110 (1995)
George v. Bethlehem Steel Corp., 31 F.3d 1171 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1043 (1994)
United States v. Rosebar, 31 F.3d 1175 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1006 (1994)
Robinson v. Aronio, 27 F.3d 877 (3d Cir. 1994), *vacated and remanded* 513 U.S. 1186 (1995) (vacating and remanding for further consideration in light of O'Neal v. McAninch, 513 U.S. 432 (1995))
United States v. McDade, 28 F.3d 283 (3d Cir. 1994), *cert. denied,* 514 U.S. 1003 (1995)
United States v. Ramsey, 30 F.3d 1489 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1026 (1994)
Twiggs v. Vaughn, 27 F.3d 559 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 937 (1994)
United States v. Copple, 24 F.3d 535 (3d Cir. 1994), *cert. denied,* 513 U.S. 989 (1994)
United States v. Lynch, 27 F.3d 559 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 838 (1994)
Se. Pa. Transp. Auth. v. Pa. Pub. Util. Comm'n, 27 F.3d 558 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 928 (1994)
Virgin Islands v. Greer, 27 F.3d 556 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1065 (1994)
Virgin Islands v. Duberry, 27 F.3d 556 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 953 (1994)
Virgin Islands v. Gonzalez, 27 F.3d 556 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1065 (1994)
Kennedy v. Zimmerman, 26 F.3d 122 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 897 (1994)
United States v. Chapple, 22 F.3d 304 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 861 (1994)
Johnson v. Rosenmeyer, 22 F.3d 301 (3d Cir. 1994), *cert. denied,* 513 U.S. 977 (1994)
Auriti v. Segal, 1994 U.S. App. LEXIS 9816 (3d Cir. 1994), *cert. denied,* 513 U.S. 825 (1994)
Nyenekor v. Boston, 22 F.3d 303 (3d Cir. 1994) (table), *cert. denied,* 514 U.S. 1038 (1994)
Pemberthy v. Beyer, 19 F.3d 857 (3d Cir. 1994), *cert. denied,* 513 U.S. 969 (1994)
Matthews v. Pineo, 19 F.3d 121 (3d Cir. 1994), *cert. denied,* 513 U.S. 820 (1994)
United States v. Baines, 22 F.3d 303 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 852 (1994)
United States v. Schindler, 22 F.3d 304 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 852 (1994)
United States v. Garrison, 22 F.3d 304 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 851 (1994)
United States v. Hayes, 22 F.3d 304 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 877 (1994)
Dooley v. Morgan, 1994 U.S. App. LEXIS 9831 (3d Cir. 1994), *cert. denied,* 513 U.S. 846 (1994)
United States v. Carper, 22 F.3d 303 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 1084 (1995)
United States v. Backstrom, 19 F.3d 644 (3d Cir. 1994) (table), *cert. denied,* 512 U.S. 1225 (1994)
Rodenbaugh v. Singer, 17 F.3d 1431 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 858 (1994)

Macario v. Pratt & Whitney Can., 17 F.3d 1430 (3d Cir. 1994), *cert. denied,* 513 U.S. 915 (1994)
United States v. Carroll, 17 F.3d 1431 (3d Cir. 1994) (table), *cert. denied,* 513 U.S. 829 (1994)
United States v. Snitkin, 17 F.3d 1432 (3d Cir. 1994) (table), *cert. denied,* 511 U.S. 1097 (1994)
In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig., 15 F.3d 1230, 1244-49 (3d Cir. 1994) (dissenting), *cert. denied,* 53 U.S. 915 (1994)
United States v. Correll, 16 F.3d 405 (3d Cir. 1993) (table), *cert. denied,* 511 U.S. 1011 (1994)
Brooks v. McCausland, 14 F.3d 46 (3d Cir. 1993) (table), *cert. denied,* 512 U.S. 1240 (1994)
United States v. Stiver, 9 F.3d 298 (3d Cir. 1993), *cert. denied,* 510 U.S. 1136 (1994)
Rodenbaugh v. Gerson, 14 F.3d 49 (3d Cir. 1993) (table), *cert. denied,* 512 U.S. 1210 (1994)
Kodak v. Comm'r, 14 F.3d 47 (3d Cir. 1993) (table), *cert. denied,* 512 U.S. 1238 (1994)
Purificato v. Comm'r, 9 F.3d 290 (3d Cir. 1993), *cert. denied,* 511 U.S. 1018 (1994)
United States v. Fisher, 10 F.3d 115 (3d Cir. 1993), *cert. denied,* 512 U.S. 1238 (1994)
United States v. DeRewal, 10 F.3d 100 (3d Cir. 1993), *cert. denied,* 511 U.S. 1033 (1994)
Cain v. Darby Borough, 7 F.3d 377, 383-84 (3d Cir. 1993) (en banc) (joining the partial dissent of Greenberg, J.), *cert. denied,* 510 U.S. 1195 (1994)
In re Donald J. Trump Casino Sec. Litig., 7 F.3d 357 (3d Cir. 1993), *cert. denied,* 510 U.S. 1178 (1994)
Shoop v. Dauphin County, 9 F.3d 1541 (3d Cir. 1993) (table), *cert. denied,* 511 U.S. 1088 (1994)
United States v. Cianca, 9 F.3d 1541 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 1002 (1993)
United States v. Chew, 9 F.3d 1541 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 1169 (1994)
United States v. Bowers, 9 F.3d 1541 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 1133 (1994)
United States v. Fields, 8 F.3d 813 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 1079 (1994)
United States v. Perales, 8 F.3d 814 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 1128 (1994)
United States v. Avila, 8 F.3d 813 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 1100 (1994)
Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1149-51 (3d Cir. 1993) (concurring), *cert. denied,* 511 U.S. 1031 (1994)
Cardwell v. United States, 6 F.3d 778 (3d Cir. 1993) (table), *cert. denied,* 511 U.S. 1051 (1994)
United States v. Arnold, 6 F.3d 780 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 1062 (1994)
Dunn v. HOVIC, 1 F.3d 1371, 1391-94 (3d Cir. 1993) (en banc), *cert. denied,* 510 U.S. 1031 (1993)
United States v. Frost, 999 F.2d 737 (3d Cir. 1993), *cert. denied,* 510 U.S. 1001 (1993)
Ticor Title Ins. Co. v. FTC, 998 F.2d 1129, 1141-43 (3d Cir. 1993) (dissenting), *cert. denied,* 510 U.S. 1190 (1993)
United States v. Yeager, 5 F.3d 1492 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 956 (1993)
United States v. Hernandez, 5 F.3d 1491 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 1136 (1994)
McManus v. Hous. Auth., 5 F.3d 1489 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 1119 (1994)
Goldberg v. Cleveland Clinic, 5 F.3d 1489 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 998 (1993)
Collier v. Marshall, Dennehey, Warner, Coleman & Goggin, 998 F.2d 1002 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 977 (1993)
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Byrd v. Cubbage, 998 F.2d 1002 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 982 (1993)
United States v. Gonzalez, 998 F.2d 1005 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 936 (1993)
United States v. Bohn, 998 F.2d 1005 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 956 (1993)
United States v. Torres, 995 F.2d 220 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 925 (1993)
Smith v. Lower Merion Twp., 995 F.2d 219 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 947 (1993)
United States v. 3201 Caughey Rd., 995 F.2d 219 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 950 (1993)
Bronson v. Zimmerman, 995 F.2d 216 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 970 (1993)
Fisher v. Rutgers State Univ., 510 U.S. 1042 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 1042 (1994)
Specter v. Garrett, 995 F.2d 404, 411-14 (3d Cir. 1993) (dissenting), *cert. granted* 510 U.S. 930, *and rev'd* 511 U.S. 462 (1994)
Kim v. Sec'y of Labor, 995 F.2d 217 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 1053 (1994)
Akins v. Cotton, 995 F.2d 215 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 981 (1993)
Murray v. Vaughn, 1993 U.S. App. LEXIS 14343 (3d Cir. 1993), *cert. denied,* 510 U.S. 893 (1993)
Richardson v. United States Dep't of Health & Human Servs., 993 F.2d 878 (3d Cir. 1993) (table), *cert. denied,* 511 U.S. 1033 (1994)
Clowes v. Allegheny Valley Hosp., 991 F.2d 1159 (3d Cir. 1993), *cert. denied,* 510 U.S. 964 (1993)
Thomas Jefferson Univ. v. Shalala, 993 F.2d 879 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 1039 (1994)
United States v. Arnold, 993 F.2d 879 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 979 (1993)
Resolution Trust Corp. v. Beck, 993 F.2d 878 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 865 (1993)
United States v. Boozer, 993 F.2d 879 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 884 (1993)
United States v. Heflin, 993 F.2d 879 (3d Cir. 1993) (table), *cert. denied,* 509 U.S. 911 (1993)
Williams v. Lehigh Valley Carpenters Union, 993 F.2d 880 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 873 (1993)
United States v. Vereb, 993 F.2d 880 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 870 (1993)
Hunt v. Beyer, 993 F.2d 877 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 979 (1993)
Plymouth Healthcare Sys. Inc. v. Keystone Health Plan E., Inc., 993 F.2d 878 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 863 (1993)
United States v. Lincoln, 1993 U.S. App. LEXIS 11863 (3d Cir. 1993), *cert. denied,* 510 U.S. 863 (1993)
United States v. Diamond, 993 F.2d 879 (3d Cir. 1993) (table), *cert. denied,* 509 U.S. 932 (1993)
Legacy, Ltd. v. Channel Home Ctrs., 989 F.2d 682 (3d Cir. 1993), *cert. denied,* 510 U.S. 865 (1993)
Dailey v. Nat'l Hockey League, 987 F.2d 172, 179-80 (3d Cir. 1993) (dissenting), *cert. denied,* 510 U.S. 816 (1993)
Coca-Cola Bottling Co. v. Coca-Cola Co., 988 F.2d 414 (3d Cir. 1993), *cert. denied,* 510 U.S. 908 (1993)
United States v. Chapple, 985 F.2d 729 (3d Cir. 1993), *cert. denied,* 508 U.S. 980 (1993)

Sullivan v. Love, 989 F.2d 489 (3d Cir. 1993), *cert. denied,* 510 U.S. 832 (1993)
Johnson v. United States, 989 F.2d 489 (3d Cir. 1993) (table), *cert. denied,* 508 U.S. 980 (1993)
United States v. Tantalo, 986 F.2d 1410 (3d Cir. 1993), *cert. denied,* 509 U.S. 908 (1993)
Aliota v. Graham, 984 F.2d 1350 (3d Cir. 1993), *cert. denied,* 510 U.S. 817 (1993)
Browne v. Maze, 986 F.2d 1408 (3d Cir. 1993) (table), *cert. denied,* 510 U.S. 840 (1993)
Ramseur v. Beyer, 983 F.2d 1215, 1239-46 (3d Cir. 1993) (en banc) (concurring and joining the concurrence of Greenberg, J.), *cert. denied,* 508 U.S. 947 (1993)
United States v. Dixon, 982 F.2d 116 (3d Cir. 1992), *cert. denied,* 508 U.S. 921 (1993)
United States v. Beveridge, 983 F.2d 1052 (3d Cir. 1992) (table), *cert. denied,* 508 U.S. 975 (1993)
Pub. Interest Research Group, Inc. v. Magnesium Elektron, Inc., 983 F.2d 1052 (3d Cir. 1992) (table), *cert. denied,* 508 U.S. 946 (1993)
Hickey v. Ballingall, 981 F.2d 1247 (3d Cir. 1992) (table), *cert. denied,* 508 U.S. 981 (1993)
United States v. Frazier, 981 F.2d 92 (3d Cir. 1992) (table), *cert. denied,* 507 U.S. 1010 (1993)
Rodolico v. Rauch, 981 F.2d 1248 (3d Cir. 1992) (table), *cert. denied,* 507 U.S. 1021 (1993)
Gackenbach v. Uniroyal, Inc., 980 F.2d 723 (3d Cir. 1992) (table), *cert. denied,* 507 U.S. 1019 (1993)
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Guy v. Westmoreland County Sheriff's Dep't, 977 F.2d 568 (3d Cir. 1992) (table), *cert. denied,* 507 U.S. 926 (1993)
Kurz v. Mairone, 977 F.2d 568 (3d Cir. 1992) (table), *cert. denied,* 508 U.S. 912 (1993)
ALM Corp. v. EPA, 974 F.2d 380 (3d Cir. 1992), *cert. denied,* 507 U.S. 972 (1993)
Terry v. Petsock, 974 F.2d 372 (3d Cir. 1992), *cert. denied,* 507 U.S. 940 (1993)
Sabb v. United States, 975 F.2d 1551 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 990 (1992)
United States v. Stepoli, 975 F.2d 1552 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 1068 (1993)
Chauffeurs, Teamsters & Helpers Local 776 v. NLRB, 973 F.2d 230 (3d Cir. 1992), *cert. denied,* 507 U.S. 959 (1993)
In re Extradition of Duncan, 975 F.2d 1549 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 1066 (1993)
United States v. MacFarlane, 975 F.2d 1552 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 1062 (1993)
D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992) (en banc), *cert. denied,* 506 U.S. 1079 (1993)
United States v. Wallace, 975 F.2d 1552 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 1027 (1992)
United States v. Polan, 970 F.2d 1280 (3d Cir. 1992), *cert. denied,* 507 U.S. 953 (1993)
Williams v. United States, 972 F.2d 1335 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 894 (1992)
Nicholson v. Hawk, 972 F.2d 1332 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 1037 (1992)
Barber v. Horsey, 972 F.2d 1330 (3d Cir. 1992) (table), *cert. denied,* 507 U.S. 916 (1993)
Elkin v. Fauver, 969 F.2d 48 (3d Cir. 1992), *cert. denied,* 506 U.S. 977 (1992)
United States v. Gray, 972 F.2d 1333 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 1057 (1993)
United States v. Jones, 972 F.2d 1333 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 964 (1992)

1975 Salaried Ret. Plan for Eligible Employees of Crucible, Inc. v. Nobers, 968 F.2d 401 (3d Cir. 1992), *cert. denied,* 506 U.S. 1086 (1993)
Geschwendt v. Ryan, 967 F.2d 877 (3d Cir. 1992) (en banc), *cert. denied,* 506 U.S. 977 (1992)
Blair v. United States, 970 F.2d 900 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 1007 (1992)
United States v. Salandra, 968 F.2d 15 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 902 (1992)
Mazur v. Merck & Co., 964 F.2d 1348 (3d Cir. 1992), *cert. denied,* 506 U.S. 974 (1992)
United States v. Palmer, 968 F.2d 15 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 875 (1992)
United States v. Maker, 968 F.2d 15 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 900 (1992)
United States v. Morris, 968 F.2d 15 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 895 (1992)
United States v. Wilson, 968 F.2d 15 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 1006 (1992)
Tigg Corp. v. Dow Corning Corp., 962 F.2d 1119 (3d Cir. 1992), *petition for cert. dismissed* 506 U.S. 1042 (1993)
Mierzejewski v. Fauver, 961 F.2d 1568 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 889 (1992)
Festa v. New Jersey Bd. of Pub. Utils., 961 F.2d 1566 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 916 (1992)
Blake v. Kaplan, 961 F.2d 1566 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 869 (1992)
Niyogi v. Equibank, 961 F.2d 1568 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 1034 (1992)
Specter v. Garrett, 971 F.2d 936, 956-61 (3d Cir. 1992) (concurring and dissenting), *vacated and remanded* 506 U.S. 969 (1992) (vacating and remanding for further consideration in light of Frankin v. Massachusetts, 505 U.S. 788 (1992))
Town Sound & Custom Tops, Inc. v. Chrysler Motor Corp., 959 F.2d 468 (3d Cir. 1992) (en banc), *cert. denied,* 506 U.S. 868 (1992)
Rock v. Zimmerman, 959 F.2d 1237 (3d Cir. 1992) (en banc) (joining except as to Part III), *cert. denied,* 505 U.S. 1222 (1992)
Caldwell v. Tom Mistick & Sons, 961 F.2d 207 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 849 (1992)
Clarke v. DRX, Inc., 961 F.2d 207 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 872 (1992)
Impounded, 961 F.2d 209 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 998 (1992)
Reese v. Love, 958 F.2d 364 (3d Cir. 1992) (table), *cert. denied,* 505 U.S. 1224 (1992)
Prostko v. Rand, 958 F.2d 364 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 865 (1992)
Dunn v. Marco, 953 F.2d 1379 (3d Cir. 1992) (table), *cert. denied,* 506 U.S. 832 (1992)
Huffsmith v. Wyoming County Prison Bd. 953 F.2d 1380 (3d Cir. 1992) (table), *motion denied* 504 U.S. 907 (1992)
Bolden v. Se. Pa.. Transp. Auth., 953 F.2d 807 (3d Cir. 1991) (en banc), *cert. denied,* 504 U.S. 943 (1992)
United States v. Bendetto, 952 F.2d 1394 (3d Cir. 1991) (table), *cert. denied,* 504 U.S. 929 (1992)
Gaydos v. Gaydos, 952 F.3d 1392 (3d Cir. 1991) (table), *cert. denied,* 505 U.S. 1225 (1992)
Williams v. Fauver, 952 F.2d 1395 (3d Cir. 1991) (table), *cert. denied,* 505 U.S. 1208 (1992)
Burkett v. Fulcomer, 951 F.2d 1431, 1449 (3d Cir. 1991) (dissenting), *cert. denied,* 505 U.S. 1229 (1992)
Urdenis v. Thermal Indus., Inc., 952 F.2d 1394 (3d Cir. 1991) (table), *cert. denied,* 504 U.S. 987 (1992)
United States v. Audinot, 952 F.2d 1394 (3d Cir. 1991) (table), *cert. denied,* 503 U.S. 995 (1992)

Balsamo v. Mazurkiewicz, 952 F.2d 1391 (3d Cir. 1992) (table), *cert. denied,* 503 U.S. 993 (1992)
Shriver v. GAF Corp., 950 F.2d 723 (3d Cir. 1991) (table), *cert. denied,* 503 U.S. 987 (1992)
United States v. Anderson, 947 F.2d 937 (3d Cir. 1991) (table), *cert. denied,* 503 U.S. 923 (1992)
United States v. McGeary, 947 F.2d 938 (3d Cir. 1991) (table), *cert. denied,* 504 U.S. 958 (1992)
Planned Parenthood v. Casey, 947 F.2d 682, 719-27 (3d Cir. 1991) (concurring and dissenting), *cert. granted* 502 U.S. 1056, *and rev'd in part* 505 U.S. 833 (1992)
Goos v. Comm'r, 947 F.2d 935 (3d Cir. 1991) (table), *cert. denied,* 503 U.S. 940 (1992)
United States v. Netelkos, 947 F.2d 938 (3d Cir. 1991) (table), *cert. denied,* 503 U.S. 908 (1992)
Kramer v. Thompson, 947 F.2d 666 (3d Cir. 1992) (table), *cert. denied,* 504 U.S. 940 (1992)
United States v. Ferguson, 945 F.2d 396 (3d Cir. 1992) (table), *cert. denied,* 503 U.S. 946 (1992)
Saleem v. 3-M Co., 1991 U.S. App. LEXIS 24536 (3d Cir. 1991), *cert. denied,* 502 U.S. 1124 (1992)
Zilich v. Nichols, 945 F.2d 397 (3d Cir. 1991) (table), *cert. denied,* 502 U.S. 1063 (1992)
United States v. Vereb, 944 F.2d 899 (3d Cir. 1992) (table), *cert. denied,* 502 U.S. 990 *and* 502 U.S. 992 (1991)
Prinski v. Termar Nav. Co., 944 F.2d 898 (3d Cir. 1991) (table), *cert. denied,* 502 U.S. 1120 (1992)
Eidukonis v. Se. Pa. Transp. Auth., 944 F.2d 896 (3d Cir. 1991) (table), *cert. denied,* 502 U.S. 1034 (1992)
Temple Univ. v. White, 941 F.2d 201 (3d Cir. 1991), *cert. denied,* 502 U.S. 1032 (1992)
United States v. Werme, 939 F.2d 108 (3d Cir. 1991), *cert. denied,* 502 U.S. 1092 (1992)
Coombs v. Baldwin, 941 F.2d 1200 (3d Cir. 1991) (table), *cert. denied,* 502 U.S. 1077 (1992)
United States v. DiLoreto, 941 F.2d 1203 (3d Cir. 1991) (table), *cert. denied,* 502 U.S. 973 (1991)
Taylor v. Freeland & Kronz, 938 F.2d 420 (3d Cir. 1991), *cert. granted* 502 U.S. 976, *and aff'd* 503 U.S. 638 (1992)
Osei-Afriyie v. Med. Coll., 937 F.2d 876 (3d Cir. 1991), *motion denied* 502 U.S. 979 (1991)
United States v. Van Tassel, 937 F.2d 600 (3d Cir. 1991), *cert. denied,* 502 U.S. 1015 (1991)
Colgan v. Fisher Scientific Co., 935 F.2d 1407 (3d Cir. 1991), *cert. denied,* 502 U.S. 941 (1991)
United States v. Plair, 937 F.2d 600 (3d Cir. 1991) (table), *cert. denied,* 502 U.S. 949 (1991)
Hodges v. Rafferty, 937 F.2d 597 (3d Cir. 1991), *cert. denied,* 502 U.S. 990 (1991)
Purvin v. Bergens, 935 F.2d 1282 (3d Cir. 1991) (table), *cert. denied,* 502 U.S. 890 (3d Cir. 1991)
United States v. Recalde, 935 F.2d 1283 (3d Cir. 1991) (table), *cert. denied,* 502 U.S. 893 (1991)
United States v. Montilla-Davilla, 935 F.2d 1283 (3d Cir. 1991) (table), *cert. denied,* 502 U.S. 958 (1991)
Inst. for Scientific Info., Inc. v. Gordon & Breach, Sci. Pub., Inc., 931 F.2d 1002 (3d Cir. 1991), *cert. denied,* 502 U.S. 909 (1991)
United States v. Berkery, 932 F.2d 961 (3d Cir. 1991) (table), *cert. denied,* 502 U.S. 894 (1991)
Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277 (3d Cir. 1991), *cert. denied,* 502 U.S. 939 (1991)

United States v. Soberon, 929 F.2d 935 (3d Cir. 1991) *cert. denied,* 502 U.S. 818 (1991)
United States v. Shoupe, 929 F.2d 116 (3d Cir. 1991), *cert. denied,* 502 U.S. 943 (1991)
Matute v. Procoast Navigation, Ltd., 928 F.2d 627 (3d Cir. 1991), *cert. denied,* 502 U.S. 919 (1991)
Harner v. Moore, 931 F.2d 50 (3d Cir. 1991) (table), *cert. denied,* 502 U.S. 819 (1991)
United States v. Lytle, 931 F.2d 52 (3d Cir. 1991) (table), *cert. denied,* 501 U.S. 1211 (1991)
Kehr Packages v. Fidelcor, Inc., 926 F.2d 1406, 1419-23 (3d Cir. 1991) (concurring and dissenting), *cert. denied,* 501 U.S. 1222 (1991)
United States v. Thomas, 931 F.2d 52 (3d Cir. 1991) (table), *cert. denied,* 502 U.S. 840 (1991)
Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310 (3d Cir. 1991), *cert. denied,* 501 U.S. 1232 (1991)
United States v. Barnes, 925 F.2d 420 (3d Cir. 1991) (table), *cert. denied,* 501 U.S. 1208 (1991)
King v. Zimmerman, 925 F.2d 417 (3d Cir. 1991) (table), *cert. denied,* 502 U.S. 828 (1991)
Bhaya v. Westinghouse Elec. Corp., 922 F.2d 184 (3d Cir. 1990), *cert. denied,* 501 U.S. 1217 (1991)
Coleman v. Dunbarton Oaks Apts., 922 F.2d 830 (3d Cir. 1990) (table), *cert. denied,* 500 U.S. 923 (1991)
United States v. Wright, 921 F.2d 42 (3d Cir. 1990), *cert. denied,* 501 U.S. 1207 (1991)
Davis v. Beard, 922 F.2d 830 (3d Cir. 1990) (table), *cert. denied,* 500 U.S. 907 (1991)
Auger v. Teneyck, 919 F.2d 730 (3d Cir. 1990) (table), *cert. denied,* 502 U.S. 809 (1991)
Muhammad v. Newark Bd. of Educ., 919 F.2d 731 (3d Cir. 1990) (table), *cert. denied,* 499 U.S. 928 (1991)
United States v. Snead, 919 F.2d 732 (3d Cir. 1990) (table), *cert. denied,* 499 U.S. 982 (1991)
Morris v. Puleo, 919 F.2d 731 (3d Cir. 1990) (table), *cert. denied,* 499 U.S. 928 (1991)
Estate of Ramos v. York, 919 F.2d 730 (3d Cir. 1990) (table), *cert. denied,* 501 U.S. 1235 (1991)
United States v. Jacobs, 919 F.2d 10 (3d Cir. 1990), *cert. denied,* 499 U.S. 930 (1991)
United States v. Azar, 919 F.2d 732 (3d Cir. 1990) (table), *cert. denied,* 499 U.S. 981 (1991)
Thomas v. New Jersey, 919 F.2d 137 (3d Cir. 1990) (table), *cert. denied,* 499 U.S. 964 (1991)
Harrison v. Beyer, 919 F.2d 135 (3d Cir. 1990) (table), *cert. denied,* 499 U.S. 980 (1991)
United States v. Pierce, 919 F.2d 138 (3d Cir. 1990) (table), *cert. denied,* 498 U.S. 1108 (1991)
Powell v. Owens, 919 F.2d 136 (3d Cir. 1990) (table), *cert. denied,* 498 U.S. 1096 (1991)
Posey v. United States Army, 915 F.2d 1561 (3d Cir. 1990) (table), *cert. denied,* 498 U.S. 1122 (1991)
Boyer v. Snap-On Tools, Corp., 913 F.2d 108 (3d Cir. 1990), *cert. denied,* 498 U.S. 1085 (1991)
James v. Dropsie Coll., 914 F.2d 243 (3d Cir. 1990) (table), *cert. denied,* 499 U.S. 938 (1991)
Dodson v. Pennsylvania, 914 F.2d 242 (3d Cir. 1990) (table), *cert. denied,* 498 U.S. 1071 (1991)
United States v. Ramos, 914 F.2d 245 (3d Cir. 1990) (table), *cert. denied,* 498 U.S. 1035 (1991)
Marshall v. Fulcomer, 914 F.2d 243 (3d Cir. 1990) (table), *cert. denied,* 498 U.S. 1035 (1991)
United States v. Williard, 914 F.2d 245 (3d Cir. 1990) (table), *cert. denied,* 498 U.S. 989 (1990)
Gauracino v. Sullivan, 908 F.2d 962 (3d Cir. 1990) (table), *cert. denied,* 498 U.S. 875 (1990)
United States v. King, 908 F.2d 965 (3d Cir. 1990) (table), *cert. denied,* 498 U.S. 991 (1990)

d. a list of appellate opinions where your decision was reversed or where your judgment was affirmed"

United States v. Rennert, 374 F.3d 206 (3d Cir. 2004), *vacated and remanded* 125 S.Ct. 1744 (2005) (vacating and remanding for further consideration in light of United States v. Booker, 125 S.Ct. 738 (2005))

United States v. Jacobs, 96 Fed. Appx. 812 (3d Cir. 2004), *vacated and remanded* 125 S.Ct. 1009 (2005) (vacating and remanding for further consideration in light of United States v. Booker, 125 S.Ct. 738 (2005))

United States v. Phyllian, 95 Fed. Appx. 430 (3d Cir. 2004), *vacated and remanded* 125 S.Ct. 1025 (2005) (vacating and remanding for further consideration in light of United States v. Booker, 125 S.Ct. 738 (2005))

United States v. Wiggins, 94 Fed. Appx. 959 (3d Cir. 2004), *vacated and remanded* 125 S.Ct. 985 (2005) (vacating and remanding for further consideration in light of United States v. Booker, 125 S.Ct. 738 (2005))

United States v. Morris, No. 04-3050 (Nov. 16, 2004) (unreported order), *vacated and remanded* 125 S.Ct. 1959 (2005) (vacating and remanding for further consideration in light of United States v. Booker, 125 S.Ct. 738 (2005)), *and dismissed on remand* 143 Fed. Appx. 505 (2005)

United States v. Pagley, 94 Fed. Appx. 104 (3d Cir. 2004), *vacated and remanded* 125 S.Ct. 1030 (2005) (vacating and remanding for further consideration in light of United States v. Booker, 125 S.Ct. 738 (2005))

United States v. Jacobs, 94 Fed. Appx. 893 (3d Cir. 2004), *vacated and remanded*125 S.Ct. 1021 (2005) (vacating and remanding for further consideration in light of United States v. Booker, 125 S.Ct. 738 (2005))

United States v. Jacobs, 93 Fed. Appx. 488 (3d Cir. 2004), *vacated and remanded* 125 S.Ct. 1007 (2005) (vacating and remanding for further consideration in light of United States v. Booker, 125 S.Ct. 738 (2005))

United States v. Watson, 93 Fed. Appx. 481 (3d Cir. 2004), *vacated and remanded* 125 S.Ct. 1001 (2005) (vacating and remanding for further consideration in light of United States v. Booker, 125 S.Ct. 738 (2005))

Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004), *cert. granted,* 542 U.S. 966, *and rev'd* 125 S.Ct. 2456 (2005)

United States v. Phillips, 349 F.3d 138 (3d Cir. 2003), *vacated and remanded* 125 S.Ct. 992 (2005) (vacating and remanding for further consideration in light of United States v. Booker, 125 S.Ct. 738 (2005))

Thomas v. Comm'r of Soc. Sec., 294 F.3d 568 (3d Cir. 2002), *cert. granted,* 537 U.S. 1187, *and rev'd* 540 U.S. 20 (2003)

Aloe v. Energy Corp. v. Apfel, 225 F.3d 648 (3d Cir. 2000) (table), *vacated and remanded* 534 U.S. 1159 (2002) (vacating and remanding for further consideration in light of Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002))

Coss v. Lackawanna County D.A., 204 F.3d 453 (3d Cir. 2000) (en banc), *cert. granted,* 531 U.S. 923 (2000), *and rev'd* 532 U.S. 394 (2001)

Raquel v. Educ. Mgmt. Corp., 196 F.3d 171, 182-86 (3d Cir. 1999) (dissenting), *vacated and remanded* 531 U.S. 952 (2000)

Fiore v. White, 149 F.3d 221 (3d Cir. 1998), *cert. granted,* 526 U.S. 1038, *question certified* 528 U.S. 23 (1999), *certified question answered* 562 Pa. 634 (2000), *and rev'd* 531 U.S. 225 (2001)

United States v. Palma-Ruedas, 121 F.3d 841, 859-865 (3d Cir. 1997) (concurring and dissenting), *cert. granted,* 524 U.S. 915, *and rev'd* 526 U.S. 275 (1999)
English v. Mentor Corp., 67 F.3d 477 (3d Cir. 1995), *vacated and remanded* 518 U.S. 1030 (vacating and remanding for further consideration in light of Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996))
Homar v. Gilbert, 89 F.3d 1009, 1023-31 (3d Cir. 1995) (concurring and dissenting), *cert. granted,* 519 U.S. 1052, *and rev'd* 520 U.S. 924 (1997)
Resolution Trust Corp. v. Cityfed Fin. Corp., 57 F.3d 1231 (3d Cir. 1995), *cert. granted,* 517 U.S. 1133 (1996), *and vacated and remanded* 519 U.S. 213 (1997)
Robinson v. Aronio, 27 F.3d 877 (3d Cir. 1994), *vacated and remanded* 513 U.S. 1186 (1995) (vacating and remanding for further consideration in light of O'Neal v. McAninch, 513 U.S. 432 (1995))
Specter v. Garrett, 995 F.2d 404, 411-14 (3d Cir. 1993) (dissenting), *cert. granted,* 510 U.S. 930, *and rev'd* 511 U.S. 462 (1994)
Specter v. Garrett, 971 F.2d 936, 956-61 (3d Cir. 1992) (concurring and dissenting), *vacated and remanded* 506 U.S. 969 (1992) (vacating and remanding for further consideration in light of Frankin v. Massachusetts, 505 U.S. 788 (1992))
Planned Parenthood v. Casey, 947 F.2d 682, 719-27 (3d Cir. 1991) (concurring and dissenting), *cert. granted,* 502 U.S. 1056, *and rev'd in part* 505 U.S. 833 (1992)
Taylor v. Freeland & Kronz, 938 F.2d 420 (3d Cir. 1991), *cert. granted,* 502 U.S. 976, *and aff'd* 503 U.S. 638 (1992)

e. a list of and copies of all your unpublished opinions.

The clerk of the Third Circuit has provided me the following list of merits panels on which I sat that issued an unpublished or non-precedential opinion.

Reiser v. New Jersey Air Nat'l Guard (Oct. 28, 2005)
Chen v. Attorney General of the United States (Oct. 28, 2005)
American Postal Workers v. NLRB (Oct. 27, 2005)
Zappan v. Pennsylvania Board of Probation and Parole (Oct. 26, 2005)
Roadmaster (USA) v. Calmodal Freight Sys (Oct. 26, 2005)
Terrell v. Hawk (Oct. 26, 2005)
Thomas v. Williamson (Oct. 25, 2005)
United States v. Arlett (Oct. 24, 2005)
United States v. Speckmann (Oct. 21, 2005)
Hassan v. Attorney General of the United States (Oct. 21, 2005)
Wortham v. Karstadtquelle AG (Oct. 20, 2005)
Williams v. Commissioner of Social Security (Oct. 20, 2005)
Arboleda v. Attorney General of the United States (Oct. 19, 2005)
United States v. Cummings (Oct. 19, 2005)
Giangrante v. Varallo (Oct. 19, 2005)
Chhibba v. Federal Bureau of Prisons (Oct. 19, 2005)
Chen v. Attorney General of the United States (Oct. 18, 2005)
Arena v. McShane (Oct. 14, 2005)
Singh v. Attorney General of the United States (Oct. 13, 2005)
Wilderman v. Cooper & Scully PC (Oct. 13, 2005)
EEOC v. Avecia, Inc. (Oct. 13, 2005)
Ford v. BICE (Oct. 13, 2005)
Lyles v. Phila Gas Works (Oct. 13, 2005)

Luis-Feliz v. Attorney General of the United States (Oct. 12, 2005)
Beam v. Downey (Oct. 12, 2005)
Vargas v. Attorney General of the United States (Oct. 12, 2005)
Mason v. Kyler (Oct. 11, 2005)
Falzett v. Pocono Moutain Sch. Dist. (Oct. 11, 2005)
Carrasquillo v. Commissioner of Social Security (Oct. 11, 2005)
McGonigal v. Commissioner of Social Security (Oct. 11, 2005)
Conerly v. Yates (Oct. 11, 2005)
Hannah v. City of Dover (Oct. 11, 2005)
United States v. Matthews (Oct. 6, 2005)
Shoukat v. Attorney General of the United States (Oct. 3, 2005)
Ignatov v. Attorney General of the United States (Sep. 30, 2005)
Thomas v. Leach (Sep. 28, 2005)
Allen v. Ripoll (Sep. 26, 2005)
Allen v. Ripoll (Sep. 26, 2005)
United States v. Morris (Sep. 23, 2005)
Maydak v. United States Department of Education (Sep. 21, 2005)
Richards v. Attorney General of the United States (Sep. 21, 2005)
Hattman v. Commissioner IRS (Sep. 21, 2005)
Hudson v. Coxon (Sep. 21, 2005)
Richards v. Attorney General of the United States (Sep. 21, 2005)
United States v. Kenny (Sep. 19, 2005)
Saunders-El v. United States (Sep. 19, 2005)
Romansky v. Stickman (Sep. 19, 2005)
Gallup, Inc. v. Kenexa Corp. (Sep. 19, 2005)
Saunders-El v. USA (Sep. 19, 2005)
Sichel v. Lappin (Sep. 16, 2005)
Miller v. Federal Bureau of Prisons (Sep. 16, 2005)
Attoh-Mensah v. Attorney General of the United States (Sep. 14, 2005)
Attoh-Mensah v. Attorney General of the United States (Sep. 14, 2005)
Rotshteyn v. Agnati (Sep. 13, 2005)
Jacobs v. Pennsylvania Dep't of Corrections (Sep. 6, 2005)
United States v. Sanchez-Sanchez (Sep. 6, 2005)
Thibeau v. Apker (Sep. 6, 2005)
Brody v. Hankin (Aug. 29, 2005)
United States v. Torres (Aug. 12, 2005)
Chandra v. Attorney General of the United States (Aug. 11, 2005)
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Spinelli v. CostCo. Wholesale, Inc. (Aug. 10, 2005)
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United States v. Santos (Aug. 10, 2005)
Mohabir v. Attorney General of the United States (Aug. 9, 2005)
Wolfe v. Frank (Aug. 8, 2005)
United States v. Arellano (Aug. 5, 2005)
Vogin v. Nicosia (Aug. 5, 2005)
Kong v. Attorney General of the United States (Aug. 4, 2005)
In re Abdul-Malik (Aug. 4, 2005)
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Herrera v. Williamson (Aug. 4, 2005)
Johnson v. Apker (Aug. 4, 2005)
DeBiasse v. Chevy Chase Bank Corp. (Aug. 4, 2005)
In re Davis v. (Aug. 3, 2005)
Commonwealth Capital Corp. v. Getronics, Inc. (Aug. 3, 2005)
Strope v. Warden, FCI Schuylkill (Aug. 3, 2005)
Solomon v. Philadelphia Housing Auth. (Aug. 2, 2005)
National Grange Mutual Ins. Co. v. Goldstein, Heslop, Steel, Clapper, Oswalt & Stoehr (Aug. 2, 2005)
Alexander v. Gennarini (Aug. 2, 2005)
Hill v. True (Aug. 2, 2005)
Hazel v. Smith (Aug. 2, 2005)
Shelley v. Sprowls (Aug. 2, 2005)
In re Timothy Hale v. (Aug. 2, 2005)
Farah v. Attorney General of the United States (Aug. 1, 2005)
Ash v. Redevelopment Auth. of Philadelphia (Aug. 1, 2005)

Maria C. v. School Dist. of Philadelphia (July 29, 2005)
Maria C. v. School Dist. of Philadelphia (July 29, 2005)
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The Clerk of the Third Circuit Court also provided me the following list of merits panels on which I sat that issued judgment orders.

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United States v. *Vinnacombe* (July 17, 1992)
United States v. *Zahorian* (July 17, 1992)
United States v. *Caldwell* (July 10, 1992)
United States v. *Gray* (July 10, 1992)
Govt of VI v. *Baez* (July 9, 1992)
United States v. *Colon* (July 9, 1992)
United States v. *Jones* (July 8, 1992)
United States v. *Jordan* (July 8, 1992)
Horosky v. *North Coventry Twp* (July 2, 1992)
First NY Bank Bus v. *Laden* (June 30, 1992)
School Asbestos v. *Lake Asbestos Quebec* (June 30, 1992)
United States v. *Rampp* (June 30, 1992)
United States v. *Vancol* (June 8, 1992)
Mycka v. *Lessey* (June 1, 1992)
Sopko v. *Rosemeyer* (June 1, 1992)
United States v. *Salandra* (May 28, 1992)
United States v. *Spiewak* (May 28, 1992)
Vartan v. *Sobolevitch* (May 26, 1992)
United States v. *Ahmad* (May 21, 1992)
Lavin v. *Bear Stearns & Co.* (May 21, 1992)
Doubles v. *Consol Freightways* (May 21, 1992)
Eisele v. *Holloway* (May 21, 1992)
Pazder v. *Intl Paper Co.* (May 21, 1992)
United States v. *Smith* (May 21, 1992)
Covey v. *Varano* (May 21, 1992)
Barry v. *White Sell Constr* (May 21, 1992)
United States v. *Wilson* (May 21, 1992)
Gurneak v. *Chevron United States Inc.* (May 20, 1992)

Morand v. *Hickory Hills West* (May 20, 1992)
Decker v. *Landmark Savings* (May 20, 1992)
United States v. *Reyes* (May 20, 1992)
United States v. *Terry* (May 20, 1992)
Ozmina v. *GAF Corporation* (May 19, 1992)
Battle v. *City of Reading* (May 13, 1992)
United States v. *Maker* (May 13, 1992)
United States v. *Morris* (May 13, 1992)
State Bank of India v. *Victory Garden* (May 13, 1992)
United States v. *Morrissey* (May 12, 1992)
United States v. *Wilson* (May 12, 1992)
Mierzejewski v. *Fauver* (Apr. 29, 1992)
Festa v. *State of NJ* (Apr. 24, 1992)
Blake v. *Kaplan* (Apr. 23, 1992)
Vey v. *Casey* (Apr. 22, 1992)
Niyogi v. *Equibank* (Apr. 22, 1992)
Brunner v. *Buchanan* (Apr. 21, 1992)
NLRB v. *Local Union 825* (Apr. 21, 1992)
Culp v. *Philadelphia Newspapers Inc.* (Apr. 21, 1992)
Swift v. *Dragovich* (Apr. 15, 1992)
Liquid Glass Entr v. *Liquid Glass Product* (Apr. 8, 1992)
United States v. *Theodoropoulos* (Apr. 2, 1992)
In re Pepe Oldsmble (Mar. 26, 1992)
NLRB v. *District 5* (Mar. 25, 1992)
Caldwell v. *Tom Mistick & Sons* (Mar. 24, 1992)
Clarke v. *DRX Inc.* (Mar. 23, 1992)
Bunting v. *Atlantic Refining* (Mar. 19, 1992)
Erie Ins. Exchange v. *Celina Mutual Ins. Co.* (Mar. 19, 1992)
Lavner v. *Cutler* (Mar. 18, 1992)
Abrahams v. *Commissioner IRS* (Mar. 17, 1992)
Becker v. *Commissioner IRS* (Mar. 17, 1992)
Hurst v. *Commissioner IRS* (Mar. 17, 1992)
Elgart v. *Commissioner IRS* (Mar. 17, 1992)
Rhode v. *Commissioner IRS* (Mar. 17, 1992)
Westinghouse Elec v. *Hartford Accident* (Mar. 17, 1992)
Summers v. *Secretary HHS* (Mar. 17, 1992)
State of New Jersey v. *Briar Lake Dev Corp.* (Mar. 16, 1992)
United States v. *Damiano* (Mar. 16, 1992)
In Re Grand Jury (Mar. 16, 1992)
Slaweks Anchorage v. *Hargrave* (Feb. 28, 1992)
Navarro v. *United States Government* (Feb. 28, 1992)
Birth v. *United States* (Feb. 28, 1992)
Pennsylvania v. *Flaherty* (Feb. 24, 1992)
Milisavic v. *Aetna Life & Cslty* (Feb. 6, 1992)
Reese v. *Love* (Feb. 6, 1992)
Eastman Kodak Co. v. *SS Sealand Voyager* (Feb. 6, 1992)
Howard v. *City of Bethlehem* (Feb. 5, 1992)
Grant v. *United States* (Feb. 5, 1992)
In re Alghny Intl (Feb. 5, 1992)
Grenell v. *NJ Supreme Court* (Feb. 4, 1992)
Cheque Rite Inc. v. *Pineo* (Feb. 4, 1992)
United States v. *Rish* (Feb. 4, 1992)
Wetherell v. *Sentry Reinsurance* (Feb. 4, 1992)
Hadjiyannis v. *SEPTA* (Feb. 4, 1992)
Crouche v. *Trans Union Credit* (Feb. 4, 1992)
In Matter of Lenzi (Feb. 4, 1992)
Prostko v. *Rand* (Feb. 3, 1992)
Home Ins Co. v. *Stegenga* (Feb. 3, 1992)
United States v. *Beasley* (Jan. 31, 1992)
MacNamara v. *Korean Air Lines* (Jan. 31, 1992)
Dunn v. *Marco* (Jan. 31, 1992)
Vito v. *Prudential Bache* (Jan. 31, 1992)
Layfield v. *Zurich* American *Ins Co.* (Jan. 31, 1992)
Ferri v. *Allegheny County* (Jan. 24, 1992)
Hodges v. *Fauver* (Jan. 24, 1992)
Huffsmith v. *Wyoming Cty Prison* (Jan. 24, 1992)
Conway v. *Frank* (Jan. 17, 1992)
Martin v. *Kaplan* (Jan. 16, 1992)

NLRB v. *Amalgamated Council* (Jan. 10, 1992)
United States v. *Benedetto* (Dec. 31, 1991)
Williams v. *Fauver* (Dec. 31, 1991)
Gaydos v. *Gaydos* (Dec. 31, 1991)
Dodson v. *Logan Twp Bd Supv* (Dec. 31, 1991)
United States v. *Oleck* (Dec. 31, 1991)
Maginn v. *United States* (Dec. 31, 1991)
Williams v. *Vaughn* (Dec. 31, 1991)
Odesser v. *Continental Bank* (Dec. 30, 1991)
Angott v. *Owens Illinois* (Dec. 26, 1991)
Wyant v. *Redman* (Dec. 24, 1991)
Ciano v. *Amer-Darling Valve* (Dec. 20, 1991)
Glickman v. *Lightolier Inc.* (Dec. 20, 1991)
Enviromaster Intl v. *TCR Byberry Creek* (Dec. 20, 1991)
Christ v. *Secretary HHS* (Dec. 19, 1991)
Urdenis v. *Thermal Ind Inc.* (Dec. 19, 1991)
United States v. *Malesic* (Dec. 18, 1991)
Hays v. *Beverly Entr Inc.* (Dec. 17, 1991)
United States v. *Cole* (Dec. 17, 1991)
Comm Unsecured v. *Doemling* (Dec. 17, 1991)
Palumbo v. *Haney* (Dec. 17, 1991)
NLRB v. *Local Union 158* (Dec. 17, 1991)
United Crane Shovel v. *OSHC* (Dec. 17, 1991)
Balsamo v. *Mazurkiewicz* (Dec. 5, 1991)
Hercules Enterprises v. *City of Harrisburg* (Nov. 13, 1991)
McElyea v. *Cooper Tire & Rubber* (Nov. 12, 1991)
Rodgers v. *Harris Graphics Corp.* (Nov. 12, 1991)
United States v. *Cordero* (Nov. 7, 1991)
Shriver v. *GAF Corporation* (Nov. 7, 1991)
Clarke v. *Brandolini* (Nov. 6, 1991)
Baily v. *Lewis* (Nov. 6, 1991)
Conway v. *Pittsburgh Corning* (Nov. 4, 1991)
Opalenik v. *Rhoades* (Nov. 4, 1991)
United States v. *Farley* (Oct. 31, 1991)
Frater v. *INS* (Oct. 31, 1991)
United States v. *McGeary* (Oct. 31, 1991)
McMillan v. *NLRB* (Oct. 31, 1991)
Lowenschuss v. *Resorts Intl Inc.* (Oct. 31, 1991)
Gatewood v. *Secretary HHS* (Oct. 31, 1991)
Scott v. *Strohm* (Oct. 31, 1991)
Hooper v. *Owens* (Oct. 21, 1991)
Goos v. *Commissioner IRS* (Oct. 17, 1991)
Haskins v. *Gebelein* (Oct. 17, 1991)
United States v. *Netelkos* (Oct. 17, 1991)
Ross v. *Philadelphia County* (Oct. 17, 1991)
Wilson v. *Rackmill* (Oct. 17, 1991)
Hackney v. *Sands Hotel & Casino* (Sep. 20, 1991)
Lewis #AJ-1616 v. *Soroko* (Sep. 20, 1991)
Katz v. *Casey* (Sep. 11, 1991)
Saleem v. *3-M Company* (Sep. 10, 1991)
United States v. *Lewis #03665-068* (Sep. 10, 1991)
Zilich v. *Nickelson* (Sep. 10, 1991)
United States v. *Real Property* (Sep. 10, 1991)
United States v. *Sitek* (Sep. 4, 1991)
Pan American *World* v. *Midlantic Natl Bank* (Aug. 16, 1991)
B.Cohen & Sons v. *New Plan Realty* (Aug. 14, 1991)
Schering Corporation v. *Private Formulations, Inc.* (Aug. 14, 1991)
Philadelphia Nat'l Bank v. *Rockko* (Aug. 14, 1991)
Progressive Casualty v. *Sui* (Aug. 14, 1991)
Nationwide Mut. Ins. Co. v. *Cameron* (Aug. 13, 1991)
Maranzini v. *Consolidated Rail Corp.* (Aug. 13, 1991)
Sun Ins. Ofc Ltd v. *Neff* (Aug. 13, 1991)
Crawford v. *Beacon Pools & Constr. Co.* (Aug. 12, 1991)
Bystran v. Convergent Business Systems, Inc. (Aug. 12, 1991)
Mack v. Kent County Vocational Technical Sch. Dist. (Aug. 12, 1991)
New Breed Moving v. *Quality Ind Trucks* (Aug. 12, 1991)

Nutrition, Inc. v. School Dist. of Penn Hills (Aug. 12, 1991)
Eidukonis v. *SEPTA* (Aug. 12, 1991)
Prinski v. *Termar Navigation Co.* (Aug. 12, 1991)
In re Indenture (Aug. 12, 1991)
Kulicke v. *Kulicke & Soffa Ind* (Aug. 5, 1991)
Gonzalez v. *Attorney General* (July 31, 1991)
Smith v. *Continental Ins. Corp.* (July 26, 1991)
Coombs v. *Baldwin* (July 24, 1991)
Greene v. *Sullivan* (July 24, 1991)
Miller v. *Yellow Freight* (July 23, 1991)
Wright v. *Fauver* (July 18, 1991)
United States v. *Raffensberger* (July 18, 1991)
Hornick v. *Salvitti* (July 17, 1991)
No. 1 Contracting Corp. v. Parsons Panamerican Corp. (July 1, 1991)
Gateway Coal Co. v. *Despot* (June 27, 1991)
Nealen v. *Doverspike* (June 27, 1991)
Local Union 97B v. *NLRB* (June 27, 1991)
NLRB v. *88 Transit Lines Inc.* (June 26, 1991)
Walker v. *Automation Devices* (June 26, 1991)
Kochaha v. *Bonnick* (June 26, 1991)
United States v. *Petergol* (June 26, 1991)
Nutmeg Ins. Co. v. *Regis Ins. Co.* (June 26, 1991)
United States v. *Sloss* (June 26, 1991)
Greenfield v. *United States Parole Commission* (June 26, 1991)
United States v. *Van Tassel* (June 26, 1991)
Smith v. Pittsburgh Bd. of Educ. (June 24, 1991)
United States v. *Taylor* (June 21, 1991)
D'Alessandro v. *VALIC* (June 20, 1991)
United States v. *Plair* (June 19, 1991)
Russell Corp. v. *Schimminger* (June 19, 1991)
Hodges v. *Rafferty* (June 18, 1991)
Carlson v. *United States Bureau of Prisons* (June 18, 1991)
Good v. Dauphin County Social Services for Children & Youth (June 11, 1991)
Kettle v. *RRRB* (June 6, 1991)
Saunders v. *Fewell* (June 3, 1991)
Mokone v. Attorney Gen. of N.J. (May 31, 1991)
Purvin v. *Bergens* (May 23, 1991)
DeBari v. Maher Terminals (May 20, 1991)
Babcock v. Bergen County Bd. of Social Services (May 17, 1991)
Showers v. *Sullivan* (May 17, 1991)
Andrews v. Gov't of Virgin Islands (May 16, 1991)
Mosteller v. *Baer* (May 9, 1991)
United States v. *Creque* (May 8, 1991)
Maddage v. *Otis Elevator* (May 8, 1991)
United States v. *Smith* (May 8, 1991)
United States v. *Navarro* (May 7, 1991)
United States v. *Recalde* (May 7, 1991)
McDonald v. *Thomas* (May 7, 1991)
United States v. *Charles* (May 6, 1991)
United States v. *Montilla-Davila* (May 1, 1991)
Fournier v. *Stackler* (Apr. 29, 1991)
Biggs v. Virgin Islands Bd. of Land Use Appeals (Apr. 29, 1991)
Morgan v. *United States Parole Commission* (Apr. 22, 1991)
Tedder v. *Schmeiser* (Apr. 17, 1991)
David H. v. Palmyra Area School Dist. (Apr. 16, 1991)
Riley v. *Sullivan* (Apr. 15, 1991)
In re Abdul-Akbar (Apr. 11, 1991)
United States v. *Berkery* (Apr. 9, 1991)
Streater v. *Redman* (Apr. 8, 1991)
Zebrowski v. *Sullivan* (Apr. 8, 1991)
United States v. *Taylor* (Apr. 2, 1991)
United States v. *Banks* (Mar. 21, 1991)
Harner v. *Moore* (Mar. 21, 1991)
United States v. *Palmer* (Mar. 21, 1991)
Walker v. *Pilot Freight* (Mar. 21, 1991)
Mar.iafava v. *Walt Disney World Co.* (Mar. 21, 1991)
Keystone Helicopter v. *Aviation Materials* (Mar. 20, 1991)

Lowenschuss v. *Home Ins. Co.* (Mar. 20, 1991)
United States v. *LaPorta* (Mar. 20, 1991)
Intl Union UAW v. *Amerace Corp. Inc.* (Mar. 19, 1991)
Schor v. *Hope* (Mar. 19, 1991)
United States v. *MacGregor* (Mar. 19, 1991)
Max Bayroff Corp. v. *OSHRC* (Mar. 19, 1991)
Don't Ruin Our Park v. *Stone* (Mar. 19, 1991)
Bush v. *Cty of Wilmington* (Mar. 18, 1991)
Hornberger v. *Director, OWCP* (Mar. 18, 1991)
Bradley v. *Pittsburgh Bd. of Educ.* (Mar. 18, 1991)
General Accident v. *ITT Gen. Corp.* (Mar. 8, 1991)
United States v. *Lytle* (Mar. 8, 1991)
Colucci v. Revere Smelting & Refining (Mar. 7, 1991)
United States v. *Thomas* (Mar. 6, 1991)
United States v. *Marino* (Feb. 28, 1991)
McClellan Realty v. *McClellan Realty* (Feb. 28, 1991)
Brown v. *Miller* (Feb. 28, 1991)
Gorman v. *Richardson* (Feb. 28, 1991)
Cohen v. *Bordas* (Feb. 27, 1991)
Ryan v. *NJ Parole Board* (Feb. 20, 1991)
Young v. *Koehane* (Jan. 31, 1991)
Bond v. *Philadelphia Education* (Jan. 31, 1991)
Winward v. *Wolfson* (Jan. 31, 1991)
Fairchilde v. *Earnst* (Jan. 28, 1991)
Hindorff v. *Westinghouse Elec* (Jan. 28, 1991)
Martino v. *New Hampshire Ins. Co.* (Jan. 24, 1991)
United States v. *Barnes* (Jan. 18, 1991)
Pascarell v. *Control Services Inc.* (Jan. 18, 1991)
Midiri Models Inc. v. *Expressions Modeling* (Jan. 18, 1991)
Kirk Bros. Mech. Contr. v. *United States Dept of Navy* (Jan. 18, 1991)
In re NY City Shoes (Jan. 18, 1991)
Matson v. *Bowen* (Jan. 17, 1991)
Allegheny Intl Inc. v. *Carpenter* (Jan. 17, 1991)
United States v. *Cope* (Jan. 17, 1991)
Funk v. *Disciplinary Bd* (Jan. 17, 1991)
United States v. *Esper* (Jan. 17, 1991)
United States v. *George* (Jan. 17, 1991)
United States v. *Harris* (Jan. 17, 1991)
United States v. *Wright* (Jan. 17, 1991)
United States v. *Hunt* (Jan. 15, 1991)
Zdrale v. *Browning Ferris Ind* (Jan. 14, 1991)
Lilley v. *Commissioner IRS* (Jan. 14, 1991)
King v. *Zimmerman* (Jan. 14, 1991)
Jannetta v. *Altoona* (Dec. 31, 1990)
Jannetta v. *Bell of Pennsylvania* (Dec. 31, 1990)
Jannetta v. *Burgmeier* (Dec. 31, 1990)
Jannetta v. *Kowaleski* (Dec. 31, 1990)
Nargi & Shaw Mech. v. *Carol Management Inc.* (Dec. 26, 1990)
Coleman v. *Dunbarton Oaks Apts* (Dec. 26, 1990)
United States v. *Milton* (Dec. 26, 1990)
Osborn #AP-8910 v. *Patterson* (Dec. 26, 1990)
United States v. *Sanders* (Dec. 21, 1990)
Lerner v. *Educational Testing* (Dec. 18, 1990)
In re FA Potts & Co. (Dec. 10, 1990)
United States v. *Porte* (Dec. 7, 1990)
Kosloff v. *Secretary, HHS* (Dec. 6, 1990)
Davis v. *Beard* (Dec. 5, 1990)
Dutoit v. Strategic Minerals Corp. (Dec. 5, 1990)
Melnyczenko v. *Bodnar* (Nov. 26, 1990)
Auger v. *Teneyck* (Nov. 26, 1990)
Muhammad v. Newark Bd. of Educ. (Nov. 23, 1990)
Slawek v. *Boardman & Hamilton* (Nov. 20, 1990)
United States v. *Snead* (Nov. 20, 1990)
Fykes v. *Vinnie's Pizzeria* (Nov. 20, 1990)
Kelvin #AS-1924 v. *Poled* (Nov. 16, 1990)
Adams v. *Owens* (Nov. 14, 1990)
Estate Israel Ramos v. *York* (Nov. 14, 1990)

Richards v. *Heckler* (Nov. 9, 1990)
True Ass'n Inc. v. *Hedstrom Corp.* (Nov. 9, 1990)
Wike v. *Morgan Drive Away* (Nov. 9, 1990)
Associated Business Tel. Sys. Corp. v. Greater Capital Hotel Corp. (Nov. 6, 1990)
Burgess v. *Bike Athletic Co.* (Oct. 31, 1990)
Ferri v. *Kozakiewicz* (Oct. 31, 1990)
Thomas v. *State of NJ* (Oct. 31, 1990)
Marx v. *Kelly Appleman* (Oct. 22, 1990)
Dollar Bank Fed v. *Bernstein Group Inc.* (Oct. 19, 1990)
Bradford-White Corp. v. *Ernst & Whinney* (Oct. 19, 1990)
Harrison v. *Beyer* (Oct. 17, 1990)
Associated Business Tel. Sys. Corp. v. Greater Capital Hotel Corp. (Oct. 17, 1990)
Pittsburgh National v. *National State Bank* (Oct. 17, 1990)
United States v. *Pierce* (Oct. 17, 1990)
United States v. *Bermudez* (Oct. 16, 1990)
Dollar Bank Fed v. *Bernstein* (Oct. 16, 1990)
State of Delaware v. *Cavazos* (Oct. 16, 1990)
Davis v. *General Motors Corp.* (Oct. 16, 1990)
Hartigan v. *Insurance NA* (Oct. 16, 1990)
Mendel v. *Marion* (Oct. 16, 1990)
Stefanowicz v. *Bowen* (Oct. 15, 1990)
Ware v. *Frank* (Oct. 15, 1990)
Fidelity & Deposit v. *Glenn* (Oct. 15, 1990)
Lewis v. *Grant R. Wright, Inc.* (Oct. 15, 1990)
MacCauley v. *Wahlig* (Oct. 15, 1990)
NLRB v. *Rynone Container* (Sep. 27, 1990)
Powell v. *United States Gypsum Co.* (Aug. 13, 1990)

Appendix 4

Question 23.c.

Case Number	Case Name	Reason for Recusal
86-1226	EEOC v. Westinghouse Electric Corp.	no specific recollection of why I recused
88-5616	United States v. Gallagher	U.S. Attorney's Office involved, on standing recusal list
88-5670	United States v. Carson	U.S. Attorney's Office involved, on standing recusal list
89-1342	United States v. Hernandez	U.S. Attorney's Office involved, on standing recusal list
89-5604, 89-5605	United States v. Daniel Touby	U.S. Attorney's Office involved, on standing recusal list
89-5993	United States v. O'Neal	U.S. Attorney's Office involved, on standing recusal list
90-1074	United States v. Lores	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
90-1267, 90-1268, 90-1305	United States v. Eufrasio	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
90-1755, 90-1743, 90-1492, 90-1541	United States v. Davis	These cases involved the U.S. Attorney's Office for the Eastern District of Pennsylvania. I chose not to recuse because the U.S. Attorney's Office for the District of New Jersey had no involvement in this matter at any point between March 1987 and July 1990.
90-3638	United States v. Robles	I recused because the defendant was connected with an investigation that occurred during my tenure in the U.S. Attorney's Office.
90-5003	United States v. Bazemore	U.S. Attorney's Office involved, on standing recusal list
90-5004	United States v. Williams	U.S. Attorney's Office involved, on standing recusal list
90-5005	United States v. Wilkins	U.S. Attorney's Office involved, on standing recusal list
90-5053	United States v. Gilliam	U.S. Attorney's Office involved, on standing recusal list
90-5063	Delta Traffic Serv. v. Mennen Co.	I recused from this case because one of the parties listed me and the U.S. Attorney's Office as counsel.
90-5082	United States v. Ford	U.S. Attorney's Office involved, on standing recusal list
90-5147	Sassower v. Abrams	Mr. George Sassower involved, on standing recusal list (Mr. Sassower filed various complaints against me and other judges)
90-5186	United States v. McNamara	U.S. Attorney's Office involved, on standing recusal list
90-5200	United States v. Lemos-Martinez	U.S. Attorney's Office involved, on standing recusal list
90-5203	United States v. Cicalese	U.S. Attorney's Office involved, on standing recusal list
90-5245	United States v. Trujillo	U.S. Attorney's Office involved, on standing recusal list
90-5264	United States v. Delgado	U.S. Attorney's Office involved, on standing recusal list
90-5292	United States v. Price	U.S. Attorney's Office involved, on standing recusal list
90-5293	United States v. Johnson	U.S. Attorney's Office involved, on standing recusal list
90-5294, 90-5295, 90-5481	American Cyanamid Co. v. SC Johnson & Son, Inc.	I recused based on a friendship with one of the attorneys.
90-5361	United States v. Salguero	U.S. Attorney's Office involved, on standing recusal list
90-5371	Gaito v. United States	U.S. Attorney's Office involved, on standing recusal list
90-5427, 90-5428	Colbert v. Gardner	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
90-5438	United States v. Bordon	U.S. Attorney's Office involved, on standing recusal list

90-5453	E R Squibb & Son, Inc. v. The Austin Co.	I recused based on a friendship with one of the attorneys.
90-5457	United States v. Barel	U.S. Attorney's Office involved, on standing recusal list
90-5490	Waldron-Ramsey v. U.S. Dep't of Army	U.S. Attorney's Office involved, on standing recusal list
90-5517	United States v. Vargas	U.S. Attorney's Office involved, on standing recusal list
90-5518	United States v. Singh	U.S. Attorney's Office involved, on standing recusal list
90-5520	United States v. Rodriguez	U.S. Attorney's Office involved, on standing recusal list
90-5538	Rai v. Marsh	U.S. Attorney's Office involved, on standing recusal list
90-5544	United States v. Weatherby	U.S. Attorney's Office involved, on standing recusal list
90-5545	United States v. Torres	U.S. Attorney's Office involved, on standing recusal list
90-5459	United States v. Newman	U.S. Attorney's Office involved, on standing recusal list
90-5646	United States v. Ryan	U.S. Attorney's Office involved, on standing recusal list
90-5660	Juanita Martinez v. Virginia Martinez	U.S. Attorney's Office involved, on standing recusal list
90-5663	Mack Boring & Parts v. Meeker Sharkey	no specific recollection of why I recused
90-5674	McMeans v. Township of Waterford	I recused because two of the defendants were involved in a case that had been pending during my tenure as U.S. Attorney.
90-5678	Conte v. United States	U.S. Attorney's Office involved, on standing recusal list
90-5680	United States v. Bressaw	U.S. Attorney's Office involved, on standing recusal list
90-5683	United States v. Grecco	U.S. Attorney's Office involved, on standing recusal list
90-5684	United States v. Mazzola	U.S. Attorney's Office involved, on standing recusal list
90-5685	United States v. Gatto	U.S. Attorney's Office involved, on standing recusal list
90-5688	United States v. Rendon	U.S. Attorney's Office involved, on standing recusal list
90-5690	Dole v. Cooper Elec. Supply	U.S. Attorney's Office involved, on standing recusal list
90-5713	United States v. Khan	U.S. Attorney's Office involved, on standing recusal list
90-5714	United States v. Rana	U.S. Attorney's Office involved, on standing recusal list
90-5716	United States v. Lemos-Villada	U.S. Attorney's Office involved, on standing recusal list
90-5721	Am. Biomaterials v. United States	U.S. Attorney's Office involved, on standing recusal list
90-5724	Lamasney v. Sec'y HHS	U.S. Attorney's Office involved, on standing recusal list
90-5726	United States v. Bitzer	U.S. Attorney's Office involved, on standing recusal list
90-5737	United States v. Garfield Container	U.S. Attorney's Office involved, on standing recusal list
90-5739	United States v. Gutierrez	U.S. Attorney's Office involved, on standing recusal list
90-5747	United States v. Garcia	U.S. Attorney's Office involved, on standing recusal list
90-5753	Hamilton v. United States	U.S. Attorney's Office involved, on standing recusal list
90-5759	United States v. Marin	U.S. Attorney's Office involved, on standing recusal list
90-5767	United States v. Cannistraro	U.S. Attorney's Office involved, on standing recusal list
90-5768	Dukes v. Bowen	U.S. Attorney's Office involved, on standing recusal list
90-5776	United States v. Canadilla	U.S. Attorney's Office involved, on standing recusal list
90-5776	Sec'y of Labor v. Int'l Matex Tank	U.S. Attorney's Office involved, on standing recusal list
90-5777	United States v. Atkins	U.S. Attorney's Office involved, on standing recusal list
90-5785	Dole v. Cooper Elec. Supply	U.S. Attorney's Office involved, on standing recusal list
90-5786	Delage v. United States	U.S. Attorney's Office involved, on standing recusal list
90-5795	United States v. Gatto	U.S. Attorney's Office involved, on standing recusal list
90-5801	United States v. Henderson	U.S. Attorney's Office involved, on standing recusal list
90-5811	EEOC v. Roadway Express, Inc.	U.S. Attorney's Office involved, on standing recusal list
90-5820	United States v. Cannistraro	U.S. Attorney's Office involved, on standing recusal list

90-5823	United States v. 92 Buena Vista Ave.	U.S. Attorney's Office involved, on standing recusal list
90-5836	United States v. Talerico	U.S. Attorney's Office involved, on standing recusal list
90-5840	United States v. Ortega	U.S. Attorney's Office involved, on standing recusal list
90-5844	United States v. Vellaro	U.S. Attorney's Office involved, on standing recusal list
90-5847	Davern v. Sec'y HHS	U.S. Attorney's Office involved, on standing recusal list
90-5858	United States v. Garfield Container	U.S. Attorney's Office involved, on standing recusal list
90-5868	United States v. Arroyave	U.S. Attorney's Office involved, on standing recusal list
90-5869	United States v. Canas	U.S. Attorney's Office involved, on standing recusal list
90-5878	United States v. Mustacchio	U.S. Attorney's Office involved, on standing recusal list
90-5879	United States v. Mustacchio	U.S. Attorney's Office involved, on standing recusal list
90-5880	United States v. Gallego-Zuluaga	U.S. Attorney's Office involved, on standing recusal list
90-5882	Messer v. U.S. Postal Service	U.S. Attorney's Office involved, on standing recusal list
90-5895	United States v. Khan	U.S. Attorney's Office involved, on standing recusal list
90-5902	United States v. Wolf	U.S. Attorney's Office involved, on standing recusal list
90-5904	Bocra v. United States	U.S. Attorney's Office involved, on standing recusal list
90-5905	United States v. McCrae	U.S. Attorney's Office involved, on standing recusal list
90-5907	Salter v. Frank	U.S. Attorney's Office involved, on standing recusal list
90-5926	United States v. Solae-Payano	U.S. Attorney's Office involved, on standing recusal list
90-5934	United States v. Lopez	U.S. Attorney's Office involved, on standing recusal list
90-5937, 90-5939	Borchers v. United States	U.S. Attorney's Office involved, on standing recusal list
90-5947	United States v. Cicco	U.S. Attorney's Office involved, on standing recusal list
90-5948	United States v. Tannis	U.S. Attorney's Office involved, on standing recusal list
90-5951	FTC v. Fax Corp. America, Inc.	U.S. Attorney's Office involved, on standing recusal list
90-5955	Morgan v. Dep't of Navy	U.S. Attorney's Office involved, on standing recusal list
90-5958	United States v. Braswell	U.S. Attorney's Office involved, on standing recusal list
90-5959	United States v. Vargas	U.S. Attorney's Office involved, on standing recusal list
90-5963	United States v. Ruiz	U.S. Attorney's Office involved, on standing recusal list
90-5964	Pulizzotto v. United States	U.S. Attorney's Office involved, on standing recusal list
90-5967	Moss v. United States	U.S. Attorney's Office involved, on standing recusal list
90-5973	United States v. Karlin	U.S. Attorney's Office involved, on standing recusal list
90-5974	United States v. Riggi	U.S. Attorney's Office involved, on standing recusal list
90-5975	United States v. Timpani	U.S. Attorney's Office involved, on standing recusal list
90-5982	United States v. Delgado	U.S. Attorney's Office involved, on standing recusal list
90-5988	Bradley v. E.I. Du Pont De Nemours	Carpenter Bennett & Morrissey involved, on standing recusal list
90-5991	Salter v. Frank	U.S. Attorney's Office involved, on standing recusal list
90-6000	Patterson v. Sec'y HHS	U.S. Attorney's Office involved, on standing recusal list
90-6009	N. Jersey Sec. Sch. v. U.S. Dep't of Ed.	U.S. Attorney's Office involved, on standing recusal list
90-6026	United States v. Morrison	U.S. Attorney's Office involved, on standing recusal list
90-6031	United States v. O'Neal	U.S. Attorney's Office involved, on standing recusal list
90-6038	Harter v. GAF Corp.	Carpenter Bennett & Morrissey involved, on standing recusal list
90-6041	United States v. Valenciano	U.S. Attorney's Office involved, on standing recusal list
90-6049	United States v. Castellano	U.S. Attorney's Office involved, on standing recusal list
90-6051	Schrob v. Catterson	U.S. Attorney's Office involved, on standing recusal list

90-6052	San Filippo v. Bongiovanni	Carpenter Bennett & Morrissey involved, on standing recusal list
91-1123	United States v. Logar	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-1296	United States v. Schwartz	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-1308	United States v. Anderson	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-1328	United States v. Lorenzo	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-1490, 91-1491	Trinsey v. Pennsylvania	no specific recollection of why I recused
91-1598	Sassower v. Sisk	Mr. George Sassower involved, on standing recusal list
91-1608	United States v. Derewal	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-1757	United States v. Peluyera	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-1792	United States v. Pelullo	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-1861	United States v. Mesa	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-1862	United States v. Ul-Haq	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-1864	United States v. Delco Wire Cable Co.	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-1865	United States v. Delco Elec. Corp.	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-3026	Martin v. Del. Law Sch. of Widener Univ., Inc.	On April 11, 1991, I wrote the following memo: AI am recused in cases involving Mr. Sassower but not Mr. Martin.@ Nevertheless, I was recused from this case. It is possible that recusal occurred due to clerical error.
91-3817	United States v. Pena	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-3820	United States v. Thomas	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-5001	United States v. Perko	U.S. Attorney's Office involved, on standing recusal list
91-5016	United States v. Maldonado	U.S. Attorney's Office involved, on standing recusal list
91-5019	United States v. Carson	U.S. Attorney's Office involved, on standing recusal list
91-5025	Harris v. Local 300	U.S. Attorney's Office involved, on standing recusal list
91-5028	Rainbow Navigation v. United States	U.S. Attorney's Office involved, on standing recusal list
91-5030	United States v. Gallagher	U.S. Attorney's Office involved, on standing recusal list
91-5040	United States v. Barber	U.S. Attorney's Office involved, on standing recusal list
91-5041	Vulcan Pioneers, Inc. v. N.J. Dep't of Civ. Serv.	U.S. Attorney's Office involved, on standing recusal list
91-5065	United States v. Gatto	U.S. Attorney's Office involved, on standing recusal list
91-5074	United States v. Kendis	U.S. Attorney's Office involved, on standing recusal list
91-5079	United States v. Wallace	U.S. Attorney's Office involved, on standing recusal list
91-5085	Martin v. Townsend	U.S. Attorney's Office involved, on standing recusal list

91-5086	United States v. Fisher	U.S. Attorney's Office involved, on standing recusal list
91-5099	United States v. Sarbello	U.S. Attorney's Office involved, on standing recusal list
91-5100	United States v. Centurione	U.S. Attorney's Office involved, on standing recusal list
91-5106	United States v. Green	U.S. Attorney's Office involved, on standing recusal list
91-5110	United States v. Craparotta	U.S. Attorney's Office involved, on standing recusal list
91-5111	United States v. Applegate	U.S. Attorney's Office involved, on standing recusal list
91-5112	United States v. McAvay	U.S. Attorney's Office involved, on standing recusal list
91-5114	United States v. Muhammad	U.S. Attorney's Office involved, on standing recusal list
91-5115	United States v. Clark	U.S. Attorney's Office involved, on standing recusal list
91-5118	Alloway v. EPA	U.S. Attorney's Office involved, on standing recusal list
91-5121	Davis v. Hayden	U.S. Attorney's Office involved, on standing recusal list
91-5129	United States v. Napier	U.S. Attorney's Office involved, on standing recusal list
91-5138	United States v. Gonzalez	U.S. Attorney's Office involved, on standing recusal list
91-5142	United States v. Martello	U.S. Attorney's Office involved, on standing recusal list
91-5144	United States v. Pinchuk	U.S. Attorney's Office involved, on standing recusal list
91-5145	Mescal v. United States	U.S. Attorney's Office involved, on standing recusal list
91-5155, 91-5188	ICI Service Corp. v. Greene	no specific recollection of why I recused
91-5166	Landano v. U.S. Dep't of Justice	U.S. Attorney's Office involved, on standing recusal list
91-5166	United States v. Gilsenan	U.S. Attorney's Office involved, on standing recusal list
91-5167	United States v. Cicalese	U.S. Attorney's Office involved, on standing recusal list
91-5170	United States v. Mitchell	U.S. Attorney's Office involved, on standing recusal list
91-5183	United States v. Plumeri	U.S. Attorney's Office involved, on standing recusal list
91-5191	United States v. Hanley	U.S. Attorney's Office involved, on standing recusal list
91-5193	United States v. Cardona	U.S. Attorney's Office involved, on standing recusal list
91-5197	United States v. Kikumura	U.S. Attorney's Office involved, on standing recusal list
91-5203, 91-5353	Bright v. Rutgers Univ.	U.S. Attorney's Office involved, on standing recusal list
91-5204	United States v. Gilbert	U.S. Attorney's Office involved, on standing recusal list
91-5205	Resyn Corp. v. United States	U.S. Attorney's Office involved, on standing recusal list
91-5210	United States v. Walski	U.S. Attorney's Office involved, on standing recusal list
91-5212	United States v. Stanik	U.S. Attorney's Office involved, on standing recusal list
91-5226	United States v. Ray	U.S. Attorney's Office involved, on standing recusal list
91-5227	United States v. Casper	U.S. Attorney's Office involved, on standing recusal list
91-5230	Brezac v. Sec'y HHS	U.S. Attorney's Office involved, on standing recusal list
91-5231	Oliver v. Brady	U.S. Attorney's Office involved, on standing recusal list
91-5242	United States v. Noordhoek	U.S. Attorney's Office involved, on standing recusal list
91-5243	United States v. Winters	U.S. Attorney's Office involved, on standing recusal list
91-5243	Kavity v. United States	U.S. Attorney's Office involved, on standing recusal list
91-5254	United States v. Zuckerman	U.S. Attorney's Office involved, on standing recusal list
91-5259	In re Cent. R.R. Co. of N.J.	no specific recollection of why I recused
91-5263	In re Grand Jury	U.S. Attorney's Office involved, on standing recusal list

91-5276, 91-5315, 91-5316, 91-5326, 91-5350, 91-5419, 91-5420, 91-5421, 91-5422, 91-5423, 91-5436, 91-5437	Williams v. Sec'y HHS	U.S. Attorney's Office involved, on standing recusal list
91-5280	United States v. Urina	U.S. Attorney's Office involved, on standing recusal list
91-5281	United States v. Rothstein	U.S. Attorney's Office involved, on standing recusal list
91-5285, 91-5478	United States v. Moussa	U.S. Attorney's Office involved, on standing recusal list
91-5290, 91-5597	Carteret Savings v. OTS	U.S. Attorney's Office involved, on standing recusal list
91-5302	Smith v. Reid	U.S. Attorney's Office involved, on standing recusal list
91-5303	United States v. Borchers	U.S. Attorney's Office involved, on standing recusal list
91-5304	Osadchy v. U.S. Army	U.S. Attorney's Office involved, on standing recusal list
91-5307	United States v. Williams	U.S. Attorney's Office involved, on standing recusal list
91-5308	United States v. Biberfeld	U.S. Attorney's Office involved, on standing recusal list
91-5312	United States v. Ortega	U.S. Attorney's Office involved, on standing recusal list
91-5313	United States v. Cuevas	U.S. Attorney's Office involved, on standing recusal list
91-5314	Rubert v. Sec'y HHS	U.S. Attorney's Office involved, on standing recusal list
91-5324	United States v. Casiano	U.S. Attorney's Office involved, on standing recusal list
91-5325	United States v. Welt	U.S. Attorney's Office involved, on standing recusal list
91-5328	United States v. Centurione	U.S. Attorney's Office involved, on standing recusal list
91-5336, 91-5337	Landano v. Rafferty	no specific recollection of why I recused, but possible reason is some connection to the U.S. Attorney's Office
91-5351	United States v. Vasquez	U.S. Attorney's Office involved, on standing recusal list
91-5358	United States v. Danzig	U.S. Attorney's Office involved, on standing recusal list
91-5371	United States v. Glynn	U.S. Attorney's Office involved, on standing recusal list
91-5372	United States v. Nwakanma	U.S. Attorney's Office involved, on standing recusal list
91-5373	United States v. Machado	U.S. Attorney's Office involved, on standing recusal list
91-5382	United States v. Thompson	U.S. Attorney's Office involved, on standing recusal list
91-5384	Sharif v. DeBellis	U.S. Attorney's Office involved, on standing recusal list
91-5401, 91-5418	Elysian Fed. Sav. Bank v. First Interregional	McCarter & English involved, on standing recusal list
91-5405, 91-5518, 91-5519	United States v. Coletti	U.S. Attorney's Office involved, on standing recusal list
91-5407	Mody v. City of Hoboken	no specific recollection of why I recused, but possible reason is some connection to the U.S. Attorney's Office
91-5409	Arab Africa Bank v. Epstein	no specific recollection of why I recused
91-5428	McBride v. Princeton Univ.	I recused based on my activity on Princeton committees.
91-5434	United States v. Saiyad	U.S. Attorney's Office involved, on standing recusal list

90-5440, 91-5441	United States v. Local 560 (IBT)	U.S. Attorney's Office involved, on standing recusal list
91-5450	United States v. Cadavid	U.S. Attorney's Office involved, on standing recusal list
91-5453	United States v. Kopp	U.S. Attorney's Office involved, on standing recusal list
91-5455, 91-5494	United States v. Rodriguez	U.S. Attorney's Office involved, on standing recusal list
91-5456, 91-5771	United States v. Canterino	U.S. Attorney's Office involved, on standing recusal list
91-5457	Gelin v. Sec'y of the Army	U.S. Attorney's Office involved, on standing recusal list
91-5464	United States v. Berbessi-Acosta	U.S. Attorney's Office involved, on standing recusal list
91-5465, 91-5612	United States v. Mayles	U.S. Attorney's Office involved, on standing recusal list
91-5466	United States v. Schneiderman	U.S. Attorney's Office involved, on standing recusal list
91-5467	Ingerman v. IRS	U.S. Attorney's Office involved, on standing recusal list
91-5469	D'Imperio v. United States	U.S. Attorney's Office involved, on standing recusal list
91-5470, 91-5768	United States v. Contents of Accounts	U.S. Attorney's Office involved, on standing recusal list
91-5472	United States v. Giraldo	U.S. Attorney's Office involved, on standing recusal list
91-5473	United States v. Capasso	U.S. Attorney's Office involved, on standing recusal list
91-5475	NLRB v. Frazier	no specific recollection of why I recused
91-5479	United States v. Marguglio	U.S. Attorney's Office involved, on standing recusal list
91-5483, 91-5534	United States v. Latham	U.S. Attorney's Office involved, on standing recusal list
91-5484	United States v. Badaracco	U.S. Attorney's Office involved, on standing recusal list
91-5487	Lang v. HHS	U.S. Attorney's Office involved, on standing recusal list
91-5489	United States v. Crapps	U.S. Attorney's Office involved, on standing recusal list
91-5490	United States v. McCollum	U.S. Attorney's Office involved, on standing recusal list
91-5493	United States v. Fredericks	U.S. Attorney's Office involved, on standing recusal list
91-5499	Corbett v. Marsh	U.S. Attorney's Office involved, on standing recusal list
91-5505	United States v. Harriatt	U.S. Attorney's Office involved, on standing recusal list
91-5508	United States v. Adeyemi	U.S. Attorney's Office involved, on standing recusal list
91-5512	Martin v. Knox	U.S. Attorney's Office involved, on standing recusal list
91-5515	United States v. Hanley	U.S. Attorney's Office involved, on standing recusal list
91-5525	United States v. Heffernan	U.S. Attorney's Office involved, on standing recusal list
91-5525	United States v. Cardona	U.S. Attorney's Office involved, on standing recusal list
91-5529	Slaughter v. Cooksey	U.S. Attorney's Office involved, on standing recusal list
91-5537	United States v. Horan	U.S. Attorney's Office involved, on standing recusal list
91-5538	United States v. Chasmer	U.S. Attorney's Office involved, on standing recusal list
91-5539	United States v. Narvarte	U.S. Attorney's Office involved, on standing recusal list
91-5561	United States v. Yepes	U.S. Attorney's Office involved, on standing recusal list
91-5582	United States v. Steinmetz	U.S. Attorney's Office involved, on standing recusal list
91-5587	United States v. Zaino	U.S. Attorney's Office involved, on standing recusal list
91-5589	United States v. Uwaezhoke	U.S. Attorney's Office involved, on standing recusal list
91-5596	Peters v. United States	U.S. Attorney's Office involved, on standing recusal list
91-5610	United States v. Holguin	U.S. Attorney's Office involved, on standing recusal list
91-5611	United States v. Abdullah	U.S. Attorney's Office involved, on standing recusal list
91-5635	United States v. Wilson	U.S. Attorney's Office involved, on standing recusal list

91-5655	Detweiler v. DeMartin	no specific recollection of why I recused
91-5656	United States v. Monteiro	U.S. Attorney's Office involved, on standing recusal list
91-5659	Kosko v. U.S. Parole Comm'n	U.S. Attorney's Office involved, on standing recusal list
91-5661	Golden v. Marsh	U.S. Attorney's Office involved, on standing recusal list
91-5665	Rebimbas v. Sec'y HHS	U.S. Attorney's Office involved, on standing recusal list
91-5676	United States v. Cen-Card Agency CCAC	U.S. Attorney's Office involved, on standing recusal list
91-5683	United States v. Londono	U.S. Attorney's Office involved, on standing recusal list
91-5684	United States v. Nunez	U.S. Attorney's Office involved, on standing recusal list
91-5687	United States v. Lieberman	U.S. Attorney's Office involved, on standing recusal list
91-5697	United States v. Zuckerman	U.S. Attorney's Office involved, on standing recusal list
91-5703	United States v. Pollen	U.S. Attorney's Office involved, on standing recusal list
91-5717	United States v. Squitieri	U.S. Attorney's Office involved, on standing recusal list
91-5718	United States v. Parrish	U.S. Attorney's Office involved, on standing recusal list
91-5723	Contreras v. INS	U.S. Attorney's Office involved, on standing recusal list
91-5751	United States v. Collazo-Martinez	U.S. Attorney's Office involved, on standing recusal list
91-5752	Matulewicz v. United States	U.S. Attorney's Office involved, on standing recusal list
91-5754	Harter v. GAF Corp.	Carpenter Bennett & Morrissey involved, on standing recusal list
91-5755	United States v. Charles	U.S. Attorney's Office involved, on standing recusal list
91-5756	M & G Convoy, Inc. v. Auto. Mech. & Helpers	Carpenter Bennett & Morrissey involved, on standing recusal list
91-5758	United States v. Pontani	U.S. Attorney's Office involved, on standing recusal list
91-5772	United States v. DelViscovo	U.S. Attorney's Office involved, on standing recusal list
91-5784	United States v. Sierra	U.S. Attorney's Office involved, on standing recusal list
91-5788	United States v. Sardinha	U.S. Attorney's Office involved, on standing recusal list
91-5814	United States v. Hargrove	U.S. Attorney's Office involved, on standing recusal list
91-5815	United States v. Esposito	U.S. Attorney's Office involved, on standing recusal list
91-5828	United States v. Barco	U.S. Attorney's Office involved, on standing recusal list
91-5836	United States v. Khaliq	U.S. Attorney's Office involved, on standing recusal list
91-5839	Shaw v. Cooksey	U.S. Attorney's Office involved, on standing recusal list
91-5859	United States v. Gonzalez	U.S. Attorney's Office involved, on standing recusal list
91-5864	United States v. Victoriano	U.S. Attorney's Office involved, on standing recusal list
91-5876	Brooks v. Dep't of Law & Pub. Safety	U.S. Attorney's Office involved, on standing recusal list
91-5900	United States v. Doe	U.S. Attorney's Office involved, on standing recusal list
91-5901	United States v. Gomez-Salazar	U.S. Attorney's Office involved, on standing recusal list
91-5902	United States v. Belton	U.S. Attorney's Office involved, on standing recusal list
91-5903, 91-5920	United States v. Garrett	U.S. Attorney's Office involved, on standing recusal list
91-5904	United States v. Eisenfleder	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
91-5916, 91-5951	McDonnell v. United States	U.S. Attorney's Office involved, on standing recusal list
91-5929	United States v. Saniel	U.S. Attorney's Office involved, on standing recusal list
91-5935	Comm. Futures Trading v. Am. Metals Exch.	U.S. Attorney's Office involved, on standing recusal list

91-5936, 91-5986	Sassower v. Abrams	Mr. George Sassower involved, on standing recusal list
91-5940	United States v. Heffernan	U.S. Attorney's Office involved, on standing recusal list
91-5943	United States v. Meza	U.S. Attorney's Office involved, on standing recusal list
91-5949, 91-5950	United States v. Gatto	U.S. Attorney's Office involved, on standing recusal list
91-5952	United States v. Pontani	U.S. Attorney's Office involved, on standing recusal list
91-5987	United States v. Garcia	U.S. Attorney's Office involved, on standing recusal list
91-5989	United States v. Ayars	U.S. Attorney's Office involved, on standing recusal list
91-5995	United States v. Zuckerman	U.S. Attorney's Office involved, on standing recusal list
91-5996	Williams v. Sec'y HHS	U.S. Attorney's Office involved, on standing recusal list
91-6002	United States v. Ospina	U.S. Attorney's Office involved, on standing recusal list
91-6011	United States v. Huerta	U.S. Attorney's Office involved, on standing recusal list
91-6019	Ortiz-Colon v. United States	U.S. Attorney's Office involved, on standing recusal list
91-6026	United States v. Bruno	U.S. Attorney's Office involved, on standing recusal list
91-6027	United States v. Fousteris	U.S. Attorney's Office involved, on standing recusal list
91-6029	Williamson v. United States	U.S. Attorney's Office involved, on standing recusal list
91-6031	United States v. Jiovine	U.S. Attorney's Office involved, on standing recusal list
91-6035	Bryen v. Becker	U.S. Attorney's Office involved, on standing recusal list
91-6042	Wilson v. U.S. Parole Comm'n	U.S. Attorney's Office involved, on standing recusal list
91-6058	United States v. Spiropoulos	U.S. Attorney's Office involved, on standing recusal list
91-6060, 92-5058, 92-5059	United States v. Iafelice	U.S. Attorney's Office involved, on standing recusal list
92-1050	United States v. Garth	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1128	United States v. O'Malley	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1183	In re Paoli R.R. Yard PCB Litig.	no specific recollection of why I recused, but possible reason is General Electric's involvement
92-1287	United States v. Palmer	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1430	United States v. Brightful	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1473	United States v. Stevens	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1510	United States v. Butler	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1572	United States v. Diaz	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1585	United States v. Jacob-Sanchez	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1624	United States v. Kates	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1660	Donnelly v. United States	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement

92-1721, 92-2105	United States v. Bachman	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1748	United States v. Paulino	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1785, 92-1903	United States v. Jones	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1797	United States v. Lu	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1831	United States v. Rivera	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1862	United States v. Arbelaez	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1891	United States v. DiFlavis	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1911	United States v. Brown Univ.	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-1921	Williams v. U.S. Postal Serv.	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-2035	Hammond v. Creative Financial	The Clerk's Office lists this as one that involved my recusal, but the docket sheet does not indicate that I recused, and I have no specific recollection of considering recusal in this case.
92-2069	United States v. Disla	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-2072	United States v. Ford	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-2108	United States v. Siwinski	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
92-3718	Muris v. Lewis	I recused based on the involvement of Timothy Lewis
92-5000	United States v. Miscio	U.S. Attorney's Office involved, on standing recusal list
92-5010	United States v. Maldonado	U.S. Attorney's Office involved, on standing recusal list
92-5019	United States v. Reinhardt	U.S. Attorney's Office involved, on standing recusal list
92-5023	United States v. Surano	U.S. Attorney's Office involved, on standing recusal list
92-5025	Colbert v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5034	United States v. Grasso	U.S. Attorney's Office involved, on standing recusal list
92-5044	United States v. Yehuda	U.S. Attorney's Office involved, on standing recusal list
92-5045	United States v. Vasquez-Caro	U.S. Attorney's Office involved, on standing recusal list
92-5046	United States v. Flores	U.S. Attorney's Office involved, on standing recusal list
92-5061	Khaliq v. Durkin	U.S. Attorney's Office involved, on standing recusal list
92-5071	Mutual Benefit Life Ins. Co. v. Zimmerman	I recused based on a friendship with one of the attorneys.
92-5072	MacDaniels v. Sec'y HHS	U.S. Attorney's Office involved, on standing recusal list
92-5075	United States v. Veale	U.S. Attorney's Office involved, on standing recusal list
92-5081	Ruiz v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5082	Ortega v. United States	U.S. Attorney's Office involved , on standing recusal list
92-5085	Mutual Benefit Life v. Zimmerman	McCarter & English involved, on standing recusal list
92-5087	United States v. Kabba	U.S. Attorney's Office involved, on standing recusal list
92-5089	United States v. Rivero	U.S. Attorney's Office involved, on standing recusal list

92-5090	United States v. Florez	U.S. Attorney's Office involved, on standing recusal list
92-5091	United States v. Florez	U.S. Attorney's Office involved, on standing recusal list
92-5092	United States v. Muhammed	U.S. Attorney's Office involved, on standing recusal list
92-5094	United States v. Surano	U.S. Attorney's Office involved, on standing recusal list
92-5095	Elshinnawy v. Garrett	U.S. Attorney's Office involved, on standing recusal list
92-5098	Becker v. Sherwin-Williams	U.S. Attorney's Office involved, on standing recusal list
92-5099	United States v. Varga	U.S. Attorney's Office involved, on standing recusal list
92-5102	Smith v. Frank	U.S. Attorney's Office involved, on standing recusal list
92-5105	United States v. Santtini	U.S. Attorney's Office involved, on standing recusal list
92-5106	United States v. Santtini	U.S. Attorney's Office involved, on standing recusal list
92-5107	United States v. Williams	U.S. Attorney's Office involved, on standing recusal list
92-5110	United States v. McPherson	U.S. Attorney's Office involved, on standing recusal list
92-5113	Riek v. Wood	U.S. Attorney's Office involved, on standing recusal list
92-5119	Gonzalez v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5126	United States v. Abdul-Hamid	U.S. Attorney's Office involved, on standing recusal list
92-5127	United States v. Atkinson	U.S. Attorney's Office involved, on standing recusal list
92-5135	United States v. Peterson	U.S. Attorney's Office involved, on standing recusal list
92-5136	United States v. McCollum	U.S. Attorney's Office involved, on standing recusal list
92-5141	United States v. Gore	U.S. Attorney's Office involved, on standing recusal list
92-5142	United States v. Cardounel	U.S. Attorney's Office involved, on standing recusal list
92-5150	United States v. Spagnoli	U.S. Attorney's Office involved, on standing recusal list
92-5153	EEOC v. Blue Diamond Growers	U.S. Attorney's Office involved, on standing recusal list
92-5158	United States v. Riggi	U.S. Attorney's Office involved, on standing recusal list
92-5182	United States v. Bertoli	U.S. Attorney's Office involved, on standing recusal list
92-5183	United States v. Khan	U.S. Attorney's Office involved, on standing recusal list
92-5184	United States v. Vera	U.S. Attorney's Office involved, on standing recusal list
92-5198	Thomas v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5199	United States v. Makhoul	U.S. Attorney's Office involved, on standing recusal list
92-5209	United States v. Zirpoli	U.S. Attorney's Office involved, on standing recusal list
92-5210	United States v. Taveras	U.S. Attorney's Office involved, on standing recusal list
92-5214	United States v. Nunez	U.S. Attorney's Office involved, on standing recusal list
92-5215	United States v. Dellisanti	U.S. Attorney's Office involved, on standing recusal list
92-5216	United States v. Parlavecchio	U.S. Attorney's Office involved, on standing recusal list
92-5220	Becker v. Sherwin-Williams	U.S. Attorney's Office involved, on standing recusal list
92-5226	United States v. Parlavecchio	U.S. Attorney's Office involved, on standing recusal list
92-5231	Smith v. Eggenberger	U.S. Attorney's Office involved, on standing recusal list
92-5234	United States v. Giaquinto	U.S. Attorney's Office involved, on standing recusal list
92-5235	United States v. Assante	U.S. Attorney's Office involved, on standing recusal list
92-5236	United States v. Harmon	U.S. Attorney's Office involved, on standing recusal list
92-5237	United States v. Malik	U.S. Attorney's Office involved, on standing recusal list
92-5244	United States v. Cariffe	U.S. Attorney's Office involved, on standing recusal list
92-5250	United States v. Maniscalo	U.S. Attorney's Office involved, on standing recusal list
92-5251	United States v. Cuomo	U.S. Attorney's Office involved, on standing recusal list
92-5252	United States v. Hall	U.S. Attorney's Office involved, on standing recusal list
92-5253	United States v. Danzey	U.S. Attorney's Office involved, on standing recusal list
92-5254	Malfatto v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5258	Hartford Associates v. United States	U.S. Attorney's Office involved, on standing recusal list

92-5259	United States v. Ezeihuaku	U.S. Attorney's Office involved, on standing recusal list
92-5260	United States v. Wright	U.S. Attorney's Office involved, on standing recusal list
92-5261	United States v. Payano	U.S. Attorney's Office involved, on standing recusal list
92-5262	United States v. Nwachia	U.S. Attorney's Office involved, on standing recusal list
92-5268	United States v. Solis	U.S. Attorney's Office involved, on standing recusal list
92-5269	United States v. Anthony	U.S. Attorney's Office involved, on standing recusal list
92-5270	United States v. Aliagha	U.S. Attorney's Office involved, on standing recusal list
92-5272	United States v. Patel	U.S. Attorney's Office involved, on standing recusal list
92-5278	United States v. Pollard	U.S. Attorney's Office involved, on standing recusal list
92-5280	Sansano v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
92-5286	United States v. Giovinazzo	U.S. Attorney's Office involved, on standing recusal list
92-5292	Peoples v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
92-5295	United States v. Cammareri	U.S. Attorney's Office involved, on standing recusal list
92-5304	United States v. Mayles	U.S. Attorney's Office involved, on standing recusal list
92-5312	United States v. Benedetto	U.S. Attorney's Office involved, on standing recusal list
92-5313	United States v. Hock	U.S. Attorney's Office involved, on standing recusal list
92-5321	Upper v. US Government	U.S. Attorney's Office involved, on standing recusal list
92-5323	United States v. Xhudo	U.S. Attorney's Office involved, on standing recusal list
92-5326	United States v. Barco	U.S. Attorney's Office involved, on standing recusal list
92-5329	United States v. Ambrutis	U.S. Attorney's Office involved, on standing recusal list
92-5330	United States v. Calvert	U.S. Attorney's Office involved, on standing recusal list
92-5332	Adeniji v. FDIC	U.S. Attorney's Office involved, on standing recusal list
92-5333	Adeniji v. Social Security Admin	U.S. Attorney's Office involved, on standing recusal list
92-5537	United States v. Vermandere	U.S. Attorney's Office involved, on standing recusal list
92-5362	United States v. Plaza	U.S. Attorney's Office involved, on standing recusal list
92-5365	United States v. Lustig	U.S. Attorney's Office involved, on standing recusal list
92-5373	United States v. Bober	U.S. Attorney's Office involved, on standing recusal list
92-5374	United States v. Polanco	U.S. Attorney's Office involved, on standing recusal list
92-5379	United States v. Hill	U.S. Attorney's Office involved, on standing recusal list
92-5380	United States v. Hill	U.S. Attorney's Office involved, on standing recusal list
92-5383	United States v. Schonewolf	U.S. Attorney's Office involved, on standing recusal list
92-5385	United States v. Montecino	U.S. Attorney's Office involved, on standing recusal list
92-5386	Wall v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5387	Candeliere v. HUD	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
92-5388	Galinkin v. IRS	U.S. Attorney's Office involved, on standing recusal list
92-5395	Mason v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
92-5400	Cano v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5402	United States v. Sanchez	U.S. Attorney's Office involved, on standing recusal list
92-5403	United States v. Sanchez	U.S. Attorney's Office involved, on standing recusal list
92-5404	United States v. Williams	U.S. Attorney's Office involved, on standing recusal list
92-5406	United States v. Johnson	U.S. Attorney's Office involved, on standing recusal list
92-5410	Toussaint v. IRS	U.S. Attorney's Office involved, on standing recusal list
92-5411	United States v. Kemenash	U.S. Attorney's Office involved, on standing recusal list
92-5419	United States v. West	U.S. Attorney's Office involved, on standing recusal list
92-5420	United States v. Matthews	U.S. Attorney's Office involved, on standing recusal list

92-5421	United States v. Dickson	U.S. Attorney's Office involved, on standing recusal list
92-5422	United States v. Cherry	U.S. Attorney's Office involved, on standing recusal list
92-5423	United States v. Hardy	U.S. Attorney's Office involved, on standing recusal list
92-5424	Smith v. Postmaster General	U.S. Attorney's Office involved, on standing recusal list
92-5426	Womack v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5430	Ind. Hwy Corp v. Danielson	U.S. Attorney's Office involved, on standing recusal list
92-5437	United States v. Cannistraro	U.S. Attorney's Office involved, on standing recusal list
92-5442	Marchand v. Plainfield	U.S. Attorney's Office involved, on standing recusal list
92-5443	United States v. Ortiz	U.S. Attorney's Office involved, on standing recusal list
92-5448	Walls v. Fed Bureau Prisons	U.S. Attorney's Office involved, on standing recusal list
92-5448	In re Grand Jury	U.S. Attorney's Office involved, on standing recusal list
92-5452	United States v. Guerra	U.S. Attorney's Office involved, on standing recusal list
92-5453	United States v. Saka	U.S. Attorney's Office involved, on standing recusal list
92-5455	Adeniji v. FDIC	U.S. Attorney's Office involved, on standing recusal list
92-5457	Guinane v. US Postal Service	U.S. Attorney's Office involved, on standing recusal list
92-5459	Geter v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5460	Williams-Moore v. Postmaster General	U.S. Attorney's Office involved, on standing recusal list
92-5461	United States v. LeCarreaux	U.S. Attorney's Office involved, on standing recusal list
92-5464	Barlow v. HUD	U.S. Attorney's Office involved, on standing recusal list
92-5467	Thakkar v. Debevoise	U.S. Attorney's Office involved, on standing recusal list
92-5475	Martello v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5486	United States v. Calderon	U.S. Attorney's Office involved, on standing recusal list
92-5491	Rinier v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5495	United States v. Walker	U.S. Attorney's Office involved, on standing recusal list
92-5498	United States v. Charles	U.S. Attorney's Office involved, on standing recusal list
92-5499	United States v. Poh	U.S. Attorney's Office involved, on standing recusal list
92-5500	United States v. Tran	U.S. Attorney's Office involved, on standing recusal list
92-5502	United States v. Londono	U.S. Attorney's Office involved, on standing recusal list
92-5503	United States v. Hagmaier	U.S. Attorney's Office involved, on standing recusal list
92-5504	United States v. Hagmaier	U.S. Attorney's Office involved, on standing recusal list
92-5505	United States v. Roman	U.S. Attorney's Office involved, on standing recusal list
92-5507	United States v. Console	U.S. Attorney's Office involved, on standing recusal list
92-5511	United States v. Markoff	U.S. Attorney's Office involved, on standing recusal list
92-5514	United States v. Cicco	U.S. Attorney's Office involved, on standing recusal list
92-5515	United States v. Tabbachino	U.S. Attorney's Office involved, on standing recusal list
92-5518	United States v. Fedor	U.S. Attorney's Office involved, on standing recusal list
92-5519	United States v. Jordan	U.S. Attorney's Office involved, on standing recusal list
92-5520	United States v. Loughney	U.S. Attorney's Office involved, on standing recusal list
92-5521	United States v. Loughney	U.S. Attorney's Office involved, on standing recusal list
92-5542	United States v. Anthony	U.S. Attorney's Office involved, on standing recusal list
92-5547	United States v. Dass	U.S. Attorney's Office involved, on standing recusal list
92-5548	United States v. Jackson	U.S. Attorney's Office involved, on standing recusal list
92-5549	United States v. Petrucci	U.S. Attorney's Office involved, on standing recusal list
92-5550	United States v. Ekwegh	U.S. Attorney's Office involved, on standing recusal list
92-5555	United States v. Curcio	U.S. Attorney's Office involved, on standing recusal list
92-5560	United States v. Pardo	U.S. Attorney's Office involved, on standing recusal list

92-5561	In re Atlantic Bus	U.S. Attorney's Office involved, on standing recusal list
92-5568	United States v. Keeley	U.S. Attorney's Office involved, on standing recusal list
92-5569	United States v. Collins	U.S. Attorney's Office involved, on standing recusal list
92-5570	United States v. Wong	U.S. Attorney's Office involved, on standing recusal list
92-5571	United States v. Davis	U.S. Attorney's Office involved, on standing recusal list
92-5575	United States v. Bogusz	U.S. Attorney's Office involved, on standing recusal list
92-5576	United States v. Caterini	U.S. Attorney's Office involved, on standing recusal list
92-5585	United States v. Davis	U.S. Attorney's Office involved, on standing recusal list
92-5588	United States v. Gatskill	U.S. Attorney's Office involved, on standing recusal list
92-5589	United States v. Londono	U.S. Attorney's Office involved, on standing recusal list
92-5591	United States v. Keith	U.S. Attorney's Office involved, on standing recusal list
92-5592	Frontier Pilots v. Texas Air Corp	McCarter & English involved, on standing recusal list
92-5593	United States v. Hollenback	U.S. Attorney's Office involved, on standing recusal list
92-5595	United States v. O'Rourke	U.S. Attorney's Office involved, on standing recusal list
92-5600	United States v. Pacheco	U.S. Attorney's Office involved, on standing recusal list
92-5606	United States v. Tamakloe	U.S. Attorney's Office involved, on standing recusal list
92-5609	United States v. Jackson	U.S. Attorney's Office involved, on standing recusal list
92-5612	United States v. Mantilla	U.S. Attorney's Office involved, on standing recusal list
92-5613	United States v. Natera	U.S. Attorney's Office involved, on standing recusal list
92-5614	United States v. Rosario	U.S. Attorney's Office involved, on standing recusal list
92-5615	United States v. Ryan	U.S. Attorney's Office involved, on standing recusal list
92-5617	United States v. Jones	U.S. Attorney's Office involved, on standing recusal list
92-5621	United States v. 102 Harcourt Ave	U.S. Attorney's Office involved, on standing recusal list
92-5625	United States v. Danon	U.S. Attorney's Office involved, on standing recusal list
92-5626	United States v. Mittenberg	U.S. Attorney's Office involved, on standing recusal list
92-5627	United States v. Maldonado	U.S. Attorney's Office involved, on standing recusal list
92-5636	Transtech Ind Inc v. A&Z Septic Clean	Vanguard Ventron Chemical involved, based on standing recusal list
92-5639	United States v. De Grandis	U.S. Attorney's Office involved, on standing recusal list
92-5643	United States v. Colina	U.S. Attorney's Office involved, on standing recusal list
92-5644	United States v. Grant	U.S. Attorney's Office involved, on standing recusal list
92-5654	United States v. Rodriguez	U.S. Attorney's Office involved, on standing recusal list
92-5656	United States v. Hardy	U.S. Attorney's Office involved, on standing recusal list
92-5659	United States v. Hutyrczyk	U.S. Attorney's Office involved, on standing recusal list
92-5663	Smith v. Eggenberger	U.S. Attorney's Office involved, on standing recusal list
92-5664	Canadilla v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5665	United States v. Barber	U.S. Attorney's Office involved, on standing recusal list
92-5672	United States v. Brower	U.S. Attorney's Office involved, on standing recusal list
92-5673	United States v. Nwizuzu	U.S. Attorney's Office involved, on standing recusal list
92-5674	United States v. Ukpai	U.S. Attorney's Office involved, on standing recusal list
92-5675	United States v. Williams	U.S. Attorney's Office involved, on standing recusal list
92-5679	Hammond v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5683	United States v. Bieregu	U.S. Attorney's Office involved, on standing recusal list
92-5684	United States v. Sullivan	U.S. Attorney's Office involved, on standing recusal list
92-5685	United States v. Sanz	U.S. Attorney's Office involved, on standing recusal list
92-5686	United States v. Seale	U.S. Attorney's Office involved, on standing recusal list
92- 5687	United States v. A Parcel of Land	U.S. Attorney's Office involved, on standing recusal list

92-5692	United States v. Zscheigner	U.S. Attorney's Office involved, on standing recusal list
92-5695	Schoonejongen v. Curtiss Wright Corp	Carpenter Bennett & Morrissey involved, on standing recusal list
92-5700	Lynch v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5703	United States v. $17,830.00	U.S. Attorney's Office involved, on standing recusal list
92-5705	United States v. Eighteen Units	U.S. Attorney's Office involved, on standing recusal list
92-5706	United States v. Acevedo	U.S. Attorney's Office involved, on standing recusal list
92-5708	United States v. Ortiz-Linares	U.S. Attorney's Office involved, on standing recusal list
92-5709	Clarken v. United States	U.S. Attorney's Office involved, on standing recusal list
92-5710	Schoonejonger v. Curtiss Wright Corp	Carpenter Bennett & Morrissey involved, on standing recusal list
92-5711	United States v. Newby	U.S. Attorney's Office involved, on standing recusal list
92-5712	United States v. Barber	U.S. Attorney's Office involved, on standing recusal list
92-5713	United States v. Schweitzer	U.S. Attorney's Office involved, on standing recusal list
92-5714	United States v. Olowe	U.S. Attorney's Office involved, on standing recusal list
92-5715	Berkeley Fed Sav v. Laurano	U.S. Attorney's Office involved, on standing recusal list
92-5718	United States v. Pollen	U.S. Attorney's Office involved, on standing recusal list
92-5726	Peak v. United States	U.S. Attorney's Office involved, on standing recusal list
92-7362	Lorenzo v. United States	U.S. Attorney's Office involved, on standing recusal list
92-7377	United States v. Netelkos	U.S. Attorney's Office involved, on standing recusal list
92-7395, 92-7396, 92-7397, 92-7398, 92-7399, 92-7400, 92-7410, 92-7411, 92-7412, 92-7413, 92-7414, 92-7415, 92-7435, 92-7436, 92-7499, 92-7500	In re Columbia Gas	I recused based on a friendship with one of the attorneys.
93-1015	United States v. Quinones	U.S. Attorney's Office involved, on standing recusal list
93-1053	United States v. Williams	U.S. Attorney's Office involved, on standing recusal list
93-1068	United States v. Lacastro	U.S. Attorney's Office involved, on standing recusal list
93-1126	United States v. Davis	U.S. Attorney's Office involved, on standing recusal list
93-1192	United States v. Rienzi	U.S. Attorney's Office involved, on standing recusal list
93-1193	Melo v. Hafer	U.S. Attorney's Office involved, on standing recusal list
93-1261	United States v. Pellulo	U.S. Attorney's Office involved, on standing recusal list
93-1313	United States v. Fugarino	U.S. Attorney's Office involved, on standing recusal list
93-1322	United States v. Turcks	U.S. Attorney's Office involved, on standing recusal list
93-1329	United States v. Kramm	U.S. Attorney's Office involved, on standing recusal list
93-1401	United States v. Chen	U.S. Attorney's Office involved, on standing recusal list

93-1411	United States v. Salcedo	U.S. Attorney's Office involved, on standing recusal list
93-1444	United States v. Curran	U.S. Attorney's Office involved, on standing recusal list
93-1489	United States v. Pyzik	U.S. Attorney's Office involved, on standing recusal list
93-1646	United States v. Martinson	U.S. Attorney's Office involved, on standing recusal list
93-1681	United States v. Shuster	U.S. Attorney's Office involved, on standing recusal list
93-1692	United States v. Soto	U.S. Attorney's Office involved, on standing recusal list
93-1802	United States v. Smith	U.S. Attorney's Office involved, on standing recusal list
93-1909	United States v. Lopez	U.S. Attorney's Office involved, on standing recusal list
93-1941	United States v. Ortiz	U.S. Attorney's Office involved, on standing recusal list
93-1966	United States v. Gaskins	U.S. Attorney's Office involved, on standing recusal list
93-2052	United States v. Ramos	U.S. Attorney's Office involved, on standing recusal list
93-2054	United States v. Alverty	U.S. Attorney's Office involved, on standing recusal list
93-2073	United States v. Cope	U.S. Attorney's Office involved, on standing recusal list
93-2085	United States v. Ramos	U.S. Attorney's Office involved, on standing recusal list
93-2086	United States v. Corrado	U.S. Attorney's Office involved, on standing recusal list
93-2147	United States v. Johnson	U.S. Attorney's Office involved, on standing recusal list
93-5000	United States v. Blair	U.S. Attorney's Office involved, on standing recusal list
93-5001	United States v. Bethea	U.S. Attorney's Office involved, on standing recusal list
93-5002	United States v. Perez	U.S. Attorney's Office involved, on standing recusal list
93-5003	United States v. Sherman	U.S. Attorney's Office involved, on standing recusal list
93-5004	United States v. Silverman	U.S. Attorney's Office involved, on standing recusal list
93-5005	United States v. Silverman	U.S. Attorney's Office involved, on standing recusal list
93-5020	Mitek v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
93-5022	United States v. Mohmoud	U.S. Attorney's Office involved, on standing recusal list
93-5025	Reo v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5026	Gonzalez v. Cooksey	U.S. Attorney's Office involved, on standing recusal list
93-5027	United States v. Scott	U.S. Attorney's Office involved, on standing recusal list
93-5031	Ferriol v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5039	United States v. Ahamefule	U.S. Attorney's Office involved, on standing recusal list
93-5041	United States v. Contorno	U.S. Attorney's Office involved, on standing recusal list
93-5044	United States v. Gaudenzi	U.S. Attorney's Office involved, on standing recusal list
93-5046	United States v. McCann	U.S. Attorney's Office involved, on standing recusal list
93-5047	Benjamin v. Frank	U.S. Attorney's Office involved, on standing recusal list
93-5049	United States v. Winters	U.S. Attorney's Office involved, on standing recusal list
93-5055	United States v. Rudnick	U.S. Attorney's Office involved, on standing recusal list
93-5057	United States v. Mayles	U.S. Attorney's Office involved, on standing recusal list
93-5059	United States v. Parrish	U.S. Attorney's Office involved, on standing recusal list
93-5061	State of New Jersey v. Shanklin	U.S. Attorney's Office involved, on standing recusal list
93-5064	United States v. Cannistraro	U.S. Attorney's Office involved, on standing recusal list
93-5065	Tillman v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5067	Bishy v. FBI	U.S. Attorney's Office involved, on standing recusal list
93-5069	United States v. Seale	U.S. Attorney's Office involved, on standing recusal list
93-5073	United States v. Young	U.S. Attorney's Office involved, on standing recusal list
93-5074	United States v. Walton	U.S. Attorney's Office involved, on standing recusal list

93-5075	United States v. Scott	U.S. Attorney's Office involved, on standing recusal list
93-5076	United States v. Cooper	U.S. Attorney's Office involved, on standing recusal list
93-5077	United States v. Cooper	U.S. Attorney's Office involved, on standing recusal list
93-5082	Gomez-Salazar v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5099	United States v. Oliva	U.S. Attorney's Office involved, on standing recusal list
93-5102	Hammond v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5104	United States v. Pardo	U.S. Attorney's Office involved, on standing recusal list
93-5111	State of New Jersey v. Baldwin	U.S. Attorney's Office involved, on standing recusal list
93-5112	Wynn v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5113	United States v. Bautista-Ramirez	U.S. Attorney's Office involved, on standing recusal list
93-5114	United States v. Dietsch	U.S. Attorney's Office involved, on standing recusal list
93-5115	United States v. Cooper	U.S. Attorney's Office involved, on standing recusal list
93-5116	United States v. Cooper	U.S. Attorney's Office involved, on standing recusal list
93-5117	United States v. Hightower	U.S. Attorney's Office involved, on standing recusal list
93-5127	Mates v. OSHA	U.S. Attorney's Office involved, on standing recusal list
93-5134	United States v. Palmieri	U.S. Attorney's Office involved, on standing recusal list
93-5140	Zuckerman v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5142	United States v. Cooper	U.S. Attorney's Office involved, on standing recusal list
93-5143	United States v. Cooper	U.S. Attorney's Office involved, on standing recusal list
93-5156	Kirby v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5157	Ortiz-Colon v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5162	Lopez v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5168	United States v. Ortiz	U.S. Attorney's Office involved, on standing recusal list
93-5170	United States v. Taylor	U.S. Attorney's Office involved, on standing recusal list
93-5171	United States v. Ricks	U.S. Attorney's Office involved, on standing recusal list
93-5172	United States v. Jemal	U.S. Attorney's Office involved, on standing recusal list
93-5173	Cooper v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5175	United States v. Payne	U.S. Attorney's Office involved, on standing recusal list
93-5176	United States v. Rodruiguez	U.S. Attorney's Office involved, on standing recusal list
93-5179	United States v. Lavoie	U.S. Attorney's Office involved, on standing recusal list
93-5180	United States v. Walsh	U.S. Attorney's Office involved, on standing recusal list
93-5183	United States v. Freeman	U.S. Attorney's Office involved, on standing recusal list
93-5188	Edmond v. Commander	U.S. Attorney's Office involved, on standing recusal list
93-5191	Esposito v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
93-5192	Tucci v. United States Dept Veterans	U.S. Attorney's Office involved, on standing recusal list
93-5200	United States v. Olu	U.S. Attorney's Office involved, on standing recusal list
93-5204	United States v. Cohen	U.S. Attorney's Office involved, on standing recusal list
93-5222	Crapps v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5228	United States v. Mayles	U.S. Attorney's Office involved, on standing recusal list
93-5237	United States v. Welbeck	U.S. Attorney's Office involved, on standing recusal list
93-5238	United States v. Lipari	U.S. Attorney's Office involved, on standing recusal list
93-5240	United States v. Freeman	U.S. Attorney's Office involved, on standing recusal list
93-5244	Edmond v. Commander	U.S. Attorney's Office involved, on standing recusal list
93-5246	United States v. Ortiz	U.S. Attorney's Office involved, on standing recusal list
93-9247	United States v. Marin	U.S. Attorney's Office involved, on standing recusal list
93-5252	United States v. Princeton Gamma Tech	U.S. Attorney's Office involved, on standing recusal list

93-5258	United States v. Forsyth	U.S. Attorney's Office involved, on standing recusal list
93-5261	United States v. Monaco	U.S. Attorney's Office involved, on standing recusal list
93-5266	United States v. Carrizales	U.S. Attorney's Office involved, on standing recusal list
93-5267	United States v. Santtini	U.S. Attorney's Office involved, on standing recusal list
93-5268	United States v. Holquin-Hernandez	U.S. Attorney's Office involved, on standing recusal list
93-5269	United States v. Van't Slot	U.S. Attorney's Office involved, on standing recusal list
92-5273	Ospina v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5276	United States v. Koufogainnakis	U.S. Attorney's Office involved, on standing recusal list
93-5278	United States v. Ramirez	U.S. Attorney's Office involved, on standing recusal list
93-5287	United States v. Richardson	U.S. Attorney's Office involved, on standing recusal list
93-5300	United States v. Pica	U.S. Attorney's Office involved, on standing recusal list
93-5310	Mates v. OSHA	U.S. Attorney's Office involved, on standing recusal list
93-5311	Merzeau v. US Dept of Justice	U.S. Attorney's Office involved, on standing recusal list
93-5320	Dorsey v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
93-5325	United States v. Eick	U.S. Attorney's Office involved, on standing recusal list
93-5236	United States v. $196,601.00	U.S. Attorney's Office involved, on standing recusal list
93-5327	Londono v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5329	FDIC v. Bathgate	U.S. Attorney's Office involved, on standing recusal list
93-5331	United States v. Pardo	U.S. Attorney's Office involved, on standing recusal list
93-5333	United States v. Murphy	U.S. Attorney's Office involved, on standing recusal list
93-5334	United States v. Ahmadi	U.S. Attorney's Office involved, on standing recusal list
93-5335	United States v. Jackson	U.S. Attorney's Office involved, on standing recusal list
93-5336	Colont v. Dept Veteran Affairs	U.S. Attorney's Office involved, on standing recusal list
93-5337	United States v. Richmond	U.S. Attorney's Office involved, on standing recusal list
93-5343	United States v. Appiah	U.S. Attorney's Office involved, on standing recusal list
93-5344	United States v. Akech	U.S. Attorney's Office involved, on standing recusal list
93-5345	Watters v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
93-5346	Apostoledes v. Cooksey	U.S. Attorney's Office involved, on standing recusal list
93-5348	Trembley v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
93-5349	Davis v. Brennan	U.S. Attorney's Office involved, on standing recusal list
93-5351	Chalmers v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
93-5352	United States v. Crudup	U.S. Attorney's Office involved, on standing recusal list
93-5353	United States v. Onibe	U.S. Attorney's Office involved, on standing recusal list
93-5354	United States v. Crump	U.S. Attorney's Office involved, on standing recusal list
93-5357	United States v. Anthony	U.S. Attorney's Office involved, on standing recusal list
93-5358	United States v. Degortari	U.S. Attorney's Office involved, on standing recusal list
93-5359	United States v. Hernandez	U.S. Attorney's Office involved, on standing recusal list
93-5360	United States v. Rodriguez	U.S. Attorney's Office involved, on standing recusal list
93-5361	United States v. Davis	U.S. Attorney's Office involved, on standing recusal list
93-5262	United States v. Deak	U.S. Attorney's Office involved, on standing recusal list
93-5365	Maldonado v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5366	Armament Eng Company v. US Army Armament	U.S. Attorney's Office involved, on standing recusal list
93-5369	United States v. Mayles	U.S. Attorney's Office involved, on standing recusal list
93-5370	United States v. Mayles	U.S. Attorney's Office involved, on standing recusal list
93-5373	McKnight v. Cooksey	U.S. Attorney's Office involved, on standing recusal list
93-5374	United States v. Santamaria	U.S. Attorney's Office involved, on standing recusal list

93-5375	United States v. Zotos	U.S. Attorney's Office involved, on standing recusal list
93-5379	United States v. Verpent	U.S. Attorney's Office involved, on standing recusal list
93-5384	United States v. Jackson	U.S. Attorney's Office involved, on standing recusal list
93-5390	United States v. Robinson	U.S. Attorney's Office involved, on standing recusal list
93-5391	Thakkar v. Debevoise	U.S. Attorney's Office involved, on standing recusal list
93-5392	Smith v. Eggenberger	U.S. Attorney's Office involved, on standing recusal list
93-5396	United States v. Bryant	U.S. Attorney's Office involved, on standing recusal list
93-5398	United States v. Staples	U.S. Attorney's Office involved, on standing recusal list
93-5399	United States v. Menon	U.S. Attorney's Office involved, on standing recusal list
93-5401	Noble v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5404	Blue v. Edmiston	U.S. Attorney's Office involved, on standing recusal list
93-5406	In re East Wind Ind	U.S. Attorney's Office involved, on standing recusal list
93-5408	United States v. Gaona	U.S. Attorney's Office involved, on standing recusal list
93-5409	United States v. Rosa	U.S. Attorney's Office involved, on standing recusal list
93-5414	Instructional Sys v. Computer Curriculum	McCarter & English involved, on standing recusal list
93-5420	United States v. Goldstein	U.S. Attorney's Office involved, on standing recusal list
93-5421	United States v. Westerman	U.S. Attorney's Office involved, on standing recusal list
93-5422	United States v. Gilsenan	U.S. Attorney's Office involved, on standing recusal list
93-5423	United States v. Cantillo	U.S. Attorney's Office involved, on standing recusal list
93-5424	United States v. Worth	U.S. Attorney's Office involved, on standing recusal list
93-5428	United States v. Tamayo	U.S. Attorney's Office involved, on standing recusal list
93-5434	Elshinnawy v. Secretary of Navy	U.S. Attorney's Office involved, on standing recusal list
93-5435	United States v. Cantillo	U.S. Attorney's Office involved, on standing recusal list
93-5436	United States v. Damon	U.S. Attorney's Office involved, on standing recusal list
93-5437	United States v. Tucker	U.S. Attorney's Office involved, on standing recusal list
93-5438	United States v. Sultan	U.S. Attorney's Office involved, on standing recusal list
93-5439	United States v. Sheikh	U.S. Attorney's Office involved, on standing recusal list
93-5440	United States v. Valesquez	U.S. Attorney's Office involved, on standing recusal list
93-5450	United States v. Berry	U.S. Attorney's Office involved, on standing recusal list
93-5457	Atkin v. EEOC	U.S. Attorney's Office involved, on standing recusal list
93-5463	George v. Cooksey	U.S. Attorney's Office involved, on standing recusal list
93-5466	Gray v. Cooksey	U.S. Attorney's Office involved, on standing recusal list
93-5467	United States v. Robinson	U.S. Attorney's Office involved, on standing recusal list
93-5468	United States v. Ragin	U.S. Attorney's Office involved, on standing recusal list
93-5469	United States v. Rivera	U.S. Attorney's Office involved, on standing recusal list
93-5470	United States v. Torres	U.S. Attorney's Office involved, on standing recusal list
93-5471	United States v. Carvajal	U.S. Attorney's Office involved, on standing recusal list
93-5472	United States v. Bonilla	U.S. Attorney's Office involved, on standing recusal list
93-5473	United States v. Torres Pelaez	U.S. Attorney's Office involved, on standing recusal list
93-5474	United States v. Cardona Osorio	U.S. Attorney's Office involved, on standing recusal list
93-5475	United States v. Ramirez	U.S. Attorney's Office involved, on standing recusal list
93-5479	United States v. Haywood	U.S. Attorney's Office involved, on standing recusal list
93-5480	Adams v. Trustees NJ Brewery	Rosemary Alito involved, on standing recusal list
93-5483	United States v. Harper	U.S. Attorney's Office involved, on standing recusal list
93-5486	United States v. Jones	U.S. Attorney's Office involved, on standing recusal list
93-5489	United States v. Colvin	U.S. Attorney's Office involved, on standing recusal list

93-5490	Instructional Sys v. Computer Curriculum	McCarter & English involved, on standing recusal list
93-5491	United States v. Ludiver	U.S. Attorney's Office involved, on standing recusal list
93-5492	United States v. White	U.S. Attorney's Office involved, on standing recusal list
93-5496	Germaine v. Cooksey	U.S. Attorney's Office involved, on standing recusal list
93-5499	Elliott v. US Parole Comm	U.S. Attorney's Office involved, on standing recusal list
93-5503	United States v. Bloom	U.S. Attorney's Office involved, on standing recusal list
93-5507	FDIC v. Bathgate	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
93-5508	Mates v. OSHA	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
93-5511	United States v. Bertoli	U.S. Attorney's Office involved, on standing recusal list
93-5512	United States v. Odumosu	U.S. Attorney's Office involved, on standing recusal list
93-5514	United States v. Shea	U.S. Attorney's Office involved, on standing recusal list
93-5517	United States v. Heller	U.S. Attorney's Office involved, on standing recusal list
93-5518	Montecino v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5519	Gaydos v. Politan	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
93-5520	United States v. Cannistraro	U.S. Attorney's Office involved, on standing recusal list
93-5526	Harris v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
93-5529	United States v. Vastola	U.S. Attorney's Office involved, on standing recusal list
93-5535	Netelkos v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5537	Balog v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
93-5538	Dia Navigation Co v. Pomeroy	U.S. Attorney's Office involved, on standing recusal list
93-5539	United States v. Rochester	U.S. Attorney's Office involved, on standing recusal list
93-5540	EEOC v. ITT Avionics Div	Rosemary Alito involved, on standing recusal list
93-5545	United States v. Khan	U.S. Attorney's Office involved, on standing recusal list
93-5548	Atkin v. Kemp	U.S. Attorney's Office involved, on standing recusal list
93-5549	United States v. Sanns	U.S. Attorney's Office involved, on standing recusal list
93-5550	United States v. White	U.S. Attorney's Office involved, on standing recusal list
93-5551	United States v. Bloom	U.S. Attorney's Office involved, on standing recusal list
93-5555	Gile v. Optical Radiation	McCarter & English involved, on standing recusal list
93-5559	Presbytery of NJ v. Florio	I recused based on my relationship with Robert J. Del Tufo, one of the named parties, with whom I had worked closely in the U.S. Attorney's Office.
93-5564	Schoonejongen v. Curtiss Wright Corp	Carpenter, Bennett & Morrissey involved, on standing recusal list
93-5568	Morgan v. Cooksey	U.S. Attorney's Office involved, on standing recusal list
93-5569	NJ Dept Env Prot v. Long Island Power	U.S. Attorney's Office involved, on standing recusal list
93-5572	FDIC v. Bathgate	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.

93-5573	Gaydos v. Chertoff	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
93-5574	United States v. Rivera	U.S. Attorney's Office involved, on standing recusal list
93-5578	United States v. Raven	U.S. Attorney's Office involved, on standing recusal list
93-5583	United States v. Colletti	U.S. Attorney's Office involved, on standing recusal list
93-5592	United States v. Klepacki	U.S. Attorney's Office involved, on standing recusal list
93-5593	United States v. Mayles	U.S. Attorney's Office involved, on standing recusal list
93-5594	United States v. Martin	U.S. Attorney's Office involved, on standing recusal list
93-5597	United States v. Conde	U.S. Attorney's Office involved, on standing recusal list
93-5598	United States v. Rodriguez	U.S. Attorney's Office involved, on standing recusal list
93-5599	Nagy v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
93-5609	Atkin v. EEOC	U.S. Attorney's Office involved, on standing recusal list
93-5610	Al-Qawee v. Cooksey	U.S. Attorney's Office involved, on standing recusal list
93-5613	NJ Dept Env Prot v. Long Island Power	U.S. Attorney's Office involved, on standing recusal list
93-5615	United States v. Brooks	U.S. Attorney's Office involved, on standing recusal list
93-5621	United States v. Earp	U.S. Attorney's Office involved, on standing recusal list
93-5629	Aliagha v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5630	Marchand v. Plainfield	U.S. Attorney's Office involved, on standing recusal list
93-5633	United States v. Marabello	U.S. Attorney's Office involved, on standing recusal list
93-5635	Instructional Sys v. Computer Curriculum	McCarter & English involved, on standing recusal list
93-5641	United States v. Oduntan	U.S. Attorney's Office involved, on standing recusal list
93-5653	Gayle Elec Inc v. US Dept Army	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
93-5658	Filippo v. Bongiovanni	Carpenter, Bennett & Morrissey involved, on standing recusal list
93-5660	United States v. Wilks	U.S. Attorney's Office involved, on standing recusal list
93-5661	United States v. Souza	U.S. Attorney's Office involved, on standing recusal list
93-5662	Manna v. US Justice	U.S. Attorney's Office involved, on standing recusal list
93-5669	Wallace v. AG	U.S. Attorney's Office involved, on standing recusal list
93-5677	United States v. Nieves	U.S. Attorney's Office involved, on standing recusal list
93-5681	One 1986 Mercedes v. One Unknown DEA	U.S. Attorney's Office involved, on standing recusal list
93-5687	United States v. Carrigan	U.S. Attorney's Office involved, on standing recusal list
93-5689	Adorno v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
93-5690	AGS Computers Inc v. US Dept Treasury	U.S. Attorney's Office involved, on standing recusal list
93-5693	United States v. Walker	U.S. Attorney's Office involved, on standing recusal list
93-5698	Holowinski v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
93-5703	Lightning Lube Inc v. Witco Corporation	no specific recollection of why I recused
93-5710	United States v. Henry	U.S. Attorney's Office involved, on standing recusal list
93-5718	United States v. Edwards	U.S. Attorney's Office involved, on standing recusal list
93-5719	United States v. Wexler	U.S. Attorney's Office involved, on standing recusal list

93-5722	Instructional Sys v. Computer Curriculum	McCarter & English involved, on standing recusal list
93-5723	United States v. Fasolino	U.S. Attorney's Office involved, on standing recusal list
93-5730	Leo v. Kerr McGee	I recused based on a friendship with one of the attorneys.
93-5732	United States v. Antar	U.S. Attorney's Office involved, on standing recusal list
93-5733	United States v. Antar	U.S. Attorney's Office involved, on standing recusal list
93-5734	United States v. Lombardi	U.S. Attorney's Office involved, on standing recusal list
93-5735	United States v. Maniscalco	U.S. Attorney's Office involved, on standing recusal list
93-5736	United States v. Cuomo	U.S. Attorney's Office involved, on standing recusal list
93-5737	United States v. Tomasino	U.S. Attorney's Office involved, on standing recusal list
93-5738	United States v. Marrone	U.S. Attorney's Office involved, on standing recusal list
93-5739	United States v. Marino	U.S. Attorney's Office involved, on standing recusal list
93-5740	United States v. Paris	U.S. Attorney's Office involved, on standing recusal list
93-5741	United States v. Cucciniello	U.S. Attorney's Office involved, on standing recusal list
93-5742	United States v. Contreras	U.S. Attorney's Office involved, on standing recusal list
93-5744	United States v. Ingram	U.S. Attorney's Office involved, on standing recusal list
93-5745	United States v. Ingram	U.S. Attorney's Office involved, on standing recusal list
93-5755	United States v. Melendez	U.S. Attorney's Office involved, on standing recusal list
93-5762	Rivero v. United States	U.S. Attorney's Office involved, on standing recusal list
93-5763	United States v. Winters	U.S. Attorney's Office involved, on standing recusal list
93-5765	United States v. Mayles	U.S. Attorney's Office involved, on standing recusal list
93-5771	Pub Interest v. Secretary Air Force	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
93-5775	Gaydos v. Chertoff	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
93-5776	Adorno v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
93-5782	United States v. Becker	U.S. Attorney's Office involved, on standing recusal list
93-5786	United States v. Srivastava	U.S. Attorney's Office involved, on standing recusal list
93-5788	United States v. Yang	U.S. Attorney's Office involved, on standing recusal list
93-7179	In re Columbia Gas	I recused based on a friendship with one of the attorneys.
93-7304	In re Columbia Gas	I recused based on a friendship with one of the attorneys.
94-1046	United States v. McGovern	U.S. Attorney's Office involved, on standing recusal list
94-1092	United States v. Nock	U.S. Attorney's Office involved, on standing recusal list
94-1123	Roe v. Operation Rescue	no specific recollection of why I recused
94-1357	United States v. Washington	U.S. Attorney's Office involved, on standing recusal list
94-1385	United States v. Bell	U.S. Attorney's Office involved, on standing recusal list
94-1462	United States v. Jackson	U.S. Attorney's Office involved, on standing recusal list
94-1572	Cohen v. Austin	U.S. Attorney's Office involved, on standing recusal list
94-1810	Thompson v. Kramer	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
94-3527	Ackerman v. Warnaco Inc	I recused after examining the brief in this case, but I do not recall which party or attorney triggered the recusal.
94-5000	United States v. Miles	U.S. Attorney's Office involved, on standing recusal list
94-5004	United States v. Lewis	U.S. Attorney's Office involved, on standing recusal list

94-5005	United States v. Martinez	U.S. Attorney's Office involved, on standing recusal list
94-5006	United States v. Antar	U.S. Attorney's Office involved, on standing recusal list
94-5008	United States v. Tukes	U.S. Attorney's Office involved, on standing recusal list
94-5009	United States v. Cook	U.S. Attorney's Office involved, on standing recusal list
94-5018	United States v. Blohm	U.S. Attorney's Office involved, on standing recusal list
94-5019	United States v. Orozco	U.S. Attorney's Office involved, on standing recusal list
94-5025	United States v. Srivastava	U.S. Attorney's Office involved, on standing recusal list
94-5029	Lightning Lube Inc v. Witco Corporation	no specific recollection of why I recused
94-5031	Dreher v. United States	U.S. Attorney's Office involved, on standing recusal list
94-5032	United States v. Okereke	U.S. Attorney's Office involved, on standing recusal list
94-5033	United States v. Malcolm	U.S. Attorney's Office involved, on standing recusal list
94-5034	United States v. Feng	U.S. Attorney's Office involved, on standing recusal list
94-5041	Chang v. Secretary Transp	U.S. Attorney's Office involved, on standing recusal list
94-5043	Russo v. Rite Hite Corp	McCarter & English involved, on standing recusal list
94-5048	Instructional Sys v. Computer Curriculum	McCarter & English involved, on standing recusal list
94-5049	Montgomery v. Quinlan	U.S. Attorney's Office involved, on standing recusal list
94-5050	Amis v. United States	U.S. Attorney's Office involved, on standing recusal list
94-5054	Byrne v. Halliburton Co.	no specific recollection of why I recused
94-5059	Pub Interest v. Secretary Air Force	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
94-5061	United States v. Thamrong	U.S. Attorney's Office involved, on standing recusal list
94-5062	State of NJ v. Hall	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
94-5063	United States v. Lewis	U.S. Attorney's Office involved, on standing recusal list
94-5065	United States v. Adu	U.S. Attorney's Office involved, on standing recusal list
94-5066	United States v. Merritt	U.S. Attorney's Office involved, on standing recusal list
94-5067	United States v. Peterson	U.S. Attorney's Office involved, on standing recusal list
94-5068	United States v. Roberts	U.S. Attorney's Office involved, on standing recusal list
94-5072	United States v. Dantzig	U.S. Attorney's Office involved, on standing recusal list
94-5079	Hypolitus v. United States	U.S. Attorney's Office involved, on standing recusal list
94-5082	Lahood v. State of NJ	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
94-5085	Adorno v. Secretary HHS	U.S. Attorney's Office involved, on standing recusal list
94-5087	Bailey v. Gallagher	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
94-5090	United States v. Bd Ed Piscataway	U.S. Attorney's Office involved, on standing recusal list
94-5091	CJ Betters Corp v. Housing Camden	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
94-5093	United States v. Westby	U.S. Attorney's Office involved, on standing recusal list
94-5095	United States v. Bieregu	U.S. Attorney's Office involved, on standing recusal list

94-5096	Cadavid v. United States	U.S. Attorney's Office involved, on standing recusal list
94-5097	Gaydos v. Chertoff	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
94-5100	Gamble v. Secretary Veterans	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
94-5106	United States v. Gorospe	U.S. Attorney's Office involved, on standing recusal list
94-5107	United States v. Cherry	U.S. Attorney's Office involved, on standing recusal list
94-5108	United States v. Benvenuto	U.S. Attorney's Office involved, on standing recusal list
94-5109	United States v. Ojenor	U.S. Attorney's Office involved, on standing recusal list
94-5119	Moss v. United States	U.S. Attorney's Office involved, on standing recusal list
94-5120	United States v. Bogos	U.S. Attorney's Office involved, on standing recusal list
94-5121	United States v. Wright	U.S. Attorney's Office involved, on standing recusal list
94-5122	United States v. Sassman	U.S. Attorney's Office involved, on standing recusal list
94-5125	Elshinnawy v. Secretary Navy	U.S. Attorney's Office involved, on standing recusal list
94-5126	Gonzalez v. Ocean Cty Bd Social	U.S. Attorney's Office involved, on standing recusal list
94-5134	Reid v. State of NJ	U.S. Attorney's Office involved, on standing recusal list
94-5139	Zuckerman v. United States	U.S. Attorney's Office involved, on standing recusal list
94-5146	United States v. Gartenberg	U.S. Attorney's Office involved, on standing recusal list
94-5147	Martin v. Townsend	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
94-5148	Lyden v. IRS	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
94-5153	United States v. Baran	U.S. Attorney's Office involved, on standing recusal list
94-5154	United States v. Baran	U.S. Attorney's Office involved, on standing recusal list
94-5156	United States v. Thompson	U.S. Attorney's Office involved, on standing recusal list
94-5167	United States v. Bertoli	U.S. Attorney's Office involved, on standing recusal list
94-5176	United States v. Torres-Rosario	U.S. Attorney's Office involved, on standing recusal list
94-5177	United States v. Calderon	U.S. Attorney's Office involved, on standing recusal list
94-5178	United States v. Nieves	U.S. Attorney's Office involved, on standing recusal list
94-5179	United States v. Wall	U.S. Attorney's Office involved, on standing recusal list
94-5181	Waldecker v. Jepsen	U.S. Attorney's Office involved, on standing recusal list
94-5182	Waldecker v. Jepsen	U.S. Attorney's Office involved, on standing recusal list
94-5187	United States v. Mayles	U.S. Attorney's Office involved, on standing recusal list
94-5198	United States v. McFadden	U.S. Attorney's Office involved, on standing recusal list
94-5204	United States v. Carrara	U.S. Attorney's Office involved, on standing recusal list
94-5205	United States v. De Lussey	U.S. Attorney's Office involved, on standing recusal list
94-5206	United States v. De Lussey	U.S. Attorney's Office involved, on standing recusal list
94-5207	United States v. Lopez	U.S. Attorney's Office involved, on standing recusal list
94-5210	Tamakloe v. United States	U.S. Attorney's Office involved, on standing recusal list
94-5219	United States v. Tawdros	U.S. Attorney's Office involved, on standing recusal list
94-5224	Puentes v. United States	U.S. Attorney's Office involved, on standing recusal list
94-5228	United States v. Antar	U.S. Attorney's Office involved, on standing recusal list
94-5230	United States v. Antar	U.S. Attorney's Office involved, on standing recusal list

94-5231	United States v. Grungo	U.S. Attorney's Office involved, on standing recusal list
94-5232	United States v. Frazier	U.S. Attorney's Office involved, on standing recusal list
94-5235	United States v. Kim	U.S. Attorney's Office involved, on standing recusal list
94-5249	Scaria v. Sec of the Treasury	U.S. Attorney's Office involved, on standing recusal list
94-5253	Eichenholtz v. Brennan	I believe I recused because Ronald J. Riccio, then Dean of Seton Hall Law School, was named as a party.
94-5254	Vaspory v. Secretary Army	U.S. Attorney's Office involved, on standing recusal list
94-5261	United States v. Dalene	U.S. Attorney's Office involved, on standing recusal list
94-5263	United States v. Koufos	U.S. Attorney's Office involved, on standing recusal list
94-5264	United States v. Koufos	U.S. Attorney's Office involved, on standing recusal list
94-5276	Hatco Corp v. WR Grace & Co	Carpenter, Bennett & Morrissey involved, on standing recusal list
94-5284	United States v. Soto	U.S. Attorney's Office involved, on standing recusal list
94-5285	United States v. Bedoya	U.S. Attorney's Office involved, on standing recusal list
94-5286	United States v. Brisita	U.S. Attorney's Office involved, on standing recusal list
94-5287	United States v. Fernandez	U.S. Attorney's Office involved, on standing recusal list
94-5288	United States v. Carnero	U.S. Attorney's Office involved, on standing recusal list
94-5291	United States v. Caiola	U.S. Attorney's Office involved, on standing recusal list
94-5292	United States v. Brown	U.S. Attorney's Office involved, on standing recusal list
94-5297	United States v. Williams	U.S. Attorney's Office involved, on standing recusal list
94-5300	United States v. Alers	U.S. Attorney's Office involved, on standing recusal list
94-5301	United States v. Kruckel	U.S. Attorney's Office involved, on standing recusal list
94-5302	United States v. Paz	U.S. Attorney's Office involved, on standing recusal list
94-5309	United States v. Rivera	U.S. Attorney's Office involved, on standing recusal list
94-5315	United States v. Pollack	U.S. Attorney's Office involved, on standing recusal list
94-5319	United States v. Miller	U.S. Attorney's Office involved, on standing recusal list
94-5320	United States v. Arroyo-Angulo	U.S. Attorney's Office involved, on standing recusal list
94-5321	United States v. Bishop	U.S. Attorney's Office involved, on standing recusal list
94-5322	Salmon v. Secretary Army	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
94-5325	United States v. Chemical Leaman	U.S. Attorney's Office involved, on standing recusal list
94-5328	Kennedy v. Kaye	U.S. Attorney's Office involved, on standing recusal list
94-5330	United States v. Zingone	U.S. Attorney's Office involved, on standing recusal list
94-5332	United States v. Pappas	U.S. Attorney's Office involved, on standing recusal list
94-5333	United States v. Pappas	U.S. Attorney's Office involved, on standing recusal list
94-5337	United States v. Castano	U.S. Attorney's Office involved, on standing recusal list
94-5339	United States v. Austin	U.S. Attorney's Office involved, on standing recusal list
94-5346	Codario v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5352	United States v. Bass	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5377	Kennedy v. Kaye	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
94-5384	United States v. Hepburn	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney

94-5388	United States v. Thompson	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5390	United States v. Morelli	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5419	Am. Centennial Insv. Underwriters Inc	no specific recollection of why I recused
94-5420	Thompson v. Toyota Mtr Corp	Carpenter, Bennett & Morrissey involved, on standing recusal list
94-5435	Thompson v. Toyota Mtr Corp	Carpenter, Bennett & Morrissey involved, on standing recusal list
94-5475	United States v. Perna	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5481	United States v. Lopez	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5482	United States v. Taccetta	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5562	United States v. Lovett	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5584	United States v. Thor	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
94-5586	United States v. Lovett	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5594	United States v. D'Alessio	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
94-5619	United States v. Kemenash	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5620	United States v. Hankins	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5627	SEC v. Antar	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
94-5641	Hein v. FDIC	McCarter & English involved, on standing recusal list
94-5661	United States v. Wheeler	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5674	United States v. Console	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5675	United States v. Console	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5682	United States v. Hernandez	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5691	In re Jason Realty	McCarter & English involved, on standing recusal list
94-5698	Health Maintenance v. Whitman	McCarter & English involved, on standing recusal list
94-5720	Mayles v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5753	United States v. Console	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
94-5772	Mayles v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney

95-1669	Fiber-Lite Corp v. First Fidelity Bank	no specific recollection of why I recused
95-3362	United States v. Grewal	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5006	United States v. Contents of Accounts	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
95-5009	United States v. Vaccaro	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5063	Stevens v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5133	Jason Realty LP v. First Fidelity Bank	McCarter & English involved, on standing recusal list
95-5181	Hein v. FDIC	McCarter & English involved, on standing recusal list
95-5196	United States v. Bertoli	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5285	United States v. Caiafa	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5286	United States v. DeAnnuntis	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5287	United States v. Atl Science & Tech	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5320	United States v. Caterini	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5335	United States v. Spiers	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5336	United States v. Spiers	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5408	United States v. Khaliq	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5501	Atkins v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5733	United States v. Local 560	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
95-5766	United States v. Contents of Accounts	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
95-5774	United States v. Berrios	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5788	United States v. Local 560	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
95-5814	Shaffer v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
95-5862	Tummala v. Merck & Co Inc	Carpenter, Bennett & Morrissey involved, on standing recusal list
95-5871	Spagnoli v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
96-5015	United States v. Gilliard	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney

96-5113	United States v. Sarbello	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
96-5200	Schulz v. US Boxing Assn	Carpenter, Bennett & Morrissey involved, on standing recusal list
96-5212	United States v. Surgent	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
96-5239	Schulz v. US Boxing Assn	Carpenter, Bennett & Morrissey involved, on standing recusal list
96-5299	Gambino v. Morris	no specific recollection of why I recused, but possible reason is some connection to the U.S. Attorney's Office
96-5321	United States v. Local 560	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
96-5327	Henderson v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
96-5328	Zuckerman v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
96-5354	Stewart v. Rutgers	Carpenter, Bennett & Morrissey involved, on standing recusal list
96-5381	Williams v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
96-5422	SsangYong USA Inc v. Innovation Group Ltd	McCarter & English involved, on standing recusal list
96-5428	In re Henry Fegeley	no specific recollection of why I recused, but possible reason is some connection to the U.S. Attorney's Office
96-5472	Tokhtameshev v. Am. Natl Can Co	McCarter & English involved, on standing recusal list
96-5478	Rutigliano v. Valley Bus Forms	Carpenter, Bennett & Morrissey involved, on standing recusal list
96-5484	Machado v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
96-5485	Markoff v. United States	no specific recollection of why I recused, but possible reason is some connection to the U.S. Attorney's Office
96-5502	United States v. Gonzalez	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
96-5530	Spagnoli v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
96-5538	Failla v. City of Passaic	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
96-5539	Failla v. City of Passaic	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
96-5589	United States v. Haddy	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
96-5616	Wallace v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
96-5667	Hardy v. United States	no specific recollection of why I recused, but possible reason is some connection to the U.S. Attorney's Office
96-5679	In re Oakview	I recused based on a friendship with one of the attorneys.
96-5680	In re Oakview	I recused based on a friendship with one of the attorneys.

96-5707	Waldorf v. Shuta	I recused based on a friendship with one of the attorneys.
96-5731	Mayles v. Lechner	I recused based on a friendship with one or more of the parties.
96-5792	In re Trombadore	no specific recollection of why I recused
96-5793	In re Trombadore	no specific recollection of why I recused
96-5835	Failla v. City of Passaic	no specific recollection of why I recused
96-5846	Seidenberg v. Mutl Life Ins Co	McCarter & English involved, on standing recusal list
97-1204	United States v. Leiss	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
97-1434	United States v. Allan	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
97-1435	United States v. Allan	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
97-1436	United States v. Allan	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
97-1820	Greenleaf v. Garlock Inc	McCarter & English involved, on standing recusal list
97-1821	Greenleaf v. Garlock Inc	McCarter & English involved, on standing recusal list
97-1903	NJ Economic Dev Auth	McCarter & English involved, on standing recusal list
97-5032	United States v. Stanley	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
97-5033	United States v. Stanley	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
97-5177	Feidt v. Owens Corning	McCarter & English involved, on standing recusal list
97-5195	Waldorf v. Shuta	I recused based on a friendship with one of the attorneys.
97-5197	Waldorf v. Shuta	I recused based on a friendship with one of the attorneys.
97-5222	Waldorf v. Shuta	I recused based on a friendship with one of the attorneys.
97-5226	United States v. Cucciniello	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
97-5236	Conerly v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
97-5266	Mennen Company v. Atl Mutl Ins Co	McCarter & English involved, on standing recusal list
97-5303	United States v. Quiles-Gonzalez	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
97-5513	Zarintash v. United States	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
97-5514	United States v. Sherman	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
97-5557	United States v. Pelullo	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
97-5604	Kikumura v. United States	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
97-5621	In re Schlam	no specific recollection of why I recused
97-5657	Hartwell v. United States	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
97-5671	Matteson v. Ryder Sys Inc	Carpenter, Bennett & Morrissey involved, on standing recusal list
97-5678	Steamship Mutual v. Bus Men's Assurance	McCarter & English involved, on standing recusal list

97-5685	Matteson v. Ryder Sys Inc	Carpenter, Bennett & Morrissey involved, on standing recusal list
97-5699	Yehuda v. United States	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
97-5735	Chemical Leaman v. Aetna Cslty & Surety	no specific recollection of why I recused
97-5736	Chemical Leaman v. Aetna Cslty & Surety	no specific recollection of why I recused
97-5765	United States v. Zuckerman	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
97-5779	Nwizuzu v. United States	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
97-5788	United States v. Plecas	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
97-5814	Muhammed v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
97-5825	Ukpai v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
97-8000	Cyber Promotions Inc	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
97-8134	Voilas v. General Motors Corp	Carpenter, Bennett & Morrissey involved, on standing recusal list
98-1315	Frank Russell Co. v. Wellington Mgt Co	no specific recollection of why I recused
98-1491	Churchill v. Star Entr	Carpenter, Bennett & Morrissey involved, on standing recusal list
98-1632	Churchill v. Star Entr	Carpenter, Bennett & Morrissey involved, on standing recusal list
98-1700	Churchill v. Star Entr	Carpenter, Bennett & Morrissey involved, on standing recusal list
98-1810	NJ Economic Dev Auth	McCarter & English involved, on standing recusal list
98-3266	Klein v. Gen Nutrition Inc	no specific recollection of why I recused
98-5000	United States v. Contents of Accounts	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
98-5016	In re Pollack	no specific recollection of why I recused
98-5039	Hernandez v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
98-5045	Port Auth NY & NJ v. Arcadian Corp	McCarter & English involved, on standing recusal list
98-5073	GAF Corp v. Hartford Accident	McCarter & English involved, on standing recusal list
98-5131	Manna v. United States	The plaintiff in this case was a defendant in a criminal case prosecuted by the U.S. Attorney's Office during my tenure.
98-5133	Ahamefule v. United States	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
98-5148	United States v. Blackwell	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
98-5232	United States v. Guagliardo	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney

98-5304	United States v. Britt	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
98-5390	Nicholas v. Saul Stone & Co LLC	I probably recused because of a friendship with one of the attorneys.
98-6019	Dumarc Shipping Co v. CIT Grp	McCarter & English involved, on standing recusal list
98-6039	McGrath v. PA Holding Ltd	Carpenter, Bennett & Morrissey involved, on standing recusal list
98-6065	Goldstein v. Johnson & Johnson	Carpenter, Bennett & Morrissey involved, on standing recusal list
98-6078	Winters v. United States	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
98-6082	Markoff v. United States	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
98-6085	Williams v. United States	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
98-6123	United States v. Ahamefule	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
98-6172	Goldstein v. Johnson & Johnson	Carpenter, Bennett & Morrissey involved, on standing recusal list
98-6262	United States v. Nathan	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
98-6263	United States v. Lander	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
98-6299	United States v. Electrodyne Sys Corp	no specific recollection of why I recused
98-6320	First Interregional	McCarter & English involved, on standing recusal list
98-6336	Danon v. United States	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
98-6342	United States v. Cucciniello	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
98-6377	United States v. Smith	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
98-6378	United States v. Dandrea	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
98-6385	United States v. Mateos	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
98-6408	Hawes v. Johnson & Johnson	Carpenter, Bennett & Morrissey involved, on standing recusal list
98-6489	Rose Art Ind Inc v. Swanson	McCarter & English involved, on standing recusal list
98-6491	Storm v. Young	no specific recollection of why I recused, but possible reason is U.S. Attorney's Office involvement
98-7601	In re Andreas Gal	no specific recollection of why I recused
99-1122	Nickelson v. US	I was a named party to this case.
99-1540	In re Patenaude	The Clerk's Office recused me from this case based on my standing recusal list, but I am uncertain which party or attorney triggered the recusal.
99-1803	Forbes v. Eagleson	General Electric involved, on standing recusal list
99-2062	In re Asbestos Prod	McCarter & English involved, on standing recusal list
99-3227	Koken v. Cologne Reinsurance	McCarter & English involved, on standing recusal list

99-5051	US v. Helbling	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5054	US v. Clark	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5218	US v. Ahamefule	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5294	US v. Sanin-Rincon	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5333	US v. Doyle	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5380	US v. Corsino	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5397, 99-5398	Guardian Life Ins. Co. v. Weisman	McCarter & English involved, on standing recusal list
99-5403	US v. Morton	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5412	US v. Clary	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5439	US v. Boone	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5447	Velasquez v. AG	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5485, 99-5555, 00-1822	In re Cendent Corp.	McCarter & English involved, on standing recusal list
99-5569	US v. Swint	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5660	Sys Documentation v. Digital Equip. Corp.	McCarter & English involved, on standing recusal list
99-5806	Liberty Insulation v. Metrix	McCarter & English involved, on standing recusal list
99-5839	Impounded	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5851	Kiareldeen v. AG	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5885	US v. Biberfeld	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5924	US v. Kern	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-5931	Carpet Grp Intl Corp v. Oriental Rug	McCarter & English involved, on standing recusal list
99-6015	Becton Dickinson v. Wolckenhauer	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
99-6023	Seidman v. Summit Bancorp	McCarter & English involved, on standing recusal list
99-6081	Abel v. Stark & Stark	The Clerk's Office recused me from this case automatically, but I am uncertain which party or attorney triggered the recusal.
99-6085	Sheiner v. Stark & Stark	The Clerk's Office recused me from this case automatically, but I am uncertain which party or attorney triggered the recusal.

99-6087	Chen v. Stark & Stark	The Clerk's Office recused me from this case automatically, but I am uncertain which party or attorney triggered the recusal.
99-6088	Russo v. Stark & Stark	The Clerk's Office recused me from this case automatically, but I am uncertain which party or attorney triggered the recusal.
00-1000	In re Guglielmo	McCarter & English involved, on standing recusal list
00-1009	In re Mary Collins	McCarter & English involved, on standing recusal list
00-1344	Starita v. NYLCare Health Plans	McCarter & English involved, on standing recusal list
00-1428	Chong v. Dist Dir INS NJ	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
00-1656	Manley v. Stark & Stark	The Clerk's Office recused me from this case automatically, but I am uncertain which party or attorney triggered the recusal.
00-1778	Kepner-Tregoe v. General Electric,	General Electric involved, on standing recusal list
00-1820, 00-1836, 00-4357, 01-4100, 01-4208	SEC v. Antar	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
00-1835	NJ Coalition Auto v. Daimler Chrysler	no specific recollection of why I recused, but it is possible that recusal was based on a friendship with one of the attorneys
00-1954	In re Cendant Corp	McCarter & English involved, on standing recusal list
00-2128, 00-2261	In re Asbestos Prod	McCarter & English involved, on standing recusal list
00-2129	Bernhardt v. Westinghouse elec	McCarter & English involved, on standing recusal list
00-2185	In re Cendant Corp	McCarter & English involved, on standing recusal list
00-2322	US v. Winters	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
00-2772, 00-2932	GEAC v. Computer Sys v. Grace Consul Inc	McCarter & English involved, on standing recusal list
00-3111	Abdulai v. AG	McCarter & English involved, on standing recusal list
00-3615	Strange v. Keiper Recaro	McCarter & English involved, on standing recusal list
00-3627	Net2phone Inc v. Sinclair	McCarter & English involved, on standing recusal list
00-3695	United Phosphorous v. Micro Flo LLC	McCarter & English involved, on standing recusal list
00-3724, 03-4674	Miller Turner v. PNC Bank	McCarter & English involved, on standing recusal list
00-3741	Claude Bamberger v. Rohm and Haas Co.	McCarter & English involved, on standing recusal list
00-4178	US v. Purzycki	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
00-5000	In re Daniel Tilli	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
00-5053	Gunter v. Ridgewood Energy	McCarter & English involved, on standing recusal list
00-5174	In re Bamberger	McCarter & English involved, on standing recusal list
00-5200	Coast Auto Grp Ltd v. VW Credit Inc.	McCarter & English involved, on standing recusal list

00-5209	US v. Torres	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
00-5259	Hart v. Hart	McCarter & English involved, on standing recusal list
00-5263	Baldassare v. County of Bergen	no specific recollection of why I recused, but it is possible that recusal was based on a friendship with one of the attorneys
00-5283	Ali v. US	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
01-1062	In re Brennan	Seton Hall involved, on standing recusal list
01-1489	Cunningham v. Becker	The Clerk's Office recused me from this case automatically, probably because the Judicial Council of Third Circuit was a party and I served on the Council.
01-1628	Parangi v. Metro Life Ins. Co.	McCarter & English involved, on standing recusal list
01-1798	Foster v. Crawford Co.	Rosemary Alito involved, on standing recusal list
01-1827	Monga v. Ottenberg	recused as described in part B.(15), above
01-1926	Gaudelli v. Eisner	I was listed as a party in this case.
01-2047	DeVito v. Bd Ed Cty Newark	McCarter & English involved, on standing recusal list
01-2078	Limited Inc. V. Cigna Ins Co	McCarter & English involved, on standing recusal list
01-2207	United States v. Mitwally	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
01-2321	Pappas v. DePuy Orthopaedics	McCarter & English involved, on standing recusal list
01-2330	Knecht v. Shannon	Kirkpatrick & Lockhart involved, on standing recusal list
01-2468	United States v. Bendolph	Kirkpatrick & Lockhart involved, on standing recusal list
01-2524	Fed Deposit Ins Corp.v. Natl Union Fire Ins	no specific recollection of why I recused
01-2803	United States v. Rohm & Haas Co	McCarter & English involved, on standing recusal list
01-2815, 01-2885	In re Okner Pkwy	McCarter & English involved, on standing recusal list
01-3148	United States v. Brennan	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
01-3276	Montefusco v. ESPN Inc	Disney involved, on standing recusal list
01-3330	P&M Products Ltd v. Rose Art Ind Inc	McCarter & English involved, on standing recusal list
01-3463	In re Metro Life Ins	McCarter & English involved, on standing recusal list
01-3486	Binney & Smith Inc v. Rose Art Ind Inc	McCarter & English involved, on standing recusal list
01-3656	In re Cendant Corp	McCarter & English involved, on standing recusal list
01-3686	In re Ernst Young	McCarter & English involved, on standing recusal list
01-4019	Total Containment v. Dayco Prod Inc	McCarter & English involved, on standing recusal list
01-4226, 01-4492, 02-1789, 02-3236	Bowers v. Natl Collegiate	Carpenter, Bennett & Morrissey involved, on standing recusal list
01-4348	Lum v. Bank Amer	First Union involved, on standing recusal list
01-8025	In re NE Tech Ser	McCarter & English involved, on standing recusal list
02-1103, 02-1124, 02-1276	Major League Umpires v. Am. League	Disney involved, on standing recusal list

02-1244	In re Wash Depot	The Clerk's Office recused me from this case automatically, probably because the Judicial Council of Third Circuit was a party and I served on the Council.
02-1426	In re Fed Mogul	McCarter & English involved, on standing recusal list
02-1799	M.A. v. Newark Pub Sch	McCarter & English involved, on standing recusal list
02-1902	Gregg v. Natl League Prof	Disney involved, on standing recusal list
02-2057, 03-2346	Caldwell Trkng PRP v. Rexon Tech Corp	I recused because of a friendship with one of the attorneys.
02-2147	Murphy v. Lenox Co	Rosemary Alito involved, on standing recusal list
02-2240	Roberts v. Univ PA	no specific recollection of why I recused
50-0100	Brophy v. Bradley	On April 8, 2003, the Clerk's Office automatically recused me and 15 other judges from this case.
02-2269	United States v. Shaw	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
02-2497	Video Pipeline Inc v. Buena Vista Home	Disney involved, on standing recusal list
02-2524	North Jersey Media v. AG	NBC involved, on standing recusal list
02-2624	United States v. Otero	Kirkpatrick & Lockhart involved, on standing recusal list
02-2655	Pharmacia Corp v. Alcon Laboratories	McCarter & English involved, on standing recusal list
02-2668	Kosiba v. Merck & Co Inc	Disney involved, on standing recusal list
02-2710, 02-2808, 02-2957	United States v. Pelullo	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
02-2932	In re Color Tile	McCarter & English involved, on standing recusal list
02-3178, 02-3953	In re ANC Rental	Disney involved, on standing recusal list
02-3285	Bowen v. United States	Kirkpatrick & Lockhart involved, on standing recusal list
02-3389	Zucker v. Westinghouse Elec	no specific recollection of why I recused
02-3391	In re Video Update	General Electric involved, on standing recusal list
02-3555	Barak v. Obioha	McCarter & English involved, on standing recusal list
02-3603, 02-3755, 02-3757, 02-3758	In re Warfarin	Bristol Myers Squibb involved, on standing recusal list
02-3724	In re Metro Life Ins	McCarter & English involved, on standing recusal list
02-3737	Delande v. ING Empl Benefits	McCarter & English involved, on standing recusal list
02-3779	Westport Ins Corp v. Mirsky	General Electric involved, on standing recusal list
02-3892	Thompson v. Gen Elec Co	General Electric involved, on standing recusal list
02-4037	In re Metro Life Ins	McCarter & English involved, on standing recusal list
02-4046	Gucci America v. Daffys	McCarter & English involved, on standing recusal list
02-4122	Verma v. Polaris Software Lab	McCarter & English involved, on standing recusal list
02-4204, 02-4298	JC Penney Life Ins v. Pilosi	McCarter & English involved, on standing recusal list
02-4252	Gouge v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
02-4266	France v. Syngenta	McCarter & English involved, on standing recusal list
02-4270	In re Metro Life Ins	McCarter & English involved, on standing recusal list
02-4297	Wallin v. Metro Life Ins	McCarter & English involved, on standing recusal list
02-4386	In re Cendant Corp	McCarter & English involved, on standing recusal list

02-4392	NY Giants Football v. Commissioner IRS	McCarter & English involved, on standing recusal list
02-4478, 02-8060	Weisfeld v. Sun Chem Corp	McCarter & English involved, on standing recusal list
03-1081	Arjomand v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
03-1398	Lacava v. Kyler	Kirkpatrick & Lockhart involved, on standing recusal list
03-1436	Mohney v. Forney	McCarter & English involved, on standing recusal list
03-1453	Copher v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
03-1469, 03-1498	Lickman v. Henkel	General Electric involved, on standing recusal list
03-1490	In re Carpet Grp	McCarter & English involved, on standing recusal list
03-1524	Wallin v. Severance Plan Elec	McCarter & English involved, on standing recusal list
03-1669	In re Cendant	McCarter & English involved, on standing recusal list
03-1863	Haynes v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
03-2116, 03-2143, 03-2410	Livornese v. Med Protective Co	General Electric involved, on standing recusal list
03-2139	GTE Corp v. Allendale Mutl Ins	General Electric involved, on standing recusal list
03-2288	In re Am. Appliance	General Electric involved, on standing recusal list
03-2364	Holden v. Mechling	Kirkpatrick & Lockhart involved, on standing recusal list
03-2572	SC Johnson & Son Inc v. DowBrands Inc	no specific recollection of why I recused
03-2793	Grispino v. New England Mutl	McCarter & English involved, on standing recusal list
03-2801, 03-3282	Marshall v. Lauriault	McCarter & English involved, on standing recusal list
03-2898	Long v. Wilson	Kirkpatrick & Lockhart involved, on standing recusal list
03-3018	Marran v. Marran	McCarter & English involved, on standing recusal list
03-3101	In re Tower Air Inc	General Electric involved, on standing recusal list
03-3225	United Steelworkers v. Flowserve Corp	McCarter & English involved, on standing recusal list
03-3388	Prometheus Radio v. FCC	NBC involved, on standing recusal list
03-3496	Morrison v. Giuliani	Solomon Smith & Barney involved, on standing recusal list
03-3577	Media General Inc v. FCC	NBC involved, on standing recusal list
03-3578	Natl Assn v. FCC	NBC involved, on standing recusal list
03-3579	Network Affiliated v. FCC	NBC involved, on standing recusal list
03-3580	Fox Entertainment v. FCC	NBC involved, on standing recusal list
03-3581	Viacom Inc v. FCC	NBC involved, on standing recusal list
03-3582	NBC Inc v. FCC	NBC involved, on standing recusal list
03-3651	Sinclair Broadcast v. FCC	NBC involved, on standing recusal list
03-3665	Media Alliance v. FCC	NBC involved, on standing recusal list
03-3675, 03-3950	Paxson Comm Corp v. FCC	NBC involved, on standing recusal list
03-3693	Strickland v. GE Co	General Electric involved, on standing recusal list
03-3695	Schmidt v. Zimmer Inc	Zimmer Holdings involved, on standing recusal list
03-3708	National Council v. FCC	NBC involved, on standing recusal list
03-3755	CA Pub Empl Ret Sys v. Chubb Corp	McCarter & English involved, on standing recusal list

03-3758, 03-4524	Ford v. Mercer Cty Corr Ctr	Kirkpatrick & Lockhart involved, on standing recusal list
03-3768	In re Morrison	Solomon Smith & Barney involved, on standing recusal list
03-3894	Tribune Co v. FCC	NBC involved, on standing recusal list
03-3909, 03-4368, 03-4369, 03-4370, 04-1749, 04-1880	In re Montgomery	General Electric involved, on standing recusal list
03-3951	Emmis Comm Corp v. FCC	NBC involved, on standing recusal list
03-3979	United States v. Morelli	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
03-4072	Ctr Digital v. FCC	NBC involved, on standing recusal list
03-4073	Clear Channel Comm v. FCC	NBC involved, on standing recusal list
03-4212	In re Kensington	no specific recollection of why I recused
03-4311	SBC Comm Inc v. FCC	SBC involved, on standing recusal list
03-4371	DiPasquale v. Stein	General Electric involved, on standing recusal list
03-4396	In re Montouri	no specific recollection of why I recused
03-4407	LLB Realty v. Core Lab	Citigroup involved, on standing recusal list
03-4433	Forum Academic v. Secretary Defense	no specific recollection of why I recused
03-4526	In re DK Acquisition	I recused because of a friendship with one of the parties.
03-4557	NJ Dept Env Prot v. Am. Thermoplastics	no specific recollection of why I recused
03-4751	Emory v. Astrazeneca Pharm	McCarter & English involved, on standing recusal list
03-4762	Rowinski v. Salomon Smith Barney	Solomon Smith & Barney involved, on standing recusal list
03-4855	Windward Agcy Inc v. Cologne Life	McCarter & English involved, on standing recusal list
04-1202	Ronson Corp v. Steel Partners II	McCarter & English involved, on standing recusal list
04-1264	West v. IDT Corp	McCarter & English involved, on standing recusal list
04-1277, 04-1300	USX Corp v. Liberty Mutl Ins Co	no specific recollection of why I recused
04-1408	Estate Salek E Beim v. Hirsch	JP Morgan Chase involved, on standing recusal list
04-1418	Tucker v. Bristol Myers Squibb	Bristol Myers Squibb involved, on standing recusal list
04-1474	Avenir Inc v. Hartford Ins Midwest	McCarter & English involved, on standing recusal list
04-1642	Lexington Ins Co v. W PA Hosp	McCarter & English involved, on standing recusal list
04-1711, 04-1712, 04-1734, 04-1748	Anderson v. Airco Inc	Fidelity involved, on standing recusal list
04-1790, 04-2896	Cantor v. Perelman	Disney involved, on standing recusal list
04-1817	Dimensional Comm Inc v. OZ Optics Ltd	McCarter & English involved, on standing recusal list
04-1851, 04-1960, 04-2049	In re Mid-Valley	Kirkpatrick & Lockhart involved, on standing recusal list

04-1853	Galanti v. Goodyear Tire	McCarter & English involved, on standing recusal list
04-2072	Rivera v. Comm PA	Kirkpatrick & Lockhart involved, on standing recusal list
04-2096	EI DuPont de Nemours v. United States	Kirkpatrick & Lockhart involved, on standing recusal list
04-2112	In re Hechinger Inv	General Electric involved, on standing recusal list
04-2237, 04-2558	Fidelity Natl Info v. Sinclair	Fidelity involved, on standing recusal list
04-2247	Panichelli v. General Elec Co	General Electric involved, on standing recusal list
04-2390	Files v. Exxonmobil Pension	Exxon involved, on standing recusal list
04-2420	Ocel v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
04-2480	Dilworth v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
04-2486	Samson v. Superior Asset	Kirkpatrick & Lockhart involved, on standing recusal list
04-2539	Tran v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
04-2581	In re GI Holdings	The Clerk's Office recused me from this case automatically, but I am uncertain which party or attorney triggered the recusal.
04-2628	Cole v. Exxon Mobil Corp	Exxon involved, on standing recusal list
04-2642	McKenna v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
04-2696	Digital Signal Inc v. Voicestream Wireless	Fidelity involved, on standing recusal list
04-2719	Scanlin v. Brown & Co	JP Morgan Chase involved, on standing recusal list
04-2762	Snik v. Verizon Wireless	Vodafone involved, on standing recusal list
04-2829	Sabo v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
04-2896	Cantor v. Perelman	Disney involved, on standing recusal list
04-3143	Solarchick v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
04-3149	In re Strategic Tech	no specific recollection of why I recused
04-3153	Chen v. Rochford	Citicorp involved, on standing recusal list
04-3277	In re Oakwood Homes	JP Morgan Chase involved, on standing recusal list
04-3286	Parker v. Kelchner	Kirkpatrick & Lockhart involved, on standing recusal list
04-3352	In re Cendant Corp	McCarter & English involved, on standing recusal list
04-3408	Cetel v. Kirwan Fin Grp Inc	General Electric involved, on standing recusal list
04-3503	Lusitania Sav Bank v. Progressive Csity	McCarter & English involved, on standing recusal list
04-3609, 04-3636	In re Congoleum Corp	Exxon involved, on standing recusal list
04-3633	In re Tower Air Inc	General Electric involved, on standing recusal list
04-3716, 04-3755	In re Suprema	McCarter & English involved, on standing recusal list
04-3733, 04-3818	Hooven v. Exxon Mobil Corp	Exxon involved, on standing recusal list
04-3839, 04-3840	27th & Girard Ltd v. McDonalds Corp	McDonalds Corp involved, on standing recusal list
04-3869	L 3 Comm Corp v. Clevenger	McCarter & English involved, on standing recusal list
04-3874	Freedom Card Inc v. JP Morgan Chase & Co	JP Morgan Chase involved, on standing recusal list
04-3876	Chase Manhattan Bank v. Freedom Card Inc	JP Morgan Chase involved, on standing recusal list

04-3882	Empl Ins Wausau v. P H Glatfelter Co	Kirkpatrick & Lockhart involved, on standing recusal list
04-3932	In re Sakhrani	McCarter & English involved, on standing recusal list
04-3936	Morton Intl Inc v. AE Staley Mfg Co	Exxon and General Electric involved, on standing recusal list
04-4080	In re Owens Corning	JP Morgan Chase involved, on standing recusal list
04-4098	Wyckoff v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
04-4099	Gajarawala v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
04-4126	Johnson v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
04-4127	Blount v. Pleasant Ridge Manor	General Electric involved, on standing recusal list
04-4180	Carpet Grp Intl v. Oriental Rug	McCarter & English involved, on standing recusal list
04-4188	Gonda v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
04-4282	Manna v. United States	U.S. Attorney's Office involved, case dated back to my tenure as U.S. Attorney
04-4285	Chase Manhattan Bank v. Freedom Card Inc	JP Morgan Chase involved, on standing recusal list
04-4303	PA Pub Util Comm v. FCC	SBC involved, on standing recusal list
04-4304, 04-4433, 04-8040	Wachtel v. Guardian Life Ins Co	McCarter & English involved, on standing recusal list
04-4334	Peloro v. FBI	McCarter & English involved, on standing recusal list
04-4347	In re Net2000 Comm	General Electric involved, on standing recusal list
04-4351	In re Color Tile	McCarter & English involved, on standing recusal list
04-4355	Cap Funding VI LP v. Chase Manhattan USA	JP Morgan Chase involved, on standing recusal list
04-4387	In re Nutraquest	McCarter & English involved, on standing recusal list
04-4434	McCoy v. Health Net	McCarter & English involved, on standing recusal list
04-4482	In re Coram	Disney and General Electric involved, on standing recusal list
04-4483	In re Official Comm	Disney and General Electric involved, on standing recusal list
04-4596	In re Orpah Barbel	JP Morgan Chase involved, on standing recusal list
04-4598	Kuhnle v. Prudential	Kirkpatrick & Lockhart involved, on standing recusal list
04-4708	Earthlink v. FCC	SBC involved, on standing recusal list
04-4725	MCI Inc v. FCC	SBC involved, on standing recusal list
04-8032	Chase Manhattan Bank v. Iridium Africa Corp	JP Morgan Chase involved, on standing recusal list
05-1193	Perlberger v. Wachovia Bank NA	no specific recollection of why I recused, but possibly because of First Union, which is on standing recusal list
05-1329, 05-1503, 05-1504	Cetel v. Kirwan Fin Grp Inc	General Electric involved, on standing recusal list
05-1379, 05-1380, 05-1381, 05-1382	In re American Pad	Kirkpatrick & Lockhart involved, on standing recusal list
05-1584	Vanguard v. Goade	Vanguard involved, on standing recusal list
05-1610	Hooven v. Exxon Mobil Corp	Exxon involved, on standing recusal list
05-1653	Telecordia Tech Inc v. Telkom SA Ltd	SBC involved, on standing recusal list

05-1736	In re Shemonsky	I recused because this case involved a suit against the Judicial Council of Third Circuit.
05-1786, 05-1787, 05-1788	PA Fedr Brhd v. Norfolk S Corp	Vanguard involved, on standing recusal list
05-1822	Gallenthin Realty v. BP Prod NA Inc	McCarter & English involved, on standing recusal list
05-1881	In re Armstrong	JP Morgan Chase and First Union involved, on standing recusal list
05-1901	Natl Fuel Gas Co v. Equimeter Inc	Kirkpatrick & Lockhart involved, on standing recusal list
05-2033, 05-2034	In re Oakwood Homes	JP Morgan Chase involved, on standing recusal list
05-2130	Admin NJ Spill Comp v. Exxon Mobil Corp	Exxon involved, on standing recusal list
05-2134	Lansing v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
05-2165	Imperial Land Corp v. Lucchino	Kirkpatrick & Lockhart involved, on standing recusal list
05-2341	Gen Elec Cap Corp v. Stone	General Electric involved, on standing recusal list
05-2403	Elliott & Frantz Inc v. Ingersoll Rand	McCarter & English involved, on standing recusal list
05-2489	In re Midwest	Kirkpatrick & Lockhart involved, on standing recusal list
05-2587	Capers v. Smith Barney	Smith Barney involved, on standing recusal list
05-3243, 05-3328	Kintner v. Metro Life Ins Co	McCarter & English involved, on standing recusal list
05-3433	Sampathachar v. Fed Kemper Life	McCarter & English involved, on standing recusal list
05-3495	In re Fed Mogul	Citicorp involved, on standing recusal list
05-3709	Salkovitz v. Pioneer Elec USA Inc	McCarter & English involved, on standing recusal list
05-4034	Sommer v. Vanguard Grp	Vanguard involved, on standing recusal list
05-4602	Gagliardi v. Kratzenberg	General Electric involved, on standing recusal list
05-8002, 05-8004, 05-8005	PA Fedr Brhd v. Norfolk S Corp	Vanguard involved, on standing recusal list

NOMINATION OF SAMUEL A. ALITO, JR., OF NEW JERSEY, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, JANUARY 10, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m., in room 216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Grassley, Kyl, DeWine, Sessions, Graham, Cornyn, Brownback, Coburn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin.

Chairman SPECTER. The Judiciary Committee will now proceed with the confirmation hearing of Judge Alito for the Supreme Court.

Before beginning the first round of questioning, just a little review as to our procedure. As announced, there will be a 30-minute allocation for each Senator. We intend to work rather late this afternoon, perhaps even into the early evening. I do not know that it is possible to complete the first round of questioning today. That would be a good objective. We will see how it goes.

Judge Alito, you are free to let us know whenever you want to break. We will take a couple of breaks at the midpoint of the morning and the afternoon, but there are 18 of us and only one of you, so when you would like a break, your schedule takes precedence over ours.

Before beginning the opening round, let me yield to my colleague, Senator Leahy, to see if he has some additional comments.

Senator LEAHY. I thank you, Mr. Chairman. I also appreciate the fact we have kept to the clock. I think it has been helpful, and I would hope that Judge Alito would bear with us on that. We will have a lot of questions. I think to take the time to get to them all—you have always been accommodating about that—I think that that requires cooperation on both sides of the dais.

We do have the advantage, Mr. Chairman, that we did not have with Judge Roberts's hearings, that we are not in session and we are not going to be interrupted by votes, and we have the time to do it. I would hope that we do not go into a marathon for both his sake and us older guys' sake. But I do appreciate that you have run this with fairness and even-handedness, and I appreciate that.

Chairman SPECTER. Since there are no older guys involved or gals, we can consider the marathon, but we will keep it within bounds. You can start the clock. I will maintain the clock meticulously, as we have maintained timing as our Judiciary Committee practice.

Judge Alito, you will be faced with many, many questions on many topics. I am going to start today with a woman's right to choose, move to Executive power, and then hopefully within the 30 minutes pick up congressional power.

Starting with a woman's right to choose, Judge Alito, do you accept the legal principles articulated in *Griswold* v. *Connecticut*, that the Liberty Clause and the Constitution carries with it the right to privacy?

Judge ALITO. Senator, I do agree that the Constitution protects a right to privacy, and it protects the right to privacy in a number of ways. The Fourth Amendment certainly speaks to the right of privacy. People have a right to privacy in their homes and in their papers, and in their persons. And the standard for whether something is a search is whether there's an invasion of a right to privacy, a legitimate expectation of privacy.

Chairman SPECTER. Well, *Griswold* dealt with the right to privacy on contraception for married women. Do you agree with that?

Judge ALITO. I agree that *Griswold* is now I think understood by the Supreme Court as based on the Liberty Clauses of the Due Process Clause of the Fifth Amendment and the 14th Amendment.

Chairman SPECTER. Do you agree also with *Eisenstadt* which carried forward *Griswold* to single people?

Judge ALITO. I do agree with the result in *Eisenstadt*.

Chairman SPECTER. Let me move now directly into *Casey* v. *Planned Parenthood*, and picking up the gravamen of *Casey* as it has applied, *Roe* on the woman's right to choose, originating from the Privacy Clause with *Griswold* being its antecedent, and I want to take you through some of the specific language of *Casey* to see what your views are, and what weight you would ascribe to this rationale as you would view the woman's right to choose. In *Casey* the joint opinion said, "People have ordered their thinking and lives around *Roe*. To eliminate the issue of reliance would be detrimental. For two decades of economic and social development people have organized intimate relationships and reliance on the availability of abortion in the event contraception should fail." Pretty earthy language, but that is the Supreme Court's language. The Court went on to say, "The ability of women to participate equally in the economic and social life of the Nation has become facilitated by their ability to control their reproductive lives."

Now that states in specific terms the principle of reliance, which is one of the mainstays, if not the mainstay, on *stare decisis* precedent to follow tradition. How would you weigh that consideration on the woman's right to choose?

Judge ALITO. Well, I think the doctrine of *stare decisis* is a very important doctrine. It's a fundamental part of our legal system, and it's the principle that courts in general should follow their past precedents, and it's important for a variety of reasons. It's important because it limits the power of the judiciary. It's important because it protects reliance interest, and it's important because it re-

flect the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions. It's not an inexorable command, but it is a general presumption that courts are going to follow prior precedents, and as you mentioned—

Chairman SPECTER. How do you come to grips with the specifics where the Court, in the joint opinion, spoke of reliance on the availability of abortion in the event contraception should fail, on that specific concept of reliance?

Judge ALITO. Well, reliance is, as you mentioned, Mr. Chairman, one of the important foundations of the doctrine of *stare decisis*. It is intended to protect reliance interests, and people can rely on judicial decisions in a variety of ways. There can be concrete economic reliance. Government institutions can be built up in reliance on prior decisions. Practices of agencies and Government officials can be molded based on reliance. People can rely on decisions in a variety of ways. In my view—

Chairman SPECTER. Let me move on to another important quotation out of *Casey*. Quote: "A terrible price would be paid for overruling *Casey*, for overruling *Roe*. It would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law, and to overrule *Roe* under fire would subvert the Court's legitimacy."

Do you see the legitimacy of the Court being involved in the precedent of *Casey*?

Judge ALITO. Well, I think that the Court, and all the courts, the Supreme Court, my court, all the Federal courts, should be insulated from public opinion. They should do what the law requires in all instances. That's why they're not—that's why the members of the judiciary are not elected. We have a basically democratic form of Government, but the judiciary is not elected, and that's the reason, so that they don't do anything under fire. They do what the law requires.

Chairman SPECTER. But do you think there is as fundamental a concern as legitimacy of the Court would be involved if *Roe* were to be overturned?

Judge ALITO. Mr. Chairman, I think that the legitimacy of the Court would be undermined in any case if the Court made a decision based on its perception of public opinion. It should make its decisions based on the Constitution and the law. It should not be—it should not sway in the wind of public opinion at any time.

Chairman SPECTER. Let me move to just the final quotation that I intend to raise from *Casey*, and it is, "After nearly 20 years of litigation in *Roe*'s wake, we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedentual force that must be accorded to its holding." That separates out the original soundness of *Roe*, which has been criticized, and then lays emphasis on the precedentual value. How would you weigh that consideration were this issue to come before you if confirmed?

Judge ALITO. Well, I agree that in every case in which there is a prior precedent, the first issue is the issue of *stare decisis*, and the presumption is that the Court will follow its prior precedents. There needs to be a special justification for overruling a prior precedent.

Chairman SPECTER. Let me turn to an analogous situation, and that is Chief Justice Rehnquist's change of heart on the *Miranda* ruling. In 1974 in the case of *Michigan* v. *Tucker*, he was then Justice Rehnquist, wrote an opinion severely limiting *Miranda*, in effect stating he did not like it. Then in the year 2000 in the case of *United States* v. *Dickerson*, Chief Justice Rehnquist wrote an opinion of holding *Miranda*, and he did that because, "*Miranda* was embedded in the routine police practices to a point where the warnings have become a part of our National culture."

Now, there has been an analogy made from what Chief Justice Rehnquist said on the *Miranda* issue to the *Roe* issue. How would you evaluate the consideration of *Roe* being embedded in the culture of our society?

Judge ALITO. Well, I think that Chief Justice Rehnquist there was getting at a very important point, and—

Chairman SPECTER. Think he was right?

Judge ALITO. I think he was getting at—he was right in saying that reliance can take many forms. It can take a very specific and concrete form, and there can be reliance in the sense that he was talking about there, and I think what he's talking about there is that a great many people, and in that instance, police departments around the country, over a long period of time, had adapted to the *Miranda* rule, had internalized it. I think that all the branches of Government had become familiar with it and comfortable with it, and had come to regard it as a good way—after a considerable breaking in period—a good way of dealing with a difficult problem, and the problem was how to deal with interrogations leading to confessions, in terms of—

Chairman SPECTER. Judge Alito, let me move to the dissenting opinion by Justice Harlan in *Poe* v. *Ullman*, where he discusses the constitutional concept of liberty and says, "The traditions from which liberty developed, that tradition is a living thing." Would you agree with Justice Harlan that the Constitution embodies the concept of a living thing?

Judge ALITO. I think the Constitution is a living thing in the sense that matters, and that is that it is—it sets up a framework of Government and a protection of fundamental rights that we have lived under very successfully for 200 years, and the genius of it is that it is not terribly specific on certain things. It sets out some things are very specific, but it sets out some general principles, and then leaves it for each generation to apply those to the particular factual situations that come up.

Chairman SPECTER. Would you agree with Cardozo on *Palco* that it represents the values of a changing society?

Judge ALITO. The liberty component of the Fifth Amendment and the 14th Amendment, which I was talking about earlier, embody the deeply rooted traditions of the country, and it's up to each—those traditions and those rights apply to new factual situations that come up. As times change, new factual situations come up, and the principles have to be applied to those situations. The principles don't change. The Constitution itself doesn't change, but the factual situations change, and as new situations come up, the principles and the rights have to be applied to them.

Chairman SPECTER. Judge Alito, the commentators have characterized *Casey* as a super precedent. Judge Luttig, in the case of *Richmond Medical Center*, called the *Casey* decision super *stare decisis*. In quoting from *Casey*, Judge Luttig pointed out, the essential holding of *Roe* v. *Wade* should be retained and once again reaffirmed. Then in support of Judge Luttig's conclusion that *Casey* was super *stare decisis*, he refers to *Stenberg* v. *Carhart*, and quotes the Supreme Court, saying, "We shall not revisit these legal principles." That is a pretty strong statement for the Court to make, that we shall not revisit the principles upon which *Roe* was founded, and the concept of super *stare decisis* or super precedent arises as the commentators have characterized it, by a number of different Justices appointed by a number of different judges over a considerable period of time. Do you agree that *Casey* is a super precedent or a super *stare decisis* as Judge Luttig said?

Judge ALITO. Well, I personally would not get into categorizing precedents as super precedents or super duper precedents, or any—

Chairman SPECTER. Did you say "super duper?"

[Laughter.]

Judge ALITO. Right.

Chairman SPECTER. Good.

Judge ALITO. Any sort of categorization like that—

Chairman SPECTER. I like that.

[Laughter.]

Judge ALITO [continuing]. Sort of reminds me of the size of laundry detergent in the supermarket.

[Laughter.]

Judge ALITO. I agree with the underlying thought that when a precedent is reaffirmed, that strengthens the precedent, and when the Supreme Court says that we are not—

Chairman SPECTER. How about being reaffirmed 38 times?

Judge ALITO. Well, I think that when a precedent is reaffirmed, each time it's reaffirmed that is a factor that should be taken into account in making the judgment about *stare decisis*, and when a precedent is reaffirmed on the ground that *stare decisis* precludes or counsels against reexamination of the merits of the precedent, then I agree that that is a precedent on precedent.

Now, I don't want to leave the impression that *stare decisis* is an inexorable command because the Supreme Court has said that it is not, but it is a judgment that has to be based, taking into account all of the factors that are relevant and that are set out in the Supreme Court's cases.

Chairman SPECTER. Judge Alito, during the confirmation hearing of Chief Justice Roberts, I displayed a chart. I do not ordinarily like charts, but this one I think has a lot of weight because it lists all 38 cases which have been decided since *Roe*, where the Supreme Court of the United States had the opportunity to—Senator Hatch is in the picture now.

[Laughter.]

Chairman SPECTER. It is a good photo op for Senator Hatch. Senator Leahy is complaining.

[Laughter.]

Senator LEAHY. Just balance it on Orrin's head.

Senator HATCH. Put that over by Leahy.

Chairman SPECTER. He wants it on his side.

[Laughter.]

Chairman SPECTER. I think the point of it is that there have been so many cases, so many cases, 15 after your statement in 1985 that I am about to come to, and eight after *Casey* v. *Planned Parenthood*, which is why it has special significance, and I am not going to press the point about super precedent. I am glad I did not have to mention super duper, that you did. Thank you very much.

Let me come now to the statement you made in 1985, that the Constitution does not provide a basis for a woman's right to an abortion. Do you agree with that statement today, Judge Alito?

Judge ALITO. Well, that was a correct statement of what I thought in 1985 from my vantage point in 1985, and that was as a line attorney in the Department of Justice in the Reagan administration.

Today if the issue were to come before me, if I am fortunate enough to be confirmed and the issue were to come before me, the first question would be the question that we've been discussing, and that's the issue of *stare decisis*. And if the analysis were to get beyond that point, then I would approach the question with an open mind, and I would listen to the arguments that were made.

Chairman SPECTER. So you would approach it with an open mind notwithstanding your 1985 statement?

Judge ALITO. Absolutely, Senator. That was a statement that I made at a prior period of time when I was performing a different role, and as I said yesterday, when someone becomes a judge, you really have to put aside the things that you did as a lawyer at prior points in your legal career and think about legal issues the way a judge thinks about legal issues.

Chairman SPECTER. Judge Alito, coming to the role you had in the Solicitor General's Office, where you wrote the memorandum in the *Thornburgh* case, urging restriction and ultimate appeal of *Roe*, that was in your capacity as an advocate. And I have seen your other statements that the role of an advocate is different from the role of a judge. But when you made the statement that the Constitution did not provide for the right to an abortion, that was in a statement you made where you were looking to get a job, a promotion within the Federal Government. So there is a little difference between the 1985 statement and your advocacy role in the *Thornburgh* memorandum, is there not?

Judge ALITO. Well, there is, Senator, and what I said was that that was a true expression of my views at the time, the statement in the 1985 appointment form that I filled out. It was a statement that I made at a time when I was a line attorney in the Department of Justice. I'm not saying that I made the statement simply because I was advocating the administration's position, but that was the position that I held at the time, and that was the position of the administration.

Chairman SPECTER. Would you state your views, the difference as you see it between what you did as an advocate in the Solicitor General's Office to what your responsibilities would be, are on the Third Circuit, or what they would be on the Court if confirmed as a judicial capacity?

Judge ALITO. Well, an advocate has the goal of achieving the result that the client wants within the bounds of professional responsibility. That's what an advocate is supposed to do, and that's what I attempted to do during my years as an advocate for the Federal Government. Now, a judge doesn't have a client, as I said yesterday, and a judge doesn't have an agenda, and a judge has to follow the law. An important part of the law in this area, as we look at it in 2006, is the law of *stare decisis*.

Chairman SPECTER. Judge Alito, you have written some 361 opinions that I would like to have the time to discuss quite a few of them with you, but I am only going to pick up one in the first round, and that is an opinion you wrote in the *Elizabeth Blackwell Health Center for Women* v. *Knoll*, and that was a case where there was a challenge between a Pennsylvania statute, which required as a prerequisite to a woman getting Medicaid, that she would have had to have reported a rape or an incest to the police, and second, a requirement that there be a second opinion from a doctor that she needed an abortion to save her life. And that statutory requirement, those two provisions conflicted with a regulation by the Department of Health and Human Services. You were on the Third Circuit, which held that the Pennsylvania statute should be stricken in deference to the rule of the Health and Human Services Department. And Judge Nygaard entered a very forceful dissent saying that this was an interpretive rule and it was inappropriate to have that kind of an interpretive rule by the Department countervail a statute.

What was your thinking in that case? Had you been predisposed to take a tough line on a woman's right to choose or on Medicaid support for someone who had been raped, you would have upheld the statute. What was your thinking in that case?

Judge ALITO. Well, what you said is correct, Senator. I cast the deciding vote there to strike down the Pennsylvania statute, and I did it because that's what I thought the law required. I thought the law required that we defer to the interpretation of the Federal statute that had been made by the Department of Health and Human Services. If I had had an agenda to strike down any—I'm sorry, to uphold any regulation of abortion that came up in any case that was presented to me, then I would have voted with Judge Nygaard in that case, and that would have turned the decision the other way.

I've sat on three abortion cases on the Third Circuit. In one of them—that was the *Casey* case—I voted to uphold regulations of abortion, and in the other two—the *Elizabeth Blackwell* case and *Planned Parenthood* v. *Farmer*—I voted to strike them down. And in each instance, I did it because that's what I thought the law required.

Chairman SPECTER. Judge Alito, I want to turn now to Executive power and to ask you first if you agree with the quotation from Justice Jackson's concurrence in the *Youngstown Steel* seizure case about the evaluation of Presidential power that I cited yesterday.

Judge ALITO. I do. I think it provides a very useful framework, and it has been used by the Supreme Court in a number of important subsequent cases, in the *Dames and Moore*, for example, involving the release of the hostages from Iran. And it doesn't answer

every question that comes up in this area, but it provides a very useful way of looking at them.

Chairman SPECTER. Do you agree with Justice O'Connor's statement quoted frequently yesterday from *Hamdi* that, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," when she was citing the *Youngstown* case? Do you agree with that?

Judge ALITO. Absolutely. That's a very important principle. Our Constitution applies in times of peace and in times of war, and it protects the rights of Americans under all circumstances.

Chairman SPECTER. You made a speech at Pepperdine where you said, in commenting about the decision of the Supreme Court in *Ex Parte Milligan*, that "The Constitution applies even in an extreme emergency." The Government made a "broad and unwise argument" that the Bill of Rights simply doesn't apply during wartime.

Do you stand by that statement?

Judge ALITO. I certainly do, Senator. The Bill of Rights applies at all times, and it's particularly important that we adhere to the Bill of Rights in times of war and in times of national crisis, because that's when there's the greatest temptation to depart from them.

Chairman SPECTER. Steering clear, Judge Alito, of asking you how you would decide a specific case, I think it is very important to find out your jurisprudential approach in interpreting whether the September 14, 2001, congressional resolution authorizing the use of force constituted congressional authorization for the National Security Agency to engage in electronic surveillance where one party to the conversation was in the United States. Let me take just a moment to lay out the factual and legal considerations.

The Foreign Intelligence Surveillance Act of 1978 provides it "shall be the exclusive means by which electronic surveillance shall be conducted and the interpretation of domestic wire, oral, and electronic communications may be conducted." The Government contends that the Foreign Intelligence Surveillance Act clause, "except as authorized by statute, opens the door to interpreting that resolution to authorize the surveillance."

Let me give you a series of questions. I don't like to put more than one on the table at a time, but I think they are necessary in this situation to give the structure as to where I am going.

First, in interpreting whether Congress intended to amend FISA by that resolution, would it be relevant that Attorney General Gonzales said we were advised that "that was not something we could likely get."

Second, if Congress had intended to amend FISA by the resolution, wouldn't Congress have specifically said so, as Congress did in passing the PATRIOT Act, giving the Executive greater flexibility in using roving wiretaps?

Third, in interpreting statutory construction on whether Congress intended to amend FISA by the resolution, what would the relevance be of rules of statutory construction that repeal or change by implication—that changes by—makes the repeal by implication or disfavor, and specific statutory language trumps more general pronouncements? How would you weigh and evaluate the President's war powers under Article II to engage in electronic surveil-

lance with the warrant required by congressional authority under Article I in legislating under the Foreign Intelligence Surveillance Act? And let me start with the broader principles.

In approaching an issue as to whether the President would have Article II powers, inherent constitutional authority to conduct electronic surveillance without a wiretap, when you have the Foreign Intelligence Surveillance Act on the books, making that the exclusive means, what factors would you weigh in that format?

Judge ALITO. Well, probably the first consideration would be to evaluate the statutory question, and you outlined some of the factors and the issues that would arise in interpreting the statute, what is meant by the provision of FISA that you quoted regarding FISA—the Foreign Intelligence Surveillance Act—being the exclusive means for conducting surveillance. And then, depending on how one worked through that statutory question, then I think one might look to Justice Jackson's framework. And he said that he divided cases in this area into three categories where the President acts with explicit or implicit congressional approval, where the President acts and Congress has not expressed its view on the matter one way or the other, and the final category where the President exercises Executive power and Congress—and that is in the face of an explicit or implicit congressional opposition to it. And depending on how one worked through the statutory issue, then the case might fall into one of those three areas.

But these questions that you pose are obviously very difficult and important and complicated questions that are quite likely to arise in litigation, perhaps before my own court or before the Supreme Court.

Chairman SPECTER. Before pursuing that further—and we will have a second round—I want to broach one other issue with you. My time is almost up. That is, in the memorandum you wrote back on February 5, 1986, about the President's power to put a signing statement on to influence interpretation of the legislation, you wrote this: "Since the President's approval is just as important as that of the House or Senate, it seems to follow that the President's understanding of the bill should be just as important as that of Congress."

Is that really true when you say the President's views are as important as Congress's? The President can express his views by a veto and then gives Congress the option of overriding a veto, which Congress does not have if the President makes a signing declaration and seeks to avoid the terms of the statute. And we have the authority from the Supreme Court that the President cannot impound funds, cannot pick and choose on an appropriation. We have the line item veto case where the President cannot strike a provision even when authorized by Congress.

Well, I have got 10 second left. I guess when my red light goes on, it does not affect you. You can respond. Care to comment?

[Laughter.]

Judge ALITO. I do, Senator. I think the most important part of the memo that you are referring to is a fairly big section that discussed theoretical problems, and it consists of a list of questions, and many of the questions are the questions that you have just raised. In that memo, I said this is an unexplored area, and here

are the theoretical questions that—and, of course, they are of more than theoretical importance—that arise in this area.

That memo is labeled a rough first effort at stating the position of the administration. I was writing there on behalf of a working group that was looking into the question of implementing a decision that had already been made by the Attorney General to issue signing statements for the purpose of weighing in on the meaning of statutes. And in this memo—as I said, it was a rough first effort, and the biggest part of it, to my mind, was the statement there are difficult theoretical interpretive questions here and here they are. And had I followed up on it—and I don't believe I had the opportunity to pursue this issue further during my time in the Justice Department—it would have been necessary to explore all those questions.

Chairman SPECTER. Well, my red light went on.

Senator Leahy?

Senator LEAHY. Well, Judge, good morning.

Judge ALITO. Good morning, Senator.

Senator LEAHY. You survived yesterday listening to us. Now we have a chance to listen to you. I will have further questions on the memo that Senator Specter spoke of, but it gets beyond the theoretical. The last few weeks, we have seen it well played out in the press where the President and Senator John McCain negotiated rather publicly an amendment, which passed overwhelmingly in the House and the Senate, outlawing the use of torture by United States officers, yet the President in a signing statement implies that it will not apply to him or to those under his command as commander in chief. Doesn't that get well beyond a theoretical issue there?

Judge ALITO. It is, and I think I said in answering the Chairman that there are theoretical issues but they have considerable practical importance. But the theoretical issues really have to be explored and resolved. I don't believe the Supreme Court has done that up to this point. I have not had occasion in my 15-plus years on the Third Circuit to come to grips with the question of what is the significance of a Presidential signing statement in interpreting a statute.

Senator LEAHY. Let me follow with a related issue. I feel one of the most important functions of the Supreme Court is to stop our Government from intruding into Americans' privacy or our freedom or our personal decisions. In my State of Vermont, we value our privacy very, very much. I think most Americans do automatically, and many times they have to go to the courts to make sure that the Government does not—whatever part of the Government it is, whatever administration it might be—that they do not overreach in going into that privacy.

Three years ago, the Office of Legal Counsel at the Justice Department—and you are familiar with that; you worked there years ago—they issued a legal opinion, which they kept very secret, in which they concluded that the President of the United States had the power to override domestic and international laws outlawing torture. It said the President could override these laws outlawing torture.

They tried to redefine torture, and they asserted, I quote, that the President enjoys "complete authority over the conduct of war," and they went on further to say that if Congress passed a criminal law prohibiting torture "in a manner that interferes with the President's direction of such core matters as detention and interrogation of enemy combatants," that would be unconstitutional. They seemed to say that the President could immunize people from any prosecution if they violated our laws on torture. And that remained the legal basis in this administration until somebody apparently at the Justice Department leaked it to the press and it became public. Once it became public, with the obvious reaction of Republicans, Democrats, everybody saying this is outrageous, it is beyond the pale, the administration withdrew that opinion as its position. The Attorney General even said in his confirmation that this no longer—no longer—represented Bush administration policy.

What is your view—and I ask this because the memo has been withdrawn. It is not going to come before you. What is your view of the legal contention in that memo that the President can override the laws and immunize illegal conduct?

Judge ALITO. Well, I think the first thing that has to be said is what I said yesterday, and that is that no person in this country is above the law, and that includes the President and it includes the Supreme Court. Everybody has to follow the law, and that means the Constitution of the United States and it means the laws that are enacted under the Constitution of the United States.

Now, there are questions that arise concerning Executive powers, and those specific questions have to be resolved, I think, by looking to that framework that Justice Jackson set out that I mentioned earlier.

Senator LEAHY. Well, let's go into one of those specifics. Do you believe the President has the constitutional authority as commander in chief to override laws enacted by Congress and to immunize people under his command from prosecution if they violate these laws passed by Congress?

Judge ALITO. Well, if we were in—if a question came up of that nature, then I think you'd be in where the President is exercising Executive power in the face of a contrary expression of congressional will through a statute or even an implicit expression of congressional will. You would be in what Justice Jackson called "the twilight zone," where the President's power is at its lowest point, and I think you would have to look at the specifics of the situation. These are the gravest sort of constitutional questions that come up, and very often they don't make their way to the judiciary or they are not resolved by the judiciary. They are resolved by the other branches of the Government.

Senator LEAHY. But, Judge, I am a little bit troubled by this because you suggested, and I completely agreed with what you said, that no one is above the law and no one is beneath the law. You are not above the law, I am not, the President is not. But are you saying that there are situations where the President not only could be above the law passed by Congress, but could immunize others, thus putting them above the law?

I mean, listen to what I am speaking to specifically. We passed a law outlawing certain conduct. The President in his Bybee memo,

which has now been withdrawn, was saying that that law won't apply to me or people that I authorize. doesn't that place not only the President but anybody he wants above the law?

Judge ALITO. Senator, as I said, the President has to follow the Constitution and the laws and, in fact, one of the most solemn responsibilities of the President—and it is set out expressly in the Constitution—is that the President is to take care that the laws are faithfully executed, and that means the Constitution, it means statutes, it means treaties, it means all of the laws of the United States.

But what I am saying is that sometimes issues of Executive power arise and they have to be analyzed under the framework that Justice Jackson set out. And you do get cases that are in this twilight zone and it is—they have to be decided when they come up based on the specifics of the situation.

Senator LEAHY. But are you saying that there could be instances where the President could not only ignore the law, but authorize others to ignore the law?

Judge ALITO. Well, Senator, if you are in that situation, you may have a question about the constitutionality of a congressional enactment. You have to know the specifics of—

Senator LEAHY. Let's assume there is not a question of the constitutionality of the enactment. Let's make it an easy one. We pass a law saying it is against the law to murder somebody here in the United States. Could the President authorize somebody, either from an intelligence agency or elsewhere, to go out and murder somebody and escape prosecution or immunize the person from prosecution, absent a Presidential pardon?

Judge ALITO. Neither the President nor anybody else, I think, can authorize someone to—can override a statute that is constitutional. And I think you are in this—when you are in the third category, under Justice Jackson, that is the issue which you are grappling with.

Senator LEAHY. But wouldn't it be constitutional for the Congress to outlaw Americans from using torture?

Judge ALITO. And Congress has done that, and it is certainly an expression of a very deep value of our country.

Senator LEAHY. And if the President were to authorize somebody to torture or say that he would immunize somebody from prosecution for doing that, he wouldn't have that power, would he?

Judge ALITO. Well, Senator, I think the important points are that the President has to follow the Constitution and the laws, and it is up to Congress to exercise its legislative power. But as to specific issues that might come up, I really need to know the specifics. I need to know what was done and why it was done, and hear the arguments on the issue.

Senator LEAHY. Let's go to some specifics. Senator Specter mentioned FISA and your role with FISA, the Foreign Intelligence Surveillance Act. Certainly, you had to be involved with it, and appropriately so, when you were a U.S. Attorney. This law came in after the abuses of the 1960s and 1970s. We had had President Nixon's enemies list, with the government breaking into doctors' offices and wiretapping innocent Americans, and so on. After that, the Congress in a strong bipartisan effort passed the FISA legislation. We

have that court which can handle applications in secret for wiretaps or surveillance, if necessary, for national security.

Now, we have just learned that the President has chosen to ignore the FISA law and the FISA court. He has issued secret orders, and according to the press and the President's own press conference, time after time after time secret orders for domestically spying on American citizens without obtaining a warrant.

Do you believe the President can circumvent the FISA law, and bypass the FISA court to conduct warrantless spying on Americans?

Judge ALITO. The President has to comply with the Fourth Amendment and the President has to comply with the statutes that are passed. This is an issue I was speaking about with Chairman Specter that I think is very likely to result in litigation in the Federal courts. It could be in my court. It certainly could get to the Supreme Court and there may be statutory issues involved—the meaning of the provision of FISA that you mentioned, the meaning certainly of the authorization for the use of military force—and those would have to be resolved.

And in order to resolve them, I would have to know the arguments that are made by the contending parties. On what basis is it claimed that there is a violation? On what basis would the President claim that what occurred fell within the authorization of the authorization for the use of military force? And then if you got beyond that, there could be constitutional questions about the Fourth Amendment, whether it was a violation of the Fourth Amendment, whether it was the valid exercise of Executive power.

Senator LEAHY. But wouldn't the burden be on the Government to prove that it wasn't a violation of the Fourth Amendment if you were spying on Americans without a warrant, especially when you have courts set up—in this case the FISA court, which sets up a very easy procedure to get the warrant? Wouldn't the burden be on the Government in that case?

Judge ALITO. Well, Senator, I think the in first instance the Government would have to come forward with its theory as to why the actions that were taken were lawful. I think that is correct.

Senator LEAHY. Well, let me ask you another one. You are saying this may come before the Third Circuit or could come before the Supreme Court, and I will accept that. But how does somebody even get there? If you are conducting illegal secret spying on a person, how are they even going to know? Where are they going to get the standing to sue?

Judge ALITO. Certainly, if someone is the subject of a search and they claim that the search violates a statute or it violates the Constitution, then they would have standing to sue and they could sue in a Federal court that had jurisdiction.

Senator LEAHY. And I am not asking these as hypothetical questions, Judge. People are getting very concerned about this. We just found out, again not because the Government told us, but because the press found out about it—and thank God that we do have a free press because so much of the stuff that is supposed to be reported to Congress never is, and we first hear about it when it is in the press.

But we found out that the Department of Defense is going around—and this makes me think of COINTELPRO during the Vietnam War—they are going around the country photographing and spying on people who are protesting the war in Iraq. They went, according to the press, and spied on Quakers in Vermont.

Now, I don't know why they spent all that money to do that. If they want to find a Vermonter protesting the war, turn on C–SPAN. I do it on the Senate floor all the time. But I know some of these Quakers. I mean, in the Quaker tradition, they have been protesting war throughout this country's history.

Now, I worry about this culture we are getting, and I just want to make sure since Congress is not going to stand up and say no, and the administration certainly is authorizing this—I want to make sure that the courts are going to say we will respect your privacy, we will respect your Fourth Amendment rights.

You know, if you have somebody who has been spied on, would you agree—and I think you did, but I want to make sure I am correct on this—do you agree that they should have a day in court?

Judge ALITO. Certainly. If someone has been the subject of illegal law enforcement activities, they should have a day in court and that is what the courts are there for, to protect the rights of individuals against the government and to—or anyone else who violates their rights. And they have to be absolutely independent and treat everybody equally.

Senator LEAHY. And those Fourth Amendment rights are pretty significant, are they not?

Judge ALITO. They are very significant.

Senator LEAHY. I think they set us apart from most other countries in the world, to our betterment. And you were a prosecutor; I was a prosecutor. I think we can agree even looking of our past professions that it protects us.

Judge ALITO. I agree, Senator. I tried to follow what the Fourth Amendment required when I was a prosecutor and I regard it as very important.

Senator LEAHY. Well, let me go back to the last time we saw Government excesses like this before FISA. When you worked in the Reagan administration, you argued to the Supreme Court that President Nixon's Attorney General should have absolute immunity for domestic spying without a warrant even in the case of willful misconduct. In your memo you said, "I do not question that the Attorney General should have immunity, but for tactical reasons I would not raise the issue here."

Do you believe today that the Attorney General would be absolutely immune from civil liability for authorizing warrantless wiretaps?

Judge ALITO. No, he would not. That was settled in that case. The Supreme Court held that the Attorney General does not have—

Senator LEAHY. But you did believe so then?

Judge ALITO. Actually, I recommended that that argument not be made. It was made and I think it is important to understand the context of that. First of all—

Senator LEAHY. You did say in the memo, "I do not question that the Attorney General should have this immunity."

Judge ALITO. That is correct, and the background of that, if I could just explain very briefly—

Senator LEAHY. Sure.

Judge ALITO [continuing]. Is that we were—there, we were not just representing the Government; we were representing former Attorney General Mitchell in his individual capacity. He was being sued for damages and we were, in a sense, acting as his private attorney. And this was an argument that he wanted to make. This was an argument that had been made several times previously by the Department of Justice during the Carter administration and then just a couple of years earlier in *Harlow* v. *Fitzgerald* in the Reagan administration. And I said I didn't think it was a good idea to make the argument in this case, but I didn't dispute that it was an argument that was there.

Senator LEAHY. You don't have any question that the judiciary has a role to play here and there can be judicial checks on such things?

Judge ALITO. No. Absolutely, it is the job of the judiciary to enforce the Constitution.

Senator LEAHY. Let's go into a couple search cases, and I think we have indicated to you that we would bring these up—*Doe* v. *Groody*, *Baker* v. *Monroe Township*. Those are unauthorized searches. In *Doe*, the police officers had a warrant for a man at a certain address. When they arrived, they found his wife and 10-year-old daughter. They were not in the warrant, they posed no threat. But the officers detained them and strip-searched them, the wife and the 10-year-old, the 10-year-old girl.

In *Baker*, a mother and her three teenage children were detained and searched when they arrived at the home of the mother's adult son. They didn't live there. They were not in the home. They were outside. They didn't pose a threat to the police, but they were ordered at gunpoint to lie on the ground. They were handcuffed, they were taken into the house and they were searched.

In *Doe*, the strip-search case of the 10-year-old girl, the officers didn't ask for permission to search anybody beyond the man they were looking for. In fact, the magistrate didn't give a search warrant for anybody else. But you went beyond that and you said that they were justified in strip-searching this 10-year-old and the mother. You went beyond the four corners of the search warrant the magistrate gave.

And one of your members of the Third Circuit, Judge Chertoff, who is now the head of Homeland Security and a former prosecutor, criticized your reasoning. He said that it would come dangerously close to displacing the critical role of the independent magistrate.

Do you continue to hold the position you took in your opinion or do you now agree with the majority that they are right and you are wrong?

Judge ALITO. Well, Senator, I haven't had occasion to think that what I said in that case was correct, but let me just explain what was going on there.

Senator LEAHY. Sure.

Judge ALITO. The issue there was whether—the first issue was whether the warrant authorized the search of people who were on

the premises and that was the disagreement between me and the majority and it was a rather technical issue about whether the affidavit that was submitted by police officers was properly incorporated into the warrant for the purposes of saying who could be searched.

And I thought that it was, and I thought that it was quite clear that the magistrate had authorized a search for people who were on the premises. That was the point of disagreement. I was not pleased that a young girl was searched in that case and I said so in my opinion. That was an undesirable thing, but the issue wasn't whether there should be some sort of rule of Fourth Amendment law that a minor can never be searched. And I think if we were to—

Senator LEAHY. But we both agree on that, Judge. The only reason I bring up these two cases is it seems in both of them you went beyond the four corners of the search warrant and you settled all issues in a light most favorable—the majority in the opinion didn't, but you did—in a light most favorable to law enforcement. In fact, in *Baker*, the majority said that.

And I worry about this because I always worry that the courts must be there to protect individuals against an overreaching government. In this case, your position in the minority was that you protected what the majority felt was an overreaching government.

Am I putting too strong an analysis on that?

Judge ALITO. I do think you are, Senator.

Senator LEAHY. OK.

Judge ALITO. I think you need to take into account what was going on here. The police officers prepared an affidavit and they said we have probable cause to believe that this drug dealer hides drugs on people who are on the premises. And therefore, when we search, we want authorization not just to search him, but to search everybody who is found on the premises because we think he hides—we have reason to believe he hides drugs there.

And the magistrate who issued the warrant said that the affidavit was incorporated into the warrant for the purpose of establishing probable cause. And we are supposed to read warrants in a common-sense fashion because they are prepared by police officers for the most part, not by lawyers, and they are often prepared under a lot of time pressure.

And it seemed to me that, reading this in a common-sense fashion, what the magistrate intended to do was to say, yes, you have authorization to do what you ask us to do. But even beyond that, the issue there was whether these police officers could be sued for damages, and they couldn't be sued for damages if a reasonable officer could have believed that that is what the magistrate intended to authorize. And I thought that surely a reasonable officer could view it that way. Now, Judge Chertoff looked at it differently and there are cases where reasonable people disagree, and that is all that was going on.

Senator LEAHY. I know. You look for what a reasonable officer would think—I spent 8 years in law enforcement. I don't know where any reasonable officer under those circumstances would feel they could strip-search a 10-year-old girl.

Let me go into another area, and it is one that touched me in your statement yesterday. You spoke eloquently of your father's experience when he came to this country. The reason it touched me is I was thinking that, when my maternal grandparents emigrated to America, to Vermont, speaking only Italian, coming from Italy to a new country, I know some of the problems they faced—these people speaking this strange language. My mother was a child learning English when she went to school. People asking, "Why don't they speak like us? Why are they different than us"; those were just some of the obstacles they faced.

In my father's case, my paternal grandfather, whom I never knew, named Patrick Leahy, died as a stonecutter in Barre, Vermont. My father was a young teen and had to go to work to support his mother, my grandmother, whom I also never knew. And the signs then were "No Irish Need Apply" or "No Catholics Need Apply." And I think you and I would be in total agreement that we are now at a different world in at least most of our country and that we are better people because we have done away with that.

What we both understand, I think, in our core, I would hope, is what happens if you have either ethnic prejudice or religious prejudice. In my case, my father was a self-taught historian, but he never was able to finish high school. I was the first Leahy to get a college degree, my sister the next one.

So with that in mind, there was something in your background that I was troubled with. That is the Concerned Alumni of Princeton University, CAP. This was a group that received attention because it was put together, but it resisted the admission of women and minorities to Princeton. They were hostile to what they felt were people that did not fit Princeton's traditional mold—women and minorities.

Now, two prominent Princetonians—one, Bill Frist, who is now the Majority Leader of the United States Senate, in a committee, roundly criticized CAP. Bill Bradley, who had joined it and then found out what it was, left it, and roundly criticized it. And yet you, proudly in 1985, well after this criticism, in your job application, proudly wrote that you were a member of it, a member of Concerned Alumni of Princeton University, a conservative alumni group.

Why, in heaven's name, Judge, with your background and what your father faced, why in heaven's name are you proud of being part of CAP?

Judge ALITO. Well, Senator, I have racked my memory about this issue, and I really have no specific recollection of that organization. But since I put it down on that statement, then I certainly must have been a member at that time. But if I had been actively involved in the organization in any way, if I had attended meetings or been actively involved in any way, I would certainly remember that, and I don't.

I have tried to think of what might have caused me to sign up for membership, and if I did, it must have been around that time. And the issue that had rankled me about Princeton for some time was the issue of ROTC. I was in ROTC when I was at Princeton, and the unit was expelled from the campus. And I felt that was

very wrong. I had a lot of friends who were against the war in Vietnam, and I respected their opinions, but I didn't think that it was right to oppose the military for that reason. And the issue, although the Army unit was eventually brought back, the Navy and the Air Force units did not come back, and the issue kept coming up. And there were people who were strongly opposed to having any unit on campus, and the attitude seemed to be that the military was a bad institution and that Princeton was too good for the military, and that Princeton would somehow be sullied if people in uniform were walking around the campus, that the courses didn't merit getting credit, that the instructors shouldn't be viewed as part of the faculty. And that was the issue that bothered me about that.

Senator LEAHY. But, Judge, with all due respect, CAP was most noted for the fact that they were worried that too many women and too many minorities were going to Princeton. In 1985, when everybody knew that is what they stood for, when a prominent Republican like Bill Frist and a prominent Democrat like Bill Bradley, both had condemned it, you, in your job application, proudly stated this as one of your credentials.

Now, you strike me as a very cautious and careful person, and I say that with admiration, because a judge should be. But I cannot believe that at 35, when you are applying for a job, that you are going to be anything less than careful in putting together such a job application, and frankly, I do not know why that was a matter of pride for you at that time.

My time is up. We will come back to this. I have other questions.

Judge ALITO. Well, Senator, as you said, from what I now know about the group, it seemed to be dedicated to the idea of bringing back the Princeton that existed at a prior point in time, and as you said, somebody from my background would not have been comfortable in an institution like that, and that certainly was not any part of my thinking in whatever I did in relation to this group.

Senator LEAHY. Or my background either, Judge, or my background either.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Hatch?

Senator HATCH. Welcome, Judge Alito. We appreciate you and the service that you have given, but much has been made about your membership in an organization called the Concerned Alumni of Princeton. Now, you mentioned this organization in your 1985 job application for a position in President Reagan's administration. And you have told us what you felt—you know about your membership in that organization. So is it fair to say that you were not a founding member?

Judge ALITO. I certainly was not a founding member.

Senator HATCH. You were not a board member?

Judge ALITO. I was not a board member.

Senator HATCH. Or, for that matter, you were not even an active member of the organization, to the best of your recollection?

Judge ALITO. I don't believe I did anything that was active in relation to this organization.

Senator HATCH. Now, some have suggested, as my friend from Massachusetts did yesterday, that by your membership in this organization, you are somehow against the rights of women and minorities attending colleges. So let me just ask you directly on the record: Are you against women and minorities attending colleges?

Judge ALITO. Absolutely no, Senator, no.

Senator HATCH. I felt that that would be your answer. I really did.

[Laughter.]

Senator LEAHY. Tough question, Orrin. Tough question.

Senator HATCH. It is a good question, though. It is one that kind of overcomes the implications that you were.

Judge ALITO. Senator, I had never attended a non-coeducational school until I went to Princeton, and after I was there a short time, I realized the benefits of attending a co-educational school.

[Laughter.]

Senator HATCH. Now, I am glad that you mentioned in your opening statement yesterday that a decade earlier, a person like yourself—and by this, I assume you meant someone of Italian ancestry.

Judge ALITO. I do, Senator, and someone not from any sort of exalted economic status.

Senator HATCH. Modest background, son of an immigrant father, and a person who had gone to public school and might not have been fully welcomed sometimes at Princeton at that time. Now, people like me are not even sure of what an eating club is, but it sure as heck does not sound like a cafeteria.

Judge ALITO. No. It's something like a fraternity, except it's just a facility. It's a private facility where students eat. Traditionally, they were selective. They had a process like Vicker and they chose people that they thought fit in with the group.

Senator HATCH. Sure.

Judge ALITO. And I did not choose to belong to an eating club. I belonged to a university facility called Stevenson Hall, which was named after Adlai Stevenson, and it was one of the most co-educational facilities on the campus. It was not selective. It was attractive to me because a lot of faculty members went there for lunch. There was a master who lived on the facility with his family, and it was an opportunity at dinner and lunch to talk to faculty members.

Senator HATCH. Well, much has been written about the just and egalitarian changes that took place at Princeton and other elite institutions in the 1960s, making them more welcoming to persons without an elite background. It has been alleged by some—most prominently, I might add, by a Democratic witness who was withdrawn at the last minute because of some politically embarrassing comments that he made—that your membership in this group demonstrates your desire to maintain some old boys' network to the detriment of women and minorities. Could you comment on that particular suggestion?

Judge ALITO. I certainly had no such desire, and I think that what I did when I was a student at Princeton and my activities since then illustrate that.

As I said, when I was at Princeton, I was a member of this university facility, and it was open to everybody, and it was one of the most co-educational facilities on the campus. And since graduating, I have actually been involved in a way in the admissions process. I was on the Schools Committee for a number of years and interviewed applicants to Princeton, and I think that shows my attitude toward the general way in which the university has been run.

Senator HATCH. Well, ROTC programs are an excellent opportunity for young men and women to attend college and to serve their country through service in the armed forces. Now, there are actually more military officers who were ROTC students than went to West Point, the Naval Academy, or the Air Force Academy. Now, that includes the eminent Colin Powell.

Now, you were a member of the ROTC; is that true?

Judge ALITO. I was, Senator.

Senator HATCH. You were a proud member of the ROTC.

Judge ALITO. I was.

Senator HATCH. Did you enjoy your time in the ROTC and in the Army afterward?

Judge ALITO. I was proud to be a member, and the unit was thrown off the campus after—well, the decision was made shortly after I joined the ROTC, and so I attended the ROTC classes on the campus during my junior year, but during my senior year the unit had been expelled from the campus, and I had to go to Trenton State College occasionally to finish up my ROTC work.

Senator HATCH. I heard a report yesterday that the ROTC building on the Princeton campus was actually firebombed at about the same time that American servicemen of college age were fighting in Vietnam. Is that accurate?

Judge ALITO. That's correct. It was very extensively damaged.

Senator HATCH. Was anybody injured?

Judge ALITO. I don't recall that anybody was injured, but certainly there's a serious risk of injury whenever an arson takes place.

Senator HATCH. Now, Judge Alito, some Senators and left-wing activist groups have focused on one case involving the Vanguard Company, claiming that your consideration of that case amounts to some kind of ethical lapse. Now, I would observe that the universal opinion is that you have unquestioned integrity and a record that is above reproach. I know we will hear from the American Bar Association later this week, but I know their highest rating includes the highest marks for integrity. In fact, I have a copy of their recommendations here.

On the issue of integrity, it says, "The matter of integrity is self-defining. A nominee's character and general reputation in the legal community are investigated, as are his or her industry and diligence. Judge Alito enjoys an excellent reputation for integrity and character, notwithstanding a widespread awareness of the Vanguard and Smith Barney recusal issues. During his personal interview with us, Judge Alito was asked about the recusal matter in detail, and he acknowledged at length that he takes the matter of recusal very seriously and that the cases had 'slipped through' the court's screening process."

I won't read the whole matter, but let me just go toward the end. "Judge Alito explained to the satisfaction of the Standing Committee the special circumstances that resulted in the screen not working or otherwise not being applied in these limited matters"—that is, the screening of cases—"and he further accepted responsibility for the errors. We accept his explanation and do not believe these matters reflect adversely on him. To the contrary, consistent and virtually unanimous comment from those interviewed included 'He has the utmost integrity'; 'he is a straight shooter, very honest, and calls them as he sees them'; 'his reputation is impeccable'; 'you can find no one with better integrity'; 'his integrity and character are of the highest caliber'; 'he is completely forthright and honest'; 'his integrity is absolutely unquestionable'; 'he is a man of great integrity.'"

"On the basis of our interviews with Judge Alito with well over 300 judges, lawyers, and members of the legal community nationwide, all of whom know Judge Alito professionally, the Standing Committee concluded that Judge Alito is an individual of excellent integrity."

Now, the reason I want to go into this is to kind of get rid of this problem that I think is as phony as anything I have ever seen in my time around here. Like I say, this case has been written about or reported on for weeks in bits and pieces so that getting a clear picture of the facts is indeed a challenge, let alone getting a clear picture of the ethical issues involved as well. And I know you have not had a chance to respond to any of it publicly, so I want to give you that chance now.

Now, please take a few minutes and briefly describe the facts of the case, and then I have a few questions on the issues that are raised by the case.

Judge ALITO. Thank you, Senator, and I appreciate the opportunity to address this because a lot has been said about it and very little by me. And I think that once the facts are set out, I think that everybody will realize that in this instance I not only complied with the ethical rules that are binding on Federal judges—and they're very strict—but also that I did what I have tried to do throughout my career as a judge, and that is to go beyond the letter of the ethics rules and to avoid any situation where there might be an ethical question raised.

And this was a case where—this is a case that came up in 2002, 12 years after I took the bench, and I acknowledge that if I had to do it over again, there are things that I would have done differently. And it's not because I violated any ethical standard, but it's because when this case first came before me, I did not focus on the issue of recusal and apply my own personal standard, which is to go beyond what the code of conduct for judges requires.

This was a pro se case, and we take our pro se cases very seriously.

Senator HATCH. By pro se, explain that.

Judge ALITO. It's a case where the plaintiff was not represented by a lawyer. She was representing—she was representing—

Senator HATCH. Paying for her own counsel and represented herself.

Judge ALITO. She represented herself initially, and we take those very seriously. We give those just as much consideration—in fact, more consideration in many respects than we do with the cases without lawyers because we take into account that somebody who's representing himself or herself can't be expected to comply with all the legal technicalities.

But for whatever reason, our court system for handling the monitoring of recusals in these pro se cases is different from the system that we use in the cases with lawyers. And maybe that's because recusal issues don't come up very often in pro se cases. But, in any event, in a case with a lawyer, before the case is ever sent to us, we receive what are known as clearance sheets, and those are—it's a stack of papers and it lists all the cases that the clerk's office is thinking of sending to us. It lists the parties in each case, and it lists the lawyers in each case. And it says, "Do you need to recuse yourself in any of these cases?" And this is the time when the judges and this is the time when I focus on the issue of recusal, and I look at each case. I look at the parties. I look at the lawyers. And I ask myself: Is there a reason why I should not participate in the case?

Now, because this case, the *Monga* case, was a pro se case, it didn't come to me with clearance sheets. I just received the briefs, and it had been through our staff attorneys' office. They take a first look at the pro se cases, and they try to make sure—they try to translate the pro se arguments into the sort of legal arguments that lawyers would make to help the pro se litigants. And they give us a recommended disposition and a draft opinion.

And when this came to me, I just didn't focus on the issue of recusal, and I sat on the initial appeal in the case. And then after the case was decided, I received a recusal motion. And I was quite concerned because I take my ethical responsibilities very seriously.

So I looked into the question of whether I was required under the code—because I just wanted to see where the law was on this. Was I required under the code of conduct to recuse myself in this case? And it seemed to me that I was not. And a number of legal experts, experts on legal ethics, have now looked into this question, and their conclusion is no, I was not required to recuse.

But I didn't stand on that because of my own personal policy of going beyond what the code requires, so I did recuse myself. And not only that, I asked that the original decision in the case be vacated, that is, wiped off the books and that the losing party in the case, the appellant, Ms. Monga, be given an entirely new appeal before an entirely new panel. And that was done.

I wanted to make sure that she did not go away from this case with the impression that she had gotten anything less than an absolutely fair hearing. And then beyond that, I realized that the fact that this has slipped through in a pro se case pointed to a bigger problem, and that was the absence of clearance sheets.

So since that time, I have developed my own forms that I use in my own chambers, and for pro se cases now, there is—I have a red sheet of paper printed up, and it is red so nobody misses it. And when a pro se case comes in, it initially goes to my law clerks, and they prepare a clearance sheet for me in that case, and then they do an initial check to see whether they spot any recusal problem.

And if they don't, then there's a space at the bottom where they initial it. And then it comes to me, and there's a space at the bottom for me to initial to make sure that I focus on the recusal problem. And in very bold print at the bottom of the sheet for my secretary, it says, "No vote is to be sent in in this case unless this form is completely filled out."

So there are a number of internal checks now in my own office to make sure that I follow my own policy of going beyond what the code requires.

Senator HATCH. In other words, there was never any possibility of you benefiting financially no matter how that case came out. Is that right?

Judge ALITO. Absolutely no chance.

Senator HATCH. And you actually did recuse yourself when the question was eventually raised, even though you didn't have to.

Judge ALITO. That's correct, Senator.

Senator HATCH. Did you genuinely feel that you were either legally or ethically required to recuse under those circumstances?

Judge ALITO. I did not think the code required—

Senator HATCH. You were just going beyond, which has been your philosophy and—

Judge ALITO. That's right.

Senator HATCH [continuing]. Ethical response, your personal ethical approach to it.

Well, your own conclusion certainly is supported by the independent ethics experts that you mentioned who have recently examined this case. I know one of them is Professor Geoffrey Hazard from the University of Pennsylvania. That name stuck out in particular because I remember when a financial conflict of interest issue arose in connection with the nomination of Supreme Court Justice Stephen Breyer. In 1994, Senator Kennedy and I, we strongly defended the Breyer nomination. I did, too. And during the hearings, Senator Kennedy highlighted a letter from Professor Geoffrey Hazard to answer Justice Breyer's critics.

Well, Professor Hazard has examined this matter, and concluded that you, Judge Alito, handled it, in his words, "quite properly."

Now, Mr. Chairman, I would like to put not only Professor Hazard's letter into the record, but the letter of Steven Lubet, Thomas Morgan, and Professor Ronald Rotunda, all of whom found that you made no ethical mistakes.

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

Senator HATCH. And let me just observe that these are all top ethics experts in our country today, and, you know, I have to say that Rotunda—or Morgan, of the George Washington University Law School, he happens to be the co-author of the Nation's most widely read ethics textbook. Now, he was blunt in his assessment saying that there was simply no basis for suggesting that you did anything improper. So I am glad to put those in the record.

Now, you actually did more than simply recusing yourself in this case. As you have explained, you even set up a special system to make sure that, you know, there never is going to be a question about this. And so you went farther than you were legally or ethically mandated to do.

Judge ALITO. I did, Senator, and that is what I have tried to do throughout my time on the bench.

Senator HATCH. Now, when the new panel of judges looked at this case, how did they rule?

Judge ALITO. They ruled the same way that we had, and we had ruled the same way that the district court did.

Senator HATCH. OK. So let me just clarify this one more time, and you tell me if this accurately describes the situation. You did not believe that you were ethically or legally required to recuse yourself in this case. All the ethics experts agree with you. Yet you recused yourself anyway when the issue was raised. The party raising the issue got an entirely new hearing before a new and different panel of judges, who ruled the same way that you did originally.

Does that about sum it up?

Judge ALITO. That's correct, Senator.

Senator HATCH. Well, I have to say, Judge, that you went above and beyond your ethical duties here, and I think you are to be applauded, not to be criticized, for your rigorous attention to judicial impartiality and integrity.

Now, let me just go into another matter here before I finish here. Some Supreme Court nominees have had legislative experience. The Justice you will replace, Justice O'Connor, served in the Arizona State Senate. Justice Breyer was chief counsel to Senator Kennedy when he chaired this Committee. I have tremendous respect for both of them.

Judge Alito, you have had no legislative experience, and there are those of us who are concerned that your many years of experience in the executive branch may have biased you in favor of Executive power, or at least some feel that way and that that is a possibility.

Yesterday, one of my Democratic colleagues claimed that your instincts are to defer to the Executive, to grant prosecutors whatever power they seek, that sort of thing. I suppose that in 15 years on the appeals court you have participated in what I would estimate at nearly 5,000 cases. You have had many opportunities to review challenges to Executive power. Is that correct?

Judge ALITO. I have, yes.

Senator HATCH. Well, I am thinking of cases such as *United States* v. *Kithcart*, where you reversed a criminal conviction because the police lacked probable cause for a search, or *Bolden* v. *Southeastern Pennsylvania Transportation Authority*, where you ruled for a former maintenance custodian for a public transportation agency, concluding that the Fourth Amendment barred a suspicionless drug test.

I want to make it clear that simply giving such examples of results on the other side of the ledger does not by itself prove that you are a good judge or a bad judge. Without also talking about the facts and the law in each case, merely tabulating winners and losers does not offer much. But since my colleagues on the other side occasionally have their tally sheets and actually some have even claimed that you may be biased when certain results seem to suit them, could you give me some more examples of cases where you voted against Executive powers?

Judge ALITO. Yes, certainly, Senator. *Brinson* v. *Vaughn* is an example of that. That was a habeas case involving a murder conviction, and I concluded and my panel concluded—and I wrote the opinion saying that there had been racial discrimination, or enough to have a hearing on the possibility of racial discrimination in the selection of the jury in that case. And, therefore, we reversed the decision of the district court.

Williams v. *Price* is another example. There we found—and that was another murder case, and so what is involved here in these cases is really the most important thing that is litigated on the criminal side in the Federal courts. That was a case where the district court had denied a writ of habeas corpus, and we reversed because we found that there had been an error in excluding testimony that showed racial bias on the part of the jurors.

There was another murder case, *United States* v. *Murray*. This was a Federal prosecution, and we had to reverse there because we concluded—and I wrote the opinion there—that the prosecutors had introduced evidence—

Senator HATCH. Well, you could go on and on, but my point is that in approximately 5,000 cases, you can find just about anything you want to, to pluck out and say, "Oh, he didn't do right here," or "He did right here." I mean, the fact of the matter is that you, as far as I can see, have always done your utmost to live up to your responsibilities as a Federal court judge and that you have done so throughout your 15 years on the bench, even though members of this illustrious body, the United State Senate, might differ with you on occasion, and others might also. But I don't know a judge alive who has been on the bench 15 years that does not have cases that some of our illustrious members disagree with. So that is the point I am trying to make.

Let me just shift here for a second. I am interested in exploring the kind of judge you are. As you can see, some of these questions have all been directed toward what kind of a judge you are. But I am interested in what is often referred to as a judicial philosophy, which means how you understand the role that judges play in our system of Government in general and how judges should go about deciding cases in particular.

I would like to explore this by giving you a chance to expand on a few things that you have said or written. In your hearing in April 1990, which my friend Senator Kennedy chaired, he asked you what qualities are most important for an appellate judge. You listed open-mindedness to litigants' arguments, close attention to the particular facts and law in the case, and trying not to import a judge's own view of the law that should be applied in the case.

Now, in your statement yesterday, you said that your experience on the appeals court has taught you a lot about, as you put it, "the way in which a judge should go about the work of judging." What has that experience taught you? How has it shaped the answer you gave before you went on the bench?

Judge ALITO. My general philosophy is that the judiciary has a very important role to play, and in speaking with Senator Leahy, I highlighted some of that. But the judiciary has to protect rights, and it should be vigorous in doing that, and it should be vigorous in enforcing the law and in interpreting the law, in interpreting the

law in accordance with what it really means and enforcing the law even if that's unpopular.

But although the judiciary has a very important role to play, it's a limited role. It is not—it should always be asking itself whether it is straying over the bounds, whether it's invading the authority of the legislature, for example, whether it is making policy judgments rather than interpreting the law. And that has to be a constant process of re-examination on the part of the judges. And that's the role that the judiciary should play.

Now, my experience on the bench has really reinforced for me the importance of the appellate process and the judicial process that I described yesterday. And that is the process of really engaging the arguments that are made, reading the briefs, and approaching it with an open mind, always with the possibility of changing your mind based on the arguments and based on the facts of a particular case.

Senator HATCH. Well, another context in which you have discussed your judicial philosophy is the questionnaire that you received from this Committee, which asked for your views on judicial activism. Now, the very first words of your answer were as given here today, that the Constitution sets forth the limited role for the judicial branch.

Now, to hear some of my colleagues describe it yesterday, judges have virtually unlimited power to right all wrongs, protect everyone from everything, and make sure that Government officials everywhere behave themselves.

Now, as an appeals court judge, the decisions of the Supreme Court add to the limitations or constraints you must observe, in my opinion. I am wondering whether you believe this notion of limited judicial power applies also the Supreme Court, and if so, how it applies when there is no higher court than the Supreme Court. Does that mean that the Supreme Court should perhaps be even more cautious, even more self-restrained since there is no appeal from any errors that they might make?

Judge ALITO. I think that's a solemn responsibility that they have. When you know that you are the Court of last resort, you have to make sure that you get it right.

It is not true, in my judgment, that the Supreme Court is free to do anything that it wants. It has to follow the Constitution, and it has to follow the laws. *Stare decisis*, which I was talking about earlier, is an important limitation on what the Supreme Court does. And although the Supreme Court has the power to overrule a prior precedent, it uses that power sparingly, and rightfully so. It should be limited in what it does.

Senator HATCH. Another place in which you have written about what might be called judicial philosophy is in your opinions—not that you have spent much time opining about such matters in the abstract. Nevertheless, I would like you to expand a little on a few of the things you have written in this regard.

For instance, in *New Jersey Payphone Association* v. *Town of West New York*—this was a 2002 case—for example, you wrote the following: "It is well established that, when possible, Federal courts should generally base their decisions on non-constitutional rather than constitutional grounds. The rationale behind the doctrine of

avoiding constitutional questions except as a last resort are grounded in fundamental constitutional principles."

Can you explain those fundamental principles and whether you think the Supreme Court as well as the appeals court should follow this imperative to avoid constitutional decisions?

Judge ALITO. I do. I think that's a very important principle. As I recall, Justice Brandeis in the *Ashwander* case was the one who articulated it most eloquently, and it's, therefore, an important reason because a constitutional decision of the Supreme Court has a permanency that a decision on an issue of statutory interpretation doesn't have. So if a case is decided on statutory grounds, there's a possibility of Congress amending the statute to correct the decision if it's perceived that the decision is incorrect or it's producing undesirable results.

I think that it's—my philosophy of the way I approach issues is to try to make sure that I get right what I decide, and that counsels in favor of not trying to do too much, not trying to decide questions that are too broad, not trying to decide questions that don't have to be decided, and not going to broader grounds for a decision when a narrower ground is available.

Senator HATCH. You have addressed issues such as abortion at different points in your career. You addressed it when you worked for the Solicitor General. You might have addressed it in several cases on the appeals court. It might be tempting to say that if you came to one conclusion while in one role, you will necessarily come to the same conclusion on the issue while in a different role.

Now, I think you have explained it pretty well today, but let me just ask one other question. Could you please explain how judges address issues differently than advocates? And how does the requirement of a case or a controversy or a limitation such as a particular standard of review shape how judges address these issues?

Judge ALITO. The standards of review are very important, and often they are prescribed by Congress. Congress gives us authority, jurisdiction to decide certain questions, but it says that you don't have the authority to go back and do what the trial—what you would have done if you were the trial judge or if you were the administrative agency; you have a limited authority of review. And I think it's very important for us to stay within the bounds of the authority that Congress gives us. I think that's a very important part of our function.

Senator HATCH. Thank you, Judge.

Chairman SPECTER. Thank you, Senator Hatch.

We will now take a 15-minute break and reconvene at 11:20.

[Recess at 11:06 a.m. to 11:20 a.m.]

Chairman SPECTER. We will continue the hearing for Judge Alito on confirmation to the Supreme Court of the United States, and we now turn in sequence to Senator Kennedy. Let us not forget to start the clock.

Senator KENNEDY. Thank you very much, Mr. Chairman.

There was one interesting omission between the exchange of yourself and Senator Hatch on the whole *Vanguard* issue in question, and that was the promise and pledge that you gave to this Committee when you were up for the Circuit Court. I have it right here. It said: I do not believe that conflicts of interest relating to

my financial interests are likely to arise. I would, however, disqualify myself from any cases involving the Vanguard Companies, the brokerage firm of Smith Barney or the First Federal Savings & Loan of Rochester, New York. So you remember that response. That was a pledge and promise to the Committee that you would recuse yourself, was it not?

Judge ALITO. Yes, it was, Senator. And as I said in answering Senator Hatch's question, if I had it to do over again, I would have handled this case differently. There were some oversights—

Senator KENNEDY. I am sure you might have, and we have had a number of different explanations for this. I would like to ask the clerk if they would take down and show the Judge, if you would like to be refreshed, about the number of times the name *Vanguard* appears on the brief, and the number of times *Vanguard* appears on the opinion, which I believe you offer. I would ask if I could get a clerk to show those two documents.

Judge ALITO. Senator, I'm familiar with that. I don't really need to see the document. Senator, the name *Vanguard* certainly appears on the briefs, and it appeared in the draft opinion that was sent to us by the staff attorney's office. I just didn't focus on the issue of recusal when it came up, and that was an oversight on my part, because it didn't give me the opportunity to apply my personal policy in going beyond what the code requires.

Senator KENNEDY. Did the individuals that responded on the ethical issues that were involved in this case, did they know that you had pledged and promised to this Committee that you would recuse yourself?

Judge ALITO. I believe that they did. I believe that some of them at least addressed that specifically—

Senator KENNEDY. Do you know specifically whether they did or not?

Judge ALITO. I believe they addressed it in their letter, so they must have been aware of it.

Senator KENNEDY. They understood that you had promised this Committee that you would recuse yourself? Your testimony now is that those that made a comment upon your ethical behavior knew as a matter of fact that you had pledged to this Committee that you would recuse yourself from the Vanguard cases?

Judge ALITO. Professor Hazard, I know, addressed that directly in his letter. I think Professor Rotunda addressed it in his letter, so, obviously, if the letters addressed the issue, they were aware of what was said on the Senate questionnaire.

Senator KENNEDY. And the final answer—and we will move on—is that you saw the name *Vanguard* on the briefs, and you, obviously, saw them on the opinion. You are the author of the opinion. But your testimony here now is even though you saw the names on that, it did not come to mind at that moment that you had made the pledge and promise to this Committee that you would recuse yourself?

Judge ALITO. I did not focus on the issue of recusal I think because 12 years had gone by, and the issue of a Vanguard recusal hadn't come up. And one of the reasons why judges tend to invest in mutual funds is because they generally don't present recusal problems, and pro se cases in particular generally don't present

recusal problems. And so, no light went off. That's all I can say. I didn't focus on the issue of recusal.

Senator KENNEDY. This is important, when the lights do go on and when the lights do go off, because, actually, the accumulation of value of Vanguard had increased dramatically during this period of time, had it not?

Judge ALITO. It had, Senator, but I had nothing to gain financially by—

Senator KENNEDY. I am not asking you to get on to the questions of gain or loss or whatever. I am just asking about the pledge to the Committee which you had given, and the fact that *Vanguard* was so obvious, both in the brief and in the opinion which you wrote, and the fact that during this period of time there had been a sizable increase in the total value of Vanguard, and as all of us know, if you are dealing with a case dealing with IBM, you cannot have even a single share in that. The point about all of this is so interested parties that have come before the courts, are going to believe not only in reality, but in appearance that they are going to get a fair shake. And that, you have said, was certainly your desire, and I certainly commend you for at least that desire. But in this case, this was something that we recognize and is extremely important.

Judge, in just the past month, Americans have learned that the President instructed the National Security Agency to spy on them at home, and they have seen an intense public debate over when the FBI can look at their library records, and they have heard the President announce that he has accepted the McCain amendment barring torture. But then just days later, as he signed it into law, the President decided he still could order torture whenever he believed it was necessary. No check, no balance, no independent oversight. So, Judge, we all want to protect our communities from terrorists, but we do not want our children and grandchildren to live in an America that accepts torture and eavesdropping on an American citizen as a way of life. We need an independent and vigilant Supreme Court to keep that from happening, to enforce the constitutional boundaries on Presidential power and blow the whistle when the President goes too far.

Congress passes laws, but this President says that he has the sole power to decide whether or not he has to obey those laws. Is that proper? I do not think so. But we need Justices who can examine this issue objectively, independently and fairly, and that is what our Founders intended and what the American people deserve.

So, Judge, we must know whether you can be a Justice who understands how to strike that proper balance between protecting our liberties and protecting our security, a Justice who will check even the President of the United States when he has gone too far.

Chief Justice Marshall was that kind of Justice when he told President Jefferson that he had exceeded his war-making powers under the Constitution. Justice Jackson was that kind of Justice when he told President Truman that he could not use the Korean War as an excuse to take over the Nation's steel mills. Chief Justice Warren Burger was that kind of Justice when he told President Nixon to turn over the White House tapes. And Justice O'Con-

nor was that kind of Justice when she told President Bush that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.

I have serious doubts that you would be that kind of Justice. Your record shows time and again that you have been overly deferential to Executive power, whether exercised by the President, the Attorney General or law enforcement officials. And your record shows that even over the strong objections of other Federal judges, other Federal judges, you bend over backwards to find even the most aggressive exercise of Executive power reasonable. But perhaps most disturbing is the almost total disregard in your record for the impact of these abuses of power on the rights and liberties of individual citizens.

So, Judge Alito, we need to know whether the average citizen can get a fair shake from you when the Government is a party, and whether you will stand up to a President, any President, who ignores the Constitution and uses arguments of national security to expand Executive power at the expense of individual liberty, whether you will ever be able to conclude that the President has gone too far.

Now, in 1985, in your job application to the Justice Department you wrote, "I believe very strongly in the supremacy of the elected branches of Government." Those are your words; am I right?

Judge ALITO. They are, and that's a very inapt phrase, and I—

Senator KENNEDY. Excuse me?

Judge ALITO. It's an inapt phrase, and I certainly didn't mean that literally at the time, and I wouldn't say that today. The branches of Government are equal. They have different responsibilities, but they are all equal, and no branch is supreme to the other branch.

Senator KENNEDY. So you have changed your mind?

Judge ALITO. No, I haven't changed my mind, Senator, but the phrasing there is very misleading and incorrect. I think what I was getting at is the fact that our Constitution gives the judiciary a particular role, and there are instances in which it can override the judgments that are made by Congress and by the Executive, but for the most part our Constitution leaves it to the elected branches of Government to make the policy decisions for our country.

Senator KENNEDY. I want to move on. Mr. Chairman, the clock is off. There are a number of points I want to cover and be timely, so I leave it up to the Chair.

Chairman SPECTER. Senator Kennedy, you are correct. We have a timer over here. We are trying to get the time fixed.

Senator KENNEDY. All right. If I would know when I have 10 minutes left?

Chairman SPECTER. Let us see if we cannot get the clock within the view of Senator Kennedy so he can see it when he is questioning the witness.

Senator KENNEDY. Thank you, Chair.

Chairman SPECTER. And give Senator Kennedy two more minutes.

Senator KENNEDY. There you go.

[Laughter.]

Senator KENNEDY. Be quiet over there, scurrilous dogs.

[Laughter.]

Senator LEAHY. Seniority has privileges.

Senator KENNEDY. Judge, quite frankly, your record shows you still believe in the supremacy of the executive branch, Judge Alito. I believe there is a larger pattern in your writings and speeches and cases that show an excess of almost single-minded deference to the Executive power without showing a balanced consideration to the individual rights of people. So let us discuss some of your opinions.

These cases deal specifically with one form or another of Executive power, the power of authorities intruding in homes, searching people who are not even suspected of committing a crime. *Mellott* v. *Heemer*—where the U.S. Marshal Service forcibly evicted a family of dairy farmers from their home and their farm. These farmers had no criminal record, and were suspected of no crime, but after they fell on very hard times, property was sold at a public auction. U.S. Marshals were sent to evict them. Remember, the marshals were sent to carry out a civil action, not a criminal action, a civil action. These farmers had committed no crime. Now, I respect the U.S. Marshals. They have a tough job and they do it with great professionalism. But in this case the marshals entered the house with loaded guns. The family was unarmed, did not resist, but still the marshals pointed loaded guns at their heads, chests and backs. One marshal chambered a cartridge in his gun. Twice they pushed the wife into her chair.

The trial judge held there was enough evidence in this case to have a jury review the facts, hear the testimony and decide whether the marshals used too much force to evict these farmers. That did not sit well with you, Judge Alito. You grabbed the case away from the jury. You would not let them hear the testimony or make up their own mind about whether the marshals had gone too far. No, you simply substituted your judgment for the jury's, and decided that the marshals' conduct was, as a matter of law, objectively reasonable. Judgment for the marshals, no jury of their peers for the farmers.

Why, Judge Alito? Your colleague on the Third Circuit, Judge Rendell, called the marshals' conduct "Gestapo-like", "Gestapo-like". She said that seven marshals terrorized a family and friends, ransacked a home while carrying out an unresisted civil eviction. The trial judge thought the decision should be made by the jury. Why did you not let the jury exercise an independent check on the marshals' actions?

Judge ALITO. There was some additional information regarding these people that was important, and that was that they had threatened other people, as I recall, and there was evidence about the possession of weapons and evidence that they would be dangerous, and that was the basis on which the marshals acted the way they did. This was a case in which they were—the marshals were sued for civil damages, and they asserted what's called the Qualified Immunity Defense, and that means that if a reasonable person could have thought there was a basis for doing what they did, then they are entitled not to be tried. And that's the law. I didn't make up that law.

Senator KENNEDY. No, the—

Chairman SPECTER. Let him finish, Senator Kennedy.

Judge ALITO. That's not a legal standard that I made up, and that was the way I saw the case, and that's the way the other judge, who was in the majority, saw the case. Now, these cases involve difficult line-drawing arguments at times, and I respect Judge Rendell's view of this very much, but reasonable people will view these things differently.

Senator KENNEDY. The issue then was the actions of the marshals, whether it was reasonable. And here you have a judge, Judge Rendell, saying it was Gestapo-like to talk about terrorizing a family and friends, ransacking a home while carrying out an unresisted civil eviction. Aren't juries there to make a judgment and determination whether it was reasonable or not reasonable, and did you not, by your action, take that away because you ruled as a matter of law that their conduct was reasonable?

Judge ALITO. The Supreme Court has told us how we have to handle this issue, and it is for the judiciary to decide in the first place whether a reasonable officer could have thought that what the officer was doing was consistent with the Fourth Amendment, and we have to make that decision. Now, if we decide that there's an issue of fact. If there's a dispute in the testimony about the evidence that the marshals had or about what these individuals were doing at the time when the search was taking place, or what the marshals did, and certainly those factual issues have to be resolved by the jury.

Senator KENNEDY. That is I think certainly the view of Judge Rendell.

Let me move on, if I could, to *Doe* v. *Groody*. I know that Senator Leahy has talked about this, and gone over the factual situation about the strip searching of a 10-year-old girl. This case, the police got the warrant to search the house. They found the suspect outside, marched him inside where they encountered wife and 10-year-old. The police took the wife and daughter upstairs, told them to remove their clothing, physically searched them, not as a protective frisk or search for weapons, but in the hopes of finding contraband. And that is when Judge Chertoff, the former Chief Federal Prosecutor for New Jersey, the former head of the Criminal Division in the Justice Department, President Bush's current Secretary of Homeland Security, held that the police went too far. As Judge Chertoff said, a search warrant for a premise does not constitute a license to search everyone inside.

You differed. And you have reviewed with us your reasoning for it, the fact that you felt that the affidavit which had been filed by the police should be included in the search warrant. Judge Chertoff takes strong exception to that, as does the Fourth Amendment. As you mentioned yourself, the affidavit represents the police, the police's view about this situation, but the affidavit—the search warrant is what is approved by the judge. Those are two different items. They come up every time in many, many instances. Why did you feel that under these circumstances, under these circumstances, that that affidavit should be included, the result of which we have the strip searching of a 10-year-old, 10-year-old that will bear the scars of that kind of activity probably for the rest of her life.

The Fourth Amendment is clear, we want to protect the innocent. We want to have a search warrant that is precise so that the police understand it and the person that it is being served to understands it. That was all spelled out in the judge's opinion. But you went further than that. You said, well, in this case we are going to include the affidavit, and as a result of your judgment in this case and the inclusion of the affidavit, we have the kind of conduct against this 10-year-old that she will never forget. Why? Why, Judge Alito?

Judge ALITO. Senator, I wasn't happy that a 10-year-old was searched. Now, there wasn't any claim in this case that the search was carried out in any sort of an abusive fashion. It was carried out by a female officer, and that wasn't the issue in the case. And I don't think that there should be a Fourth Amendment rule. But, of course, it's not up to me to decide that minors can never be searched, because if we had a rule like that, then where would drug dealers hide their drugs? That would lead to greater abuse of minors.

The technical issue in the case was really not whether a warrant can incorporate a search warrant—an affidavit. There's no dispute that a judge or a magistrate issuing a warrant can say that the affidavit is incorporated, and that was done here. The issue was whether—and it was a very technical issue. Was it incorporated only on the issue of probable cause or was it also incorporated on the issue of who would be searched? If the magistrate had said in the warrant, this warrant is incorporated as to the people who may be searched, and then in the affidavit it said, and it did say this very clearly, we want authorization to search anybody who's on the premises, then there would be no problem whatsoever.

The warrant said it was incorporated on the issue of probable cause, and I thought that reading it in a common sense fashion, which is what we're supposed to do, that necessarily meant that the magistrate said there was probable cause to search anybody who's found on the premises and that's what I'm authorizing you to do.

Senator KENNEDY. And that is what Judge Chertoff took strong exception, in a very eloquent statement in talking about the protections and the reasons for the strict interpretation for the warrant. Let me move on.

Judge Alito, your Third Circuit decisions don't exist in a vacuum. I'd like to, Mr. Chairman, at this point, since there have been some questions about whether we are flyspecking these cases, I would like to include in the appropriate place in the record the Knight Ridder studies that concluded that Judge Alito never found a government search unconstitutional; the Yale Law School professors study that found that Judge Alito ruled for the government in almost every case reviewed—this was their conclusion; the Washington Post stories with regard to the cases; and also Professor Cass Sunstein's conclusions that Judge Alito rules against individuals 84 percent of the time.

Chairman SPECTER. In accordance with our practices, if you want them in the record, they will be there, without objection.

Senator KENNEDY. So just looking at your writings and speeches, Judge Alito, you have endorsed the supremacy of the elected

branch of government. You have clarified that today. You argued that the Attorney General should have absolute immunity, even for actions that he knows to be unlawful or unconstitutional. You suggested that the Court should give a President's signing statement great deference in determining the meaning and the intent of the law and argued as a matter of your own political and judicial philosophy for an almost all-powerful Presidency. Time and again, even in routine matters involving average Americans, you give enormous, almost total deference to the exercise of governmental power. So I want to ask you about some of the possible abuses of the Executive power and infringement on individual rights that we are facing in the country today.

Judge Alito, just a few weeks ago, by a vote of 90 to nine, the Senate passed a resolution sponsored by Senator John McCain to ban torture, whether it be here at home or abroad, and as a former POW in Vietnam, John McCain knows a thing or two about torture. For a long time, the White House threatened to veto the legislation, and finally, Senator McCain met with the President and convinced him to approve the anti-torture law. Two weeks after that, the President issued a signing statement, no publicity, no press release, no photo op, where he quietly gutted his commitment to enforce the law banning torture. The President stated, in essence, that whatever the law of the land might be, whatever Congress might have written, the Executive branch has the right to authorize torture without fear of judicial review.

Now, I raise this issue with you, Judge, I raise this with you because you were among the early advocates of these so-called Presidential signing statements when you were a Justice Department official. You urged President Reagan to use the signing statements to limit the scope of laws passed by Congress, even though Article I of the Constitution vests all legislative powers in the Congress. You urged the President to adopt what you described as a novel proposal, to issue statements aimed at undermining the Court's use of legislative history as a guide to the meaning of the law. You wrote these words. The President's understanding of the bill should be just as important as that of Congress.

With respect to the statement issued by President Bush reserving his right to order torture, is that what you had in mind when you said or wrote, the President's understanding of the bill should be just as important as that of Congress?

Judge ALITO. When I interpret statutes, and that's something that I do with some frequency on the Court of Appeals, where I start and often where I end is with the text of the statute. And if you do that, I think you eliminate a lot of problems involving legislative history and also with signing statements. So I think that's the first point that I would make.

Now, I don't say I'm never going to look at legislative history, and the role of signing statements in the interpretation of statutes is, I think, a territory that's been unexplored by the Supreme Court and it certainly is not something that I have dealt with as a judge.

This memo was a memo that resulted from a working group meeting that I attended. The Attorney General had already decided that as a matter of policy, the administration, the Reagan administration, would issue signing statements for interpretive purposes

and had made an arrangement with the West Publishing Company to have those published. And my task from this meeting was to summarize where the working group was going and where it had been, and I said at the beginning of the meeting that this was a rough—at the beginning of the memo that this was a rough first effort to outline what the administration was planning to do and I was a lawyer for the administration at the time. Then I had a big section of that memo saying, and these are the theoretical problems and some of them are the ones that you mentioned. And that's where I left it, and all of that would need to be explored to go any further.

Senator KENNEDY. Well, Judge Alito, in the same signing statement undermining the McCain anti-torture law, the President referred to his authority to supervise the unitary Executive branch. That's an unfamiliar term to most Americans, but the Wall Street Journal describes it as the foundation of the Bush administration's assertion of power to determine the fate of enemy prisoners, jailing U.S. citizens as enemy combatants without charging them. President Bush has referred to this doctrine at least 110 times, while Ronald Reagan and the first President Bush combined used the term only seven times. President Clinton never used it.

Judge Alito, the Wall Street Journal reports that officials of the Bush administration are concerned that current judges are not buying into its unitary Executive theory, so they are appointing new judges more sympathetic to their Executive power claims. We need to know whether you are one of those judges.

In 2000, in the year 2000, in a speech soon after the election, you referred to the unitary Executive theory as the gospel and affirmed your belief in it. So, Judge Alito, the President is saying he can ignore the ban on torture passed by Congress, that the courts cannot review his conduct. In light of your lengthy record on the issues of Executive power, deferring to the conduct of law enforcement officials even when they are engaged in conduct that your judicial colleagues condemn, Judge Chertoff, Judge Rendell, subscribing to the theory of unitary Executive, which gives the President complete power over the independent agencies, the independent agencies that protect our health and safety, believing that the true independent special prosecutors who investigate Executive wrongdoing are unconstitutional, referring to the supremacy of the elected branches over the judicial branch and arguing that the court should give equal weight to a President's view about the meaning of the laws that Congress has passed, why should we believe that you will act as an independent check on the President when he claims the power to ignore the laws passed by Congress?

Judge ALITO. Well, Senator, let me explain what I understand the idea of the unitary Executive to be, and I think it's—there's been some misunderstanding, at least as to what I understand this concept to mean. I think it's important to draw a distinction between two very different ideas. One is the scope of Executive power, and often Presidents or occasionally Presidents have asserted inherent Executive powers not set out in the Constitution. And we might think of that as how big is this table, the extent of Executive power.

And the second question is when you have a power that is within the prerogative of the Executive, who controls the Executive? And those are separate questions. And the issue of, to my mind, the concept of unitary Executive doesn't have to do with the scope of Executive power. It has to do with who within the Executive branch controls the exercise of Executive power, and the theory is the Constitution says the Executive power is conferred on the President.

Now, the power that I was addressing in that speech was the power to take care that the laws are faithfully executed, not some inherent power but a power that is explicitly set out in the Constitution.

Senator KENNEDY. Would that have any effect or impact on independent agencies?

Judge ALITO. The status of independent agencies, I think, is now settled in the case law. This was addressed in *Humphrey's Executor* way back in 1935 when the Supreme Court said that the structure of the Federal Trade Commission didn't violate the separation of powers. And then it was revisited and reaffirmed in *Wiener* v. *United States* in 1958—

Senator KENNEDY. So your understanding of any unitary Presidency, that they do not therefore have any kind of additional kind of control over the independent agencies that has been agreed to by the Congress and signed into law at—

Judge ALITO. I think that *Humphrey's Executor* is a well-settled precedent. What the unitary Executive, I think, means now, we would look to *Morrison*, I think, for the best expression of it, and it is that things cannot be arranged in such a way that interfere with the President's exercise of his power on a functional, taking a functional approach.

Senator KENNEDY. I want to just mention this signing of the understanding of the legislation that we passed banning torture, what the President signed on to. The Executive branch shall construe the Title X in Division A relating to detainees in a matter with the constitutional authority of the President to supervise the unitary Executive branch as the commander in chief, and consistent with the constitutional limitations on judicial power. Therefore, it is the warning that the courts are not going to be able to override the judgments and decisions. That is certainly my understanding of those words, which will assist in achieving the shared objective of the Congress and the President.

That statement there, in terms of what was agreed to by Congress 90-to-9, by John McCain, by President Bush, and then we have this signing document which effectively just undermines all of that, is something that we have to ask ourselves whether this is the way that we understand the way the laws are to be made. It is very clear in the Constitution who makes the laws, and Congress and the Senate makes it. The President signs it, and that is the law. That is the law. These signing statements and recognizing these signing statements and giving these value in order to basically undermine that whole process is a matter of enormous concern.

Thank you.

Chairman SPECTER. Judge Alito, Senator Kennedy had noted that there were substantial gains, as he put it, in the Vanguard stock or the Vanguard asset during the period of time that you held them, but he did not give you an opportunity to answer that. I don't like to interrupt in the midst of a series of questions, but you can respond to that if you care to do so at this time.

Judge ALITO. Mr. Chairman, I had additional holdings in Vanguard during my period of service, but I think that the important point as far as that is concerned is that nobody has claimed that I had anything to gain financially from participating in this case and I certainly did not.

Chairman SPECTER. Senator Grassley?

Senator GRASSLEY. I have a much more positive view of you than has just been expressed.

[Laughter.]

Senator GRASSLEY. I can't be cynical about your judging. In fact, maybe from what I have criticized the Supreme Court in a long period of time, I might feel you are too cautious, too willing to follow precedent.

But I think in regard to Vanguard, the point ought to be made that you did nothing wrong. You didn't violate any law or any ethics rule. And the point is being made that maybe you didn't remember a promise that you had made to this Committee, but let me assure you, don't lose any sleep over that. If Senators kept every word they made to their constituents, there wouldn't be any Senators left. There is always shortness of memory and without ill intent, whether it is on the part of a Senator or whether it is on the part of Judge Alito.

I hope the viewing public is impressed by your intellect and your legal capabilities and your judicial record. Clearly, they are seeing that you have the kind of background and practical experience that it takes to be a Supreme Court Justice. In addition, I think you have demonstrated now after five or six of us asking you questions that you are very candid in answering questions so far and being honest with our Committee.

These nomination hearings that we are holding are, of course, a unique opportunity for all of us, Senators and the public, to explore more in depth how Supreme Court nominees view the roles of justice, how a nominee approaches constitutional interpretation and precedent, as well as a nominee's appreciation of the separate branches of government, and you have been involved in all of those discussions already this morning. It is unfortunate that some extreme liberal groups have attacked your commitment to the law as well as your honesty and integrity, but now you are doing your best, and I think doing a good job, of setting the record straight.

So before I ask you some questions, I want to bring up some of these issues that have been brought up against you, and you don't necessarily have to respond in any way. I just think it is points that ought to be made as I see you. I am only one Senator, but I think I have had a good opportunity to study you and particularly your cases.

I would like to address these ethics charges that we have seen generated by some of the left-wing liberal interest groups and even my colleagues on the other side of the aisle. These allegations are

just plain absurd. You are going to see some charts that hopefully will be held up that I am not going to point to, but bring up some of these charges, because I think we want to prove that these allegations are absurd. It is puzzling to me that anyone would actually believe these claims, especially when people who know Judge Alito the best, people who have known him for a long period of time and who have worked closely with him, better than any of our Senators would know you, they all say that you are a man of honor, integrity, and principle. They have no question about that.

The fact is that the ABA looks at issues such as integrity and ethics when it evaluates a judicial nominee and it found you, Judge Alito, to be unanimously well qualified, a rating that Democrats have always claimed to be a gold standard. The ABA didn't find a problem with Judge Alito's record.

Moreover, several leading ethicists from across the political spectrum reviewed these allegations and they all agreed that you, Judge Alito, acted properly and that none of these charges have merit. It says in a letter from George Mason University Law Professor Ronald Rotunda, already referred to by members, and in a letter to Chairman Specter, quote, "Neither Federal statute nor Federal rules nor Model Code of Judicial Conduct of the American Bar Association provide that a judge should disqualify himself in any case involving a mutual fund company," and they give as examples Vanguard, Fidelity, T. Rowe Price, "simply because a judge owns mutual funds that the company manages and holds in trust for a judge," end of quote. So basically, according to law, Judge Alito was not required to recuse himself in the *Vanguard* case, but he did it anyway.

So let me repeat, five leading ethicists all say Judge Alito did nothing wrong. Professor Thomas Morgan, quote, "In my opinion, Judge Alito's participation in the *Vanguard* case was in no way improper, nor does it give any reason to doubt that he would fully comply with his ethical responsibilities, if confirmed."

And Professor Steven Lubet and David McGowan wrote, "You do not need to be a fan of Alito's jurisprudence to recognize that he is a man of integrity. Other judges and Justices would do well to follow this example," end of quote.

In addition, no complaint filed against Judge Alito has ever been validated, and to top it off, we have heard glowing statement after glowing statement from folks closest to the Judge, your law clerks, Republicans and Democrats alike, as well as lawyers and judges who practiced before and worked with the Judge on a daily basis. These people know this nominee best and they all say that he is a man of humility, a man of principle, and they don't have any question about the Judge's integrity.

So it is patently unfair that some folks, intent on torpedoing this nomination, are trying to give these allegations weight that they don't deserve. It should be clear to everyone that this is a blatant tactic to tar Judge Alito's honorable and distinguished judicial record, and I hope this puts to rest these outrageous claims that Judge Alito doesn't have the integrity to be a Supreme Court Justice. It is outlandish and should be rejected.

I am now getting to a question that I want to ask you about Executive power. Some of your critics have questioned your ability,

and we have just heard it recently, to be independent from the Executive branch. They pointed principally to your work as a lawyer for the Department of Justice 20 years ago, suggesting that you would just rubber-stamp administration policy. I would like to give you an opportunity to address this. So, Judge Alito, do you believe that the Executive branch should have unchecked authority?

Judge ALITO. Absolutely not, Senator.

Senator GRASSLEY. Judge Alito, you do understand that under the doctrine of separation of powers, the Supreme Court has an obligation to make sure that each branch of government does not coopt authority reserved to the coordinate branch, and do you understand that where constitutionally protected rights are involved, the courts have an important role to play in making sure that the Executive branch does not trample those rights?

Judge ALITO. I certainly do, Senator. Each branch has very important individual responsibilities and they should all perform their responsibilities.

Senator GRASSLEY. So clarify for me. Do you believe that the President of the United States is above the law and the Constitution?

Judge ALITO. Nobody in this country is above the law, and that includes the President.

Senator GRASSLEY. Judge Alito, would you have any difficulty ruling against the Executive branch of the Federal Government if it were to overstep its authority in the Constitution?

Judge ALITO. I would not, Senator. I would judge the cases as they come up and I think that I believe very strongly in the independence of the judiciary. I have been a member of the judiciary now for the past 15-and-a-half years and I understand the role that the judiciary has to play, and one of its most important roles is to stand up and defend the rights of people when they are violated.

Senator GRASSLEY. This first question is very general. It is a new area. I would like to explore in detail what you understand to be the proper role of a judge in a democratic society. So could you generally give me what your views are on this approach?

Judge ALITO. Yes. Our Constitution sets up a system of government that is democratic. So the basic policy decisions are made by people who are elected by the people so that the people can control their own destiny. But the Constitution establishes certain principles that can't be violated by the Executive branch or by the legislative branch. It sets up a structure of government that everybody has to follow and it protects fundamental rights. And it is the job of the judiciary to enforce the provisions of the Constitution and to enforce the laws that are enacted by Congress in accordance with the meaning that Congress attached to those laws, not to try to change the Constitution, not to try to change the laws, but to be vigilant in enforcing the Constitution and in enforcing the laws.

Senator GRASSLEY. What do you think about judges allowing their own political and philosophical views to impact on any jurisprudence? Second, do you believe that there is any room for a judge's own value or personal beliefs when he or she interprets the Constitution?

Judge ALITO. Judges have to be careful not to inject their own views into the interpretation of the Constitution, and for that mat-

ter, into the interpretation of statutes. That is not the job that we are given. That is not authority that we are given. Congress has the law-making authority. You have the authority to make the policy decisions and it's the job of the judiciary to carry out the policy decisions that are made by Congress when it's enacting statutes.

Senator GRASSLEY. Further explanation on that point, three subparts. Do you believe that Justices should consider political dimensions of controversial cases? Do you believe that when faced with hard cases, the Supreme Court should look at pleasing the home crowd or splitting the baby? And what is the proper role of the Supreme Court in deciding highly charged cases, meaning, I suppose in most cases, we would be talking about politically charged cases?

Judge ALITO. The Framers of the Constitution made a basic decision when they set up the Federal judiciary the way they set up it, and there's a reason why they gave Federal judges life tenure, and that is so that they will be insulated from all of the things that you mentioned. They will not decide cases based on the way the wind is blowing at a particular time, that at a time of crisis, for example, when people may lose sight of fundamental rights, the judiciary stands up for fundamental rights, that it is not reluctant to stand up for the unpopular and for what the Court termed insular minorities, that the Constitution—that the judiciary enforces the Constitution and the laws in a steadfast way and not in accordance with the way the wind is blowing.

Senator GRASSLEY. Let us look at the Bill of Rights and many other amendments that are often praised in broad, spacious terms. If a judge was so inclined, he or she could expand on the interpretation, use, and effect of many provisions of the Constitution. Do you agree with the school of thought that takes the position that when Congress and the Executive branch are slow or do not act in a particular manner, act at all, let us say, then the Supreme Court would have a license to create solutions based on some of the broad wording contained in the Constitution? Do you think that this is a proper role for the Supreme Court, or do you take the position that judges have a duty to respect constitutional restraints?

Judge ALITO. Judges have to respect constitutional restraints. They have to exercise what's called judicial self-restraint because there aren't very many external checks on the judiciary on a day-to-day basis. So the judiciary has to restrain itself and engage in a constant process of asking itself, is this something that we are supposed to be doing or are we stepping over the line and invading the area that is left to the legislative branch, for example. The judiciary has to engage in that on a constant basis.

Senator GRASSLEY. Well, just suppose that Congress had not even acted in a certain area and there are people that are bringing cases before the court that would give an opportunity to fill in on something that Congress didn't do. What about in—

Judge ALITO. The judiciary is not a law-making body. Congress is the law-making body. Congress has the legislative power and the judiciary has to perform its role and not try to perform the role of Congress or the Executive.

Senator GRASSLEY. I don't know whether you have ever had a case where the Framers—where you are dealing with the problems that the Framers maybe in broad ways in the Constitution couldn't

provide for, but how would you apply the words of the Constitution into problems that the Framers could not have foreseen?

Judge ALITO. There are very important provisions of the Constitution that are not cast in specific terms, and I think for good reason. They set out a principle, and then it is up to the judiciary to apply that principle to the facts that arise during different periods in the history of our country.

The example that I like to cite here is the prohibition against unreasonable searches and seizures in the Fourth Amendment. Now, this goes all the way back to the adoption of the Fourth Amendment at the end of the 18th century and most of the types of searches that come up today are things that the Framers never could have anticipated. They couldn't foresee automobiles or telephones or cell phones or the Internet or any of the other means of communication that have prevented new search and seizure issues. But they set out a good principle, and the principle is that searches can't be carried out unless they're reasonable, and generally, there has to be a warrant issued by a neutral and detached magistrate before a search can be carried out.

And so as these new types of searches have arisen and new means of communication have come into practice, the judiciary has applied this principle and the legislative branch has applied the principle in statutes like the wiretapping statute to the new situations that have come up.

Senator GRASSLEY. What factors, if any, and there may not be any, but what factors, if any, are there which can affect a judge's interpretation of the text of the Constitution? Can these factors be determined and applied without involving personal bias of judges?

Judge ALITO. I think they can. There would be no, I think, basis for judges to exercise the power of judicial review if they were doing nothing different from what the legislature does in passing statutes. So judges have to look to objective things, and if it's a question of absolutely first impression, and there aren't that many constitutional issues that arise at this point in our history that are completely issues of first impression, you would look to the text of the Constitution and you would look to anything that would shed light on the way in which the provision would have been understood by people reading it at the time.

You certainly would look to precedent, which is an objective factor, and most of the issues that come up in constitutional law now fall within an area in which there is a rich and often very complex body of doctrine that has worked out. Search and seizure is an example. Most of the issues that arise concerning—freedom of speech is another example. There is a whole body of doctrine dealing with that, and that's objective and you would look to that and you would reason by analogy from the precedents that are in existence.

Senator GRASSLEY. Let me bring up the tension between majority rule and individual freedoms. This involves the tensions between the American ideal of democratic rule and the concept of individual liberties, where neither the majority nor the minority can be fully trusted to define the proper spheres of our democratic authority and liberty. I assume that you agree that there is tension that has to be resolved?

Judge ALITO. There is tension because our system of government is fundamentally a democratic system, as I said. The authority to make the basic policy decisions that affect people's lives, most of them, most of those decisions are to be made by the legislature and by the Executive in carrying out the law. But the judiciary has the responsibility to exercise the power of judicial review. And so if something comes up that violates the Constitution, then it's been established now going all the way back to *Marbury* v. *Madison*, if that comes up in a case, it is the duty of the judiciary to say what the law is and to enforce the law in that decision, and if that means saying that something that another branch of government has done is unconstitutional, then that's what the judiciary has to do.

Senator GRASSLEY. How would you go about your duties as a Justice in determining where the right of the silent majority ends and where the right of the individual begins? What principles of constitutional interpretation help you to begin your analysis of whether a particular statute infringes upon some individual right?

Judge ALITO. I would look to the text of the provision. I would look to anything that sheds light on what that would have been understood to mean. I would look to precedent, and as I mentioned a minute ago, I think in most of the areas now where constitutional issues come up with some frequency, there is a body of precedent. That would be—that shapes the decision. That's generally what is going to dictate the outcome in the case, and if it's a new question, then usually the judiciary will see where it fits into the body of precedent and reason by analogy from prior precedents.

Senator GRASSLEY. Some judges and scholars believe that in resolving this dilemma, the court's obligation to the intent of the Constitution are so generalized and remote that judges are free to create a Constitution that they think best fits today's changing society. What do you think of such an approach?

Judge ALITO. Judges don't have the authority to change the Constitution. The whole theory of judicial review that we have, I think is contrary to that notion. The Constitution is an enduring document and the Constitution doesn't change. It does contain some important general principles that have to be applied to new factual situations that come up. But in doing that, the judiciary has to be very careful not to inject its own views into the matter. It has to apply the principles that are in the Constitution to the situations that come before the judiciary.

Senator GRASSLEY. I think you heard in opening comments some of the members of this Committee that they view the courts as a place taking the lead in creating a more just society. Is that a role for the courts, and I don't know whether you want to call this judicial activism, but I would, is it ever justified?

Judge ALITO. Well, I think that if the courts do the job that they are supposed to do, they will produce, we will produce a more just society. I think if you take a position as a Federal judge, you have to have faith that if you do your job, then you will be helping to create a more just society. The Constitution and the constitutional system that we have is designed to produce a just society.

It gives different responsibilities to different people. You could think of a football team or you could think of an orchestra where

everybody has a different part to play, and the whole system won't work if people start playing—start performing the role of someone else. Everyone in the system has to perform their role, and I think you have to have faith, and I think it's a well-grounded faith, that if you do that, if the judiciary does what it is supposed to do, the whole system will work toward producing a more just society.

Senator GRASSLEY. I want to go back and expand on a point I referred to as maybe Congress not acting some time and what the Court should do about that. This was a line of questioning that I also asked Chief Justice Roberts when he was before us. At that time, I referred to the confirmation of Justice Souter, and Justice Souter responded to my questions regarding the interpretation of statutory law by speaking about the Court's filling vacuums in law left by Congress. Do you believe that the Supreme Court should fill in vacuums in the law left by Congress, or is this a way for Justices to take an activist role in that they get to decide how to fill in generalities and resolve contradictions in law? If you are confirmed by the Senate, do you believe that your job is to fill in vacuums?

Judge ALITO. Well, I don't know exactly what Justice Souter was referring to when he said that, but just speaking for myself, I think that it is our job to interpret and to enforce the statutes that Congress passes and not to add to those statutes and not to take away from those statutes.

Senator GRASSLEY. Further on judicial restraint, are there any situations where you believe it is appropriate for a Supreme Court Justice to depart from the issue at hand and announce broad sweeping constitutional doctrine, and if you do, could you please describe in detail what those circumstances might be?

Judge ALITO. I think that the judiciary should decide the case—I think judges should decide the case that is before them. I think it's hard enough to do that and get it right. If judges begin to go further and announce—and decide questions that aren't before them, or issue opinions or statements about questions that aren't before them—from my personal experience, what happens when you do that is that you magnify the chances of getting something wrong. When you have an actual concrete case of controversy before you, focus on that. It improves your ability to think through the issue and it focuses your thinking on the issue and it makes for a better decision if you just focus on the matter that is at hand and what you have to decide and not speak more broadly.

If you speak more broadly, I think there is a real chance of saying something that you don't mean to say, or suggesting something that you don't mean to say and deciding questions before they have been fully presented to you, before you have heard all the arguments about this other question that isn't really central to the case that is before you.

Senator GRASSLEY. You might sometime be faced with what people might call a bad law or some unpopular law which nonetheless might be constitutional. Do you believe that—I guess the question should be, what do you believe would be the court's role in that instance? Is the court ever justified in correcting what might be a problem out there, presumably created by a law Congress passed?

Judge ALITO. Courts do not have the authority to repeal statutes or to amend statutes, and so once a court has determined what a statute means, then it's the obligation of the courts to enforce that statute. Now, sometimes when a case of statutory interpretation comes before a court and your first look at the statute seems to produce an absurd result, let's say, or a very unjust result, then I think the judiciary has the obligation to go back and say, well, is this really what the statute means, because the legislature generally is not going to want to produce a result like that. So maybe our first look at this statute has produced an interpretation that's it's an incorrect statute. So I think we have to do that.

And occasionally, a statute will come along or an administrative regulation will come along and the way it's applied in a particular case shows that there's a problem with the statute or the regulation that maybe Congress didn't anticipate or the administrative agency didn't anticipate. And in those instances, while I think it is the obligation of the judiciary to apply the statute that is before the judiciary, I think it is proper for us to say, look, this shows how this statute or this regulation plays out in the real world in this situation and maybe you didn't think about that and maybe that's something that you want to take into account if you're going to revise the statute or issue a new regulation. I think those are proper roles for us.

Senator GRASSLEY. What is your position regarding results-oriented jurisprudence, where the rationale is made secondary to the actual result reached? When, if ever, is results-oriented jurisprudence justified?

Judge ALITO. Results-oriented jurisprudence is never justified because it is not our job to try to produce particular results. We are not policymakers and we shouldn't be implementing any sort of policy agenda or policy preferences that we have.

Senator GRASSLEY. In the past few decades, certain interest groups and legal scholars and even some Members of Congress have tried to convert the Supreme Court from a legal institution into political, social, and cultural ones. Because of this, the Court has morphed in that direction, I believe, becoming a battlefield for warring interest groups who are raising and spending millions of dollars on disinformation campaigns and website blogs. There are even blogs going on all the time about this hearing. Do you think it is because the Supreme Court has injected itself into policy issues better left to the elected branches of government, or has the Supreme Court tried to act as kind of a roving commission, attempting to solve perceived societal problems, or maybe it is none of the above? What do you think can be done to restore the sense of constitutional balance between the Supreme Court and the Executive and legislative branches of government and understanding all are co-equal?

Judge ALITO. I think the branches are co-equal and I think that the judiciary as a whole, including the Supreme Court, must always be mindful of the role that it is supposed to play in our system of government. It has an important role to play, but it's a limited role and it has to do what it is supposed to do vigilantly, but it also has to be equally vigilant about not stepping over the bounds and invading the authority of Congress or invading the au-

thority of the Executive or other government officials whose actions may be challenged. I think the challenge for the judiciary.

Senator GRASSLEY. Thank you, Judge Alito.

Chairman SPECTER. Thank you, Senator Grassley.

Senator Biden?

Senator BIDEN. Thank you, Mr. Chairman. I understand, Judge, I am the only one standing between you and lunch, so I will try to make this painless.

Judge, I would like to say a few very brief things at the outset. I am puzzled, and I suspect you may be puzzled by some of the questions. I don't think anybody thinks you are a man lacking in integrity. I don't think anybody thinks that you are a person who is not independent. I think that what people are wondering about and puzzled about is not whether you lack independence, but whether you independently conclude that the Executive trumps the other two branches. They wonder when you back—granted, it is back in 1985 or 1984 when you wrote, "I do not question the Attorney General should have this immunity, has absolute immunity. But for tactical reasons," et cetera. So people are puzzled, at least some are puzzled, and so I don't want you to read any of this, at least from my perspective, as I have read it so far, that people think that this is a bad guy. What people are puzzled about with the recusal issue was under oath you said, "I will recuse myself on anything relating to"—and then a case comes up. So they are looking for an explanation. So it is not about whether you are profiting or whether you are, you know, all this malarkey about what you broke judicial ethics. It is a simple kind of thing. You know, you under oath said, "I promise if this ever comes up, I will recuse myself," and then you gave an explanation. You know, it slipped, you forgot, it had been years earlier, et cetera.

So don't read it as, you know, this is one of these things where we know you are—the people I have spoken to on your court—and it is my circuit—have a very high regard for you, and I think you are a man of integrity. The question is sometimes some of the things you have said and done at least puzzle me. And I would like to—and one of the things—this is not part of the line of questioning I wanted to ask, but I did ask you when you were kind enough to come to my office about the Concerned Alumni of Princeton. Were you aware of some of the other things they were saying that had nothing to do with ROTC? Because there was a great deal of controversy.

I mean, I can remember—I can remember this. My son was—well, anyway, he ended up going to that other university, the University of Pennsylvania. But I remember, you know, Princeton. I had spoken on campus in the early 1970s. This was a big thing, up at Princeton at the Woodrow Wilson School. And I remember—I didn't remember Bill Frist, but I remember that there was this disavowing, that Bill Bradley, this great basketball star and now U.S. Senator, was, you know, disassociating himself with this outfit, that there was a magazine called Prospect. I remember the magazine. And all I want to ask is: Were you aware of the other things that this outfit was talking about? Were you aware of this controversy going on in 1972?

Judge ALITO. Senator, I don't believe that I was, and when it was mentioned that Senator Bradley had withdrawn from a magazine, that didn't ring any bells for me. I did not recall anything like that.

Senator BIDEN. It was a pretty outrageous group. I mean, I believe you that you were unaware of it, but here I was, University of Delaware graduate, a sitting U.S. Senator. I was aware of it because I was up there on the campus. I mean, it was a big deal. It was a big deal, at least in our area, the Delaware Valley, if you know Princeton, Penn, the schools around there had this kind of—because the big thing was going on at Brown at the time as well.

And, by the way, for the record, I know you know. When you stated in your application that you are a member—you said in 1985, "I am a member"—they had restored ROTC. I mean, ROTC was back on the campus. But, again, this is just by way of, you know, why some of us are puzzled, because if I was aware of it and I didn't even like Princeton.

[Laughter.]

Senator BIDEN. No, I mean, I really didn't like Princeton. I was an Irish Catholic kid who thought it hadn't changed like you concluded it had. I mean, you know, I admit, I have a little—you know, one of my real dilemmas is I have two kids who went to Ivy League schools. I am not sure my Grandfather Finnegan will ever forgive me for allowing that to happen.

But all kidding aside, I was not a big Princeton fan, and so maybe that is why I focused on it and no one else did. But I remember at the time.

The other thing is, Judge, you know, the other thing you should be aware of—and kind of don't take this personally what is going on here—every nominee who comes before us is viewed by all the Senators, left, right, center, Democrat, Republican, at least on two levels, at least in my experience here. One is, the first one, individual qualifications and what their constitutional methodology, their views are, their philosophy. But the other is—and it always occurs—whose spot they are taking and what impact that will have on the Court. Everybody wrote with Roberts after the fact—and a lot of people voted for Roberts that were doubtful. I was doubtful. I voted no. But he was replacing Rehnquist. So Roberts for Rehnquist, you know, what is the worst that can happen, quote-unquote, or the best that can happen?

Now, I am not being facetious. What is the best or worst? If you are conservative, the best that can happen is he is as good as Rehnquist. From the standpoint of someone who is a liberal, the worst that can happen, he is as good as Rehnquist.

So, I mean, but you are replacing—I mean, we can't lose this, and so people understand this. You are replacing someone who has been the fulcrum on an otherwise evenly divided Court. And a woman who most scholars who write about her and in a retrospective about her say this is a woman who viewed things from—the phrase you have used—a real-world perspective. This was a former legislator. This was a former practitioner. This was someone who came to the bench and applied—to her critics, she applied too much common sense. Critics would say that she was too sensitive to the impact on individuals, you know, what would happen to an individual. So her focus on the impact on individuals was sometimes

criticized and praised. It is just important you understand, at least for my questioning, that this goes beyond you. It goes to whether or not your taking her seat will alter the constitutional framework of this country by shifting the balance, 5–4, 4–5, one way or another.

And that is the context in which at least I want to ask you my questions after trying to get some clarification or getting some clarification from you on Concerned Princeton—because, again, a lot of this just is puzzling, not able to be answered, just puzzling.

Judge, you and I both know—and clearly one of the hallmarks, at least in my view, of Justice O'Connor's position was she fully understood the real world of discrimination. I mean, she felt it. Graduated No. 2 in her class from Stanford, could not get a job, was offered a job by law firms. Granted, she is a little older than you are, but could not get a job because she was a woman. They offered her a job as a secretary. And so she understood what I think everybody here from both ends of the spectrum here understand, that discrimination has become very sophisticated. It has become very, very sophisticated, very much more subtle than it was when I got here 34 years ago or 50 years ago. And employers don't say anymore, you know, "We don't like blacks in this company," or "We don't want women here." They say things like, "Well, they wouldn't fit in," or, you know, "They tend to be too emotional," or, you know, "a little high-strung." I mean, there are all different ways in which now it has become so much more subtle. And that is why we all, Democrat and Republican, wrote Title VII. We wrote these laws to try to get at what we observed in the real world.

What we observed in the real world is it is real subtle, and so it is harder to make a case of discrimination, even though there is no doubt that it still exists.

And so I would like to talk to you about a couple of anti-discrimination cases. One is the *Bray* case. In that case, a black woman said she was denied a promotion for a job that she was clearly qualified for—there was no doubt she was qualified—and she said, "I was denied that job because I am a black woman." And it was, as I said, indisputable she was qualified. It was indisputable that the corporation failed to follow their usual internal hiring procedures. And the corporation gave conflicting explanations as to why they reached a decision to hire another woman who they asserted was more qualified than Ms. Bray.

Now, the district court judge said, you know, Ms. Bray had not even made a prima facie case here—or she made a prima facie, but she had not made a sufficient showing to get to a jury, I am finding for the corporation here. And Ms. Bray's attorney appealed, and it went up to the Third Circuit. And you and your colleagues disagreed. Two of your colleagues said, you know, Ms. Bray should have a jury trial here, and you said, no, I don't think she should, and you set out a standard, as best I can understand it. And I want to talk to you about it. And your colleagues said that if they applied your standard in Title VII cases, discrimination cases, that it would effectively, their words, "eviscerate Title VII," because, they went on to say, it "ignores the realities of racial animus." They went on to say that "Racial animus runs so deep in some people

that they are incapable of acknowledging that a black woman is qualified for a job."

But, Judge, you dismissed that assertion. You said that the conflicting statements that the employer made were just loose language, and you expressed your concern about allowing disgruntled employees to impose costs of a trial on employers. And so your colleagues thought you set the bar, I think it is fair to say, pretty high in order to make the case that it should go to a jury.

Can you tell me what the difference is between a business judgment as to who is most qualified—because actually you said this comes down to "subjective business judgment"—and discrimination? You said, "Subjective business judgment should prevail unless the qualifications of the candidate are extremely disproportionate." What is the difference between that in today's world and discrimination? I know you want to eliminate discrimination. Explain to me how that test is distinguishable from just plain old discrimination.

Judge ALITO. Well, this case was one of quite a few that we get that are on the line, and I think when you think about the nature of the appellate system, it stands to reason that it is going to work out that way. The really strong cases tend to settle; the really weak cases are either dismissed and not appealed, or they settle for modest amounts. So the ones that are hotly contested on appeal tend to be the ones that are close to the line, whatever the legal standard is.

Now, four Federal judges looked at the facts in this case. One was Judge Maryanne Trump Barry, who was then the district court judge and is now one of my colleagues on the Third Circuit. I was one. And we thought the evidence was not quite sufficient. And then my colleague, Theodore McKee, and Judge Green, a district court judge from Philadelphia, a fine district court judge, sitting by designation, thought that the evidence was sufficient. And I think that division illustrates this was a factual case on which reasonable people would disagree. This was a case in which there was no direct evidence of discrimination, and I could not agree with you more that we can't stop there. There are subtle forms of discrimination, and the judicial process has to be attentive to the fact that discrimination exists and today a lot of it is driven underground.

But all there was in this case were—all that the plaintiff could point to to show that there were facts from which you could infer discrimination were a very—what looked like a really minor violation of the company's internal practices. They had a policy under which if somebody was being considered for a promotion, they would interview that person and they would decide we are going to promote or we are not going to promote. And if they decided they were not going to promote, then they were supposed to tell that person, "We've decided we're not going to promote you," before they go on to interviewing the next person. And in this instance, it appeared that they interviewed Ms. Bray, and they decided they weren't going to promote her. And then they interviewed the other candidate, Ms. Real, before they told Ms. Bray that they weren't going to promote her.

There was no—they had nothing to gain by doing that. So it is a fact to be considered—

Senator BIDEN. Judge, I don't mean to interrupt. I want to make sure I understand. I think the reason for that policy is that that is the way people do discriminate. For example, you get somebody in, a woman, a black, a Hispanic, whomever, who is qualified but you don't want to hire them. And if you say, OK, in your own mind, I am going to keep looking until I find someone who is more qualified so that I don't have to hire—I mean, just so we both understand. That is why that rule is there. It is not just a little deal. It is the real world. That is how people work. People don't say anymore, "I am not going to hire that man over there because he is black" or "he is Jewish" or "she is a woman." They don't do that anymore. What they do is they look around and they keep looking until they find someone, aha, I got one here who is a Rhodes scholar, I got one here who is a white male who happened to have experience doing it. That is why they have that rule.

So, again, I am not questioning your commitment to civil rights. What I do wonder about is whether or not you—it is presumptuous of me to say this—whether you fully appreciate how discrimination does work today. That is why the corporation set that rule up: Interview the one inside the company, that was our practice, hire inside, tell them they have the job or not, so that the supervisor, who may not want to work with a black woman, doesn't get a chance to go, "I am going to keep looking. Send me in"—"find me somebody who has some experience somewhere else." That is why they have the rule, right?

Judge ALITO. Well, I think you make a good point, Senator, but in this instance, my recollection is—and, in fact, I am quite sure of this. These were both people who were from the inside. They were both Marriott employees. And I think they were both being considered for the position at the time. So it wasn't an instance in which they interviewed Ms. Bray and then they said, "Well, she is qualified, but we really don't want to hire her. Let's keep looking."

If there had been evidence to that effect, then I would certainly think for the reasons that you've outlined that you could draw a pretty substantial inference of an intent to discriminate from that.

Senator BIDEN. Well, Judge—

Judge ALITO. But nothing like that was presented to us in that case, as I remember it.

Senator BIDEN. Weren't the facts in that case also that there was a Mr. Josten, who had held the very job—he was leaving the job. That is the job being filled. He said, "In my opinion, which I let be known"—excuse me. I beg your pardon. It wasn't Mr. Josten. The person who was giving up the job said, "In my opinion, I let it be known to Mr. Josten"—the guy doing the hiring—"which Mr. Josten was aware of, that Bray was more than qualified to take over my position as Director of Services at Park Ridge. To this day"—this is a quote—"I cannot understand why she was not offered the position." That was in the record. It was in the record that Josten had said in a deposition under oath she is not qualified, when she clearly was qualified.

I mean, I guess what I am curious about is why in a close case like this wouldn't you let the jury decide it? Why did you become essentially the trier of fact? I mean, what was your thinking?

Judge ALITO. Well, my thinking was that the standard we were to apply was could a reasonable jury find that discrimination was proven here. And it was my view and it was the view of the district judge that a reasonable jury couldn't find that. The district judge actually looked at the qualifications of the two candidates and said, "This isn't even close. Ms. Real is much better qualified than Ms. Bray."

Now, I didn't say that and I didn't think that. I thought that they had somewhat different qualifications, and a reasonable person could view it either way. But there just wasn't anything that I saw that a reasonable person could point to as a basis for a reasonable inference of an intent to discriminate.

Senator BIDEN. Well, again, I am puzzled by this, just trying to understand your reasoning, because as you accurately point out, you didn't say the one was more qualified. You said they were equally qualified. And that is what puzzled me. And what really got my attention in the case was you have a collegial court, you know, the Third Circuit. I mean, that is my observation. I don't follow it quite as closely as the man who has appointed about everybody on that court, our Chairman. But I follow it very closely, and I thought it was pretty strong language that the majority of your panel said that your standard would eviscerate the Ninth Amendment. That in Third Circuit language is a pretty strong statement.

Let me move on to another case, if I may, the *Sheridan* case, another discrimination case. Again, a little puzzling to me. This is a case where you were the only judge in this circumstance out of 11 judges on your circuit who heard the appeal who ruled that a jury trial should have been overruled—a jury verdict should have been overruled. In this case, a woman alleged that she was constructively discharged. For the non-lawyers listening to this, it means she basically was demoted to the point where she was, as a practical matter, forced to quit.

This woman alleged that she was constructively discharged, and she argued that it occurred after she had brought a discrimination claim and where the record showed that her employer said, "I am going to hound you like a dog." It was in the record. "I am going to hound you like a dog for bringing this discrimination claim."

Now, there was more than one issue. One was whether this was vindictive—I forget the proper phrase—or whether or not she should have been promoted. The third was whether she was constructively discharged.

And the jury heard the case and said, "We conclude she was constructively discharged," i.e., she was basically forced out, and she was forced out because she was being discriminated against. And 10 out of 11 of your colleagues reached that same conclusion.

But you said—and this is what I want you to explain to me. You said, "An employer may not wish to disclose his real reasons for taking punitive action against someone or not hiring someone or for his animosity toward someone." And you went on to say, "The reason for the animosity on the part of the employer might be based on sheer personal antipathy," which is OK.

Now, again, this is a matter of real world versus, you know, theoretically. Can you tell me how you can tell the difference when an employer is saying, "Ms. Feinstein, I am not going to hire you be-

cause the person seeking the job has a Rhodes scholarship and I like him better, and it turns out they weren't a Rhodes scholar. The real reason is I just don't like your glasses. I don't like the way you look."

I am not being facetious. That is—

[Laughter.]

Senator LEAHY. I like the way you look, Dianne. You look OK.

Senator BIDEN. For the record, I am a fan of the woman from California.

But all kidding aside, I mean, that is how it read to me, that sheer personal antipathy is OK even when the employer's reason for not hiring the person toward whom they showed sheer personal antipathy wasn't true. How do you distinguish that from discrimination, subtle discrimination? That is tough for me.

Judge ALITO. Well, this case concerned an issue that had really divided the courts of appeals at the time when our court addressed it. And the courts of appeals—this gets into a fairly technical question involving a Supreme Court case called the *McDonnell Douglas* case. But to put it in simple terms, the courts of appeals have divided into three camps on this. There was the pretext-plus camp, which was the one that was the least hospitable to claims by employees. There was the pretext-only camp, which was the camp that was most favorable to employees. And there was the middle camp. And my position was in the middle camp, and when the issue went to the Supreme Court—and it did a couple of years later—in *Reeves* v. *Sanderson Plumbing*, Justice O'Connor wrote the opinion for the Supreme Court, and she agreed with my analysis of this legal issue, that in most instances pretext is sufficient. In fact, in the vast majority of instances if the plaintiff can show or could point to enough evidence to show that the reason given by the employer is a pretext, is incorrect, then that is enough to go to the jury. In the vast majority of cases, that is sufficient, but not in every case, and that is what I said in *Sheridan* and that is what Justice O'Connor said when she wrote the opinion for the Supreme Court in *Reeves* v. *Sanderson Plumbing*.

Senator BIDEN. Well, I went back and read *Reeves* and I looked at O'Connor's statements, and with all due respect you could argue she used the same standard, but it is clear to me she would have reached a different conclusion. She would have been with your ten colleagues.

Here is what she said. She said in the *Reeves* case that she would not send the case to the jury if, and I am quoting, "One, the record conclusively revealed some other non-discriminatory reason for the employer's decision." I fail to see how the record conclusively showed that, and I doubt whether she would have seen that.

Or, two, continuing to quote, "If the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant uncontroverted evidence that no discrimination had occurred." It seems to me she is much more prepared to give the benefit of the doubt to the employee in that situation and you are much prepared to give the benefit of the doubt to the employer.

I mean, by her own language, I find it hard to figure how she would have reached the same substantive conclusion that you did

that a jury trial wasn't appropriate, notwithstanding the fact that I think you make a good point that the test she said was more like the test you said. But the real-world outcome, I think, she would have been—presumptuous of me to say it—I think it would have been 11 to 1 and not 10 to 2 had she been on the court, but who knows?

Judge ALITO. Well, Senator, I think the vote on my court was a reflection of the standard that they applied and they did not apply the *Reeves* v. *Sanderson Plumbing* standard. Of course, *Reeves* hadn't been decided at that point, but they applied the standard that said if the plaintiff can create a fact issue as to whether it was pretextual, then that alone is sufficient. So they didn't get into an evaluation of the sort of evidentiary points that you were mentioning.

Senator BIDEN. Well, they kind of did talk—you would know better than I, Judge. I don't mean to suggest I am correcting you, but as I read the case, they did get into the minutia about—

Judge ALITO. They did.

Senator BIDEN [continuing]. The factual minutia. And in the *Reeves* case, O'Connor, not that it is—because there are two different cases we are talking about here; we are talking about a similar rule, two different cases. O'Connor reversed the Fifth Circuit decision and here is what she said when she reversed it. She said that she reversed the lower court because, quote, "It proceeded from the assumption that a prime facie case of discrimination combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate non-discriminatory reason for its decision is insufficient as a matter of law to sustain a jury finding of intentional discrimination."

It seems to me that is what you did. In my view, that is what you did—that is the conclusion you reached in the *Sheridan* case. She overruled in *Reeves*, as I read it. But at any rate, as someone once said, it is your day job and we do this part-time. We have other things like wars and foreign policy to deal with, so I am not presuming to be as knowledgeable about this as you are.

Let me move on to a third case very quickly—I only have two-and-a-half minutes left—and it is the *Casey* case, *Planned Parenthood*. And I don't care what your position is on abortion. This is not about your abortion position. It is about your reasoning here. As a matter of fact, with 2 minutes and 30 seconds, I probably can't get into the case. maybe I should do it in a second round, but I should tell you now I want to talk to you about, again, the real world here and kind of the effects test.

And so for me, Judge, where I am still remaining somewhat puzzled is on whether or not you—whether it is applying the unitary Executive standard and what you mean by that or whether it is the assertions made relative to how to look at discrimination cases, which are difficult, you seem to come down—I am not associating myself with the studies done—I don't know enough to know whether they are correct or not—by Cass Sunstein or others. I don't disagree with them.

But as I have tried diligently to look at your record, you seem to come down more often and give the benefit of the doubt to the outfit against whom discrimination is being alleged. You seem to

lean—in close cases, you lean to the state versus the individual. Now, again, a lot of constitutional scholars would argue that is perfectly correct.

All I am suggesting is if I am right—and we will get a chance to do this again—if I am right, that would be a change that will occur, more than subtle, on the bench, on this Court, on a closely divided Court, which would take it in a direction that I am not as comfortable with as others may be.

But at any rate, you have been very gracious. I appreciate you being responsive, and I thank the Chair. And I want to note for maybe the first time in history, Biden is 40 seconds under his time.

[Laughter.]

Chairman SPECTER. Thank you very much, Senator Biden. It is greatly appreciated.

We are going to stay in session for just ten more minutes and call now on Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

Mr. Chairman, let me begin by just asking the witness if you would like to comment again on the unitary Executive. I have this specifically in mind because while I think I understood your explanation of it, Senator Biden just referred to it and I thought maybe it would be useful to draw the distinction that I heard you draw with respect to your discussion of the unitary Executive power, if you could do that, please.

Judge ALITO. Yes, certainly, Senator. As I understand the concept, it is the concept that the President is the head of the Executive branch. The Constitution says that the President is given the Executive power and the idea of the unitary Executive is that the President should be able to control the Executive branch, however big it is or however small it is, whether it is as small as it was when George Washington was President or whether it is as big as it is today or even bigger.

It has to do with control of whatever the Executive is doing. It doesn't have to do with the scope of Executive power. It does not have to do with whether the Executive power that the President is given includes a lot of unnamed powers or what is often called inherent power. So it is the issue—it is the difference between scope and control. And as I understand the idea of the unitary Executive, it goes just to the question of control. It doesn't go to the question of scope.

Senator KYL. Of who eventually has the last say about Executive power, which would be the President?

Judge ALITO. Right.

Senator KYL. OK, thank you. Now, I want to also ask you a question which was asked of Judge Bork in his confirmation hearing, and his answer, as I understand it, was not well accepted by some Members of the Senate, was expressed as one of the reasons for their opposition to him. So it is more than just a mundane question, although it is a simple question.

By accepting the President's nomination, you have obviously expressed a willingness to serve on the U.S. Supreme Court. So my question is why would you want to serve on the U.S. Supreme Court?

Judge ALITO. I think it is an opportunity for me to serve the country using whatever talent I have. I think that the courts have a very important role to play, but it is a limited role. So it is important for them to do a good job of doing what they are supposed to do, but also not to try to do somebody else's job.

And I think that this is an area for—this is a way in which I can make a contribution to the country and to society. I have tried to do that on the court of appeals and I would continue to do that if I am confirmed for the Supreme Court.

Senator KYL. Thank you. Now, let me ask you a question that I also asked now Chief Justice John Roberts, and it is obvious from my question that I do not support the use of foreign law as authority in United States court opinions.

I mentioned to him the 2005 case of *Roper* v. *Simmons*, in which the Supreme Court spent perhaps 20 percent of its legal analysis discussing the laws of Great Britain, Saudi Arabia, Yemen, Iran, Nigeria and China. And I reminded the Committee of Justice Breyer's 1999 dissent from denial of cert in *Knight* v. *Florida*, in which he relied on the legal opinions of Zimbabwe, India, Jamaica and Canada in arguing that a delay caused by a convicted murderer's repeated appeals, appeals brought by the convict, should be considered cruel and unusual punishment.

I expressed my view that reliance on foreign law is contrary to our constitutional traditions. It undermines democratic self-government and it is utterly impractical, given the diversity of legal viewpoints worldwide. And I would add that it is needlessly disrespectful of the American people, as seen through the widespread public criticism of the trend.

Now, with my cards on the table, I turn to you. What is the proper role, in your view, of foreign law in U.S. Supreme Court decisions, and when, if ever, is citation to or reliance on these foreign laws appropriate?

Judge ALITO. I don't think that foreign law is helpful in interpreting the Constitution. Our Constitution does two basic things. It sets out the structure of our Government and it protects fundamental rights. The structure of our Government is unique to our country, and so I don't think that looking to decisions of supreme courts of other countries or constitutional courts in other countries is very helpful in deciding questions relating to the structure of our Government.

As for the protection of individual rights, I think that we should look to our own Constitution and our own precedents. Our country has been the leader in protecting individual rights. If you look at what the world looked like at the time of the adoption of the Bill of Rights, there were not many that protected human—in fact, I don't think there were any that protected human rights the way our Bill of Rights did.

We have our own law, we have our own traditions, we have our own precedents, and we should look to that in interpreting our Constitution. There are other legal issues that come up in which I think it is legitimate to look to foreign law. For example, if a question comes up concerning the interpretation of a treaty that has been entered into by many countries, I don't see anything wrong with seeing the way the treaty has been interpreted in other

countries. I wouldn't say that that is controlling, but it is something that is useful to look to.

In private litigation, it is often the case—I have had cases like this in which the rule of decision is based on foreign law. There may be a contract between parties and the parties will say this contract is to be governed by the laws of New Zealand or wherever. So, of course, there, you have to look to the law of New Zealand or whatever the country is.

So there are situations in litigation that come up in Federal court when it is legitimate to look to foreign law, but I don't think it is helpful in interpreting our Constitution.

Senator KYL. Thank you. Now, let me close with this question. In the Judiciary Committee's questionnaire to you, you were asked about your views of judicial activism, and as part of your answer you said something intriguing to me. You said some of the finest chapters in the history of the Federal courts have been written when Federal judges, despite resistance, have steadfastly enforced remedies for deeply rooted constitutional violations.

How does one determine that a constitutional violation is deeply rooted, and can you elaborate on what you meant by that and when Federal courts should be especially aggressive in their use of equitable powers?

Judge ALITO. Well, what I was referring to were the efforts of Federal judges, lower Federal court judges in the South during the days after the decision in *Brown v. Board of Education* to try to implement that historic decision, despite enormous public resistance at times. But they—this was an example of the Federal judiciary not swaying in the wind of public opinion. There was a lot of opposition and I am sure that it didn't make them popular.

I have read a number of books concerning the situation in which they found themselves, but on the whole they behaved—they did what a Federal judge is supposed to do, which is that they enforced the decision of the Supreme Court of the United States that, after a long delay, vindicated what the Equal Protection Clause of the 14th Amendment was supposed to mean, which was to guarantee equal rights to people of all races.

Senator KYL. Are there other examples that come to your mind of that same application of power? It seems counter intuitive, but when you think about it, it is absolutely essential for the courts sometimes to buck public opinion and enforce what may be considered unpopular laws.

Judge ALITO. Well, there were some examples cited earlier today when the courts said that the Executive had overstepped the bounds of its authority. The *Youngstown Steel* case was cited, and that is certainly an example where President Truman thought that it was necessary to seize the steel mills so as not to interfere with the war effort in Korea. But the Supreme Court said that this was an overstepping of the bounds of Executive authority.

There was a reference to *United States* v. *Nixon* where the Supreme Court said that the President of the United States had to comply with grand jury subpoena for documents and they stood up for what they understood the law to mean, despite the fact that there must have been great pressure against them in another di-

rection. So when situations like that come up, it is the responsibility of the judiciary to hold fast.

Senator KYL. Mr. Chairman, since there are just about 30 seconds left here, rather than ask another question, let me just close with quoting three sentences from the letter sent by the American Bar Association to you dated January 9. I thought this was especially interesting in view of the subjects that they dealt with—the integrity of the nominee, as well as his abilities and character.

They said, "Fifty years ago, a Supreme Court Justice wrote of the traits of character necessary to serve well on the Supreme Court. He referred to the ability to put one's passion behind one's judgment instead of in front of it and to demonstrate what he called dominating humility. It is the belief of the Standing Committee that Judge Samuel Alito possesses those same qualities."

I think that is quite a testament to your character and your integrity, and I am sure you appreciate the Bar Association reaching that conclusion.

Judge ALITO. Thank you very much, Senator.

Chairman SPECTER. We will now recess until 2:15, at which time Senator Kyl will be recognized for 20 minutes, which is the balance of his 30-minute first round.

Recess until 2:15.

[Whereupon, at 1:04 p.m., a luncheon recess was taken.]

[AFTERNOON SESSION 2:15 p.m.]

Chairman SPECTER. We will turn now to Senator Kyl, who has 20 more minutes on his first round of 30 minutes.

Senator Kyl?

Senator KYL. Thank you, Mr. Chairman. First let me ask unanimous consent to put three items in the record, one of these items related to—actually, two of them relate to the matter of the CAP that we have heard something about. I would like to enter into the record two letters by Democratic attorneys that make clear that Judge Alito has been extremely helpful in advancing the interest of women and minorities. One letter notes that as U.S. Attorney, he put women and minorities in supervisory positions. The other is from the President-elect of the National Bar Association for Women.

And also a Washington Post article from January 9th, in which criminal defense lawyer and Democrat, Alberto Rivas, who served in the U.S. Attorney's Office when Judge Alito was in charge said, speaking of the judge, "While he opposed numeric hiring quotas, he took steps to diversify an office that had the reputation of something of a white boys' club.

Mr. Chairman, I hope that this will help address what I think is almost getting to be a—

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

Senator KYL. Thank you. Secondly, there has been some discussion of this Knight-Ridder article that has, to be my understanding, been rather completely discredited, and I ask unanimous consent that the attached document analyzing that article be added to the record.

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

Senator KYL. Before the break, Senator Biden suggested that—at least I understood him to suggest that there was no reason to belong to this organization, CAP, in 1985 because ROTC was safely on campus at that time.

Judge, let me ask you a question. Do you know what year you joined the CAP?

Judge ALITO. I don't know, Senator. I tried to rack my memory about that, but as I said, if I had been active in my membership, I think I certainly would have remembered that, and if I had renewed the membership, I think I would remember that. So my best reconstruction of this is that it probably was sometime around the time when I wrote that statement.

Senator KYL. Long after you were gone from the school.

Judge ALITO. That's correct.

Senator KYL. In that event, Mr. Chairman, I ask unanimous consent to include in the record an article from the campus newspaper, the Princeton Packet, dated February 12th, 1985, which expressly explains that ROTC was a core motivation behind the CAP in 1985.

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

Senator KYL. Thank you. Mr. Chairman, I noted with interest a comment that Senator Durbin made in his opening statement because it referred to a good friend and former colleague of ours, Senator Simon, who put forth a pretty good test about courts. He said that the real test is, is the Court restricting freedom or expanding it? I thought about that because it seems to me that so many of these cases about expanding freedom or restricting it are cases that boil down to the eye of the beholder.

I specifically thought about the Ninth Circuit case, because my State is from the Ninth Circuit, outlawing "under God" in the Pledge of Allegiance, saying that that is unconstitutional. I checked, according to the one survey that I had access to, 93 percent of the American people support the right to say "under God" in the Pledge of Allegiance. I know that the plaintiff in the case, Michael Newdow, thought that he was advancing his freedom or his daughter's freedom in successfully getting the Court to strike it down, but it seems to me that the majority of the people are having their freedom restricted in such a case.

And I certainly will not ask you because that case could well come before the Court again. I would not ask you how you would rule on it. But as a general proposition, this matter of restricting freedom, is it not the case that in many situations you have two competing types of freedom or liberty involved and it is a question of interpreting the Constitution rather than specifically setting out to advance one sort of freedom as opposed to another?

Judge ALITO. I think that's exactly right, Senator. Often there are conflicting freedoms and that makes the case difficult.

Senator KYL. Let me ask you too, there was a concern expressed by Senator Biden that the big factor in your nomination in his view was the fact that you would be replacing Justice Sandra O'Connor, and that that might mean that you would change the direction of the Court. That is the concern expressed anyway. As has been famously said, I know Justice O'Connor. I have been a friend of hers for at least 30 years, and I do not think she is any kind of a liberal

member of the Court. She might properly be called moderately conservative. I am not sure how she would characterize herself. But I noted that of the 109 Justices to sit on the Supreme Court, nearly half, 46 to be exact, have replaced judges appointed by another political party, so it is not at all uncommon, indeed, it is almost half the situations in which a different party nominates the Justice replacing a sitting Justice, and one might expect, therefore, some difference.

But I checked the record because this had been brought up by Senator Brownback yesterday. I found in the nomination of Justice Ginsburg and the confirmation hearings there, she replaced Justice White, who I think rightly has been called a centrist on the Court, certainly not a liberal, and yet I saw not one expression of concern by any Senator, Democrat or Republican, that Justice Ginsburg might be ruling quite a bit differently than Justice White in decisions in the Court.

So it seems to me that that is not a test that is rightly applied. That is a results-oriented test, exactly the same kind of thing that you have said that judges should not do when they approach cases.

Let me get to a point that Senator Kennedy made. He said that you have been overly deferential to Executive power, and criticized what he called—and I think I have this quotation exactly—"your almost total disregard of the impact of these powers on the rights of individuals." I would like to know what your response is to that charge and whether you can cite some specific cases that would refute what he said.

Judge ALITO. Certainly, Senator. I have tried to decide every case on its own merits, and sometimes that means siding with the Government, and sometimes it means siding with the party who's claiming a violation of rights, and I do it on an individual basis. Cases that show that I do that are cases like *United States* v. *Kithcart*, which was a case in which an African-American man had been stopped by police officers because he was—because there had been a description of some robbery suspects, and they had been described as—the perpetrator was described as a black man in a black car, and Mr. Kithcart was a black man in a black car. And they thought that was sufficient to stop the car, and I wrote an opinion saying that that was insufficient, and that was basically racial profiling and was not permitted.

Another example is *Bolden* v. *Southeastern Pennsylvania Transportation Authority*, which had to do with a drug test, and I found that the test there constituted a search and a seizure and would be a violation absent consent on the part of the party who was searched. There have been a number of criminal cases in which I've sided with the person claiming a violation of rights. *Carpenter* v. *Vaughn* was a case in which I wrote an opinion reversing a death—I joined an opinion reversing a death penalty. The *Bronshtein* case was another case that came up fairly recently in which I joined an opinion reversing a death penalty. There have been quite a few cases of this nature, Senator.

Senator KYL. I noted a tax case too, or a case involving tax evasion, *Leveto* v. *Lapina*. Do you remember that 2001 case?

Judge ALITO. I do. That was the case in which there was a search of a—I believe it was the office of a veterinarian, and in a

way that is a similar case to the *Mellott* case that I was discussing earlier, although in *Mellott* I thought that the search was carried out properly. In the *Leveto* case, on the facts of that case, I thought the search was not carried out properly, that the officers violated the Fourth Amendment in the way they went about carrying out that search. They forced the occupants of these premises to remain on the premises for a very extended period of time while the search was being conducted, and violated their Fourth Amendment rights, and that's what I said in the opinion.

Senator KYL. Do you have an idea of how many cases that have gone to decision that you have participated in on your 15 years as a Circuit Court Judge?

Judge ALITO. I think it's well over 4,000 on the merits.

Senator KYL. I suspect that of those 4,000 cases there might be one or two that I would disagree with your decisions on, maybe even more than that. But the point here is there are numerous cases in which you have found that the Government acted improperly in criminal law context, in warrant context, in discrimination context, in other cases in which you have found either that the Government acted properly, or that at a minimum, Government officials were entitled to some immunity with respect to being privately sued; is that correct?

Judge ALITO. That's correct, Senator.

Senator KYL. Let me also address this question of discrimination, especially racial discrimination. This is a matter that was discussed in some prior questioning. Specifically, in Senator Biden's questions, it dealt with the *Sheridan* case in which you were the sole dissenter. In the subsequent U.S. Supreme Court case, the *Reeves* decision, my understanding from your answer is that the Supreme Court addressed the same issue of law that you and your colleagues had disagreed about, and that the U.S. Supreme Court voted unanimously, and in an opinion written by Justice O'Connor, that the test that you used in the *Sheridan* case was the correct test to use; is that correct?

Judge ALITO. Yes, Senator, that is correct.

Senator KYL. Now, there are some other cases involving employees claiming racial discrimination that I have looked at, and one of the Senators seemed to suggest in a comment that he made that you had never written opinions or decided cases for a black plaintiff. Is that a fair statement?

Judge ALITO. No, it's not accurate.

Senator KYL. Do you recall cases in which you upheld the discrimination claims of racial minorities?

Judge ALITO. There was the case of *Goosby* v. *Johnson & Johnson*, and that case could be considered together with the *Bray* case that I was discussing before the break. Those were both cases in which my colleague, Judge McKee wrote the opinion, and in the *Goosby* case I agreed with him. It was a similar case, but it was a case where I thought the facts fell on the other side of the line.

There was a case called *Smith* v. *Davis*, which was another case where I joined an opinion upholding the claim of an African-American who was claiming racial discrimination. The *Robinson* case involved claims of race and gender discrimination, as I recall. There are a number of cases in the criminal law context. I just mentioned

the *Kithcart* case. There was the *Brinson* case. There was *Williams* v. *Price*. There have been many cases involving other forms of discrimination, age discrimination, the *Showalter* case; disability case, the *Mondzelewski* case; the case of *Shapiro* v. *Lakewood Township*. There was *Zubi* v. *AT&T*, which was a case involving the statute of limitations for a claim of racial discrimination.

Senator KYL. And you were the lone dissenter in that case, is that correct?

Judge ALITO. I was the dissenter in that case.

Senator KYL. And your position was what?

Judge ALITO. My position was that—the majority's position was that the claim had to be thrown out because the statute of limitations had been violated, and my position was that the claim should be allowed to go forward because the statute of limitations was longer than the majority had recognized. And that case—that issue later went to the Supreme Court in a case called *Jones* v. *Donnelley* and the Supreme Court agreed with my position, that the longer statute of limitations applied.

Senator KYL. I note there is another case involving an African-American woman who claimed that her coworkers had made racial and sexual slurs against her, denied her training opportunities and so on, and you ruled that she was entitled to $124,000 in damages and attorneys' fees, a case called *Reynolds* v. *USX Corporation*. Do you remember that case?

Judge ALITO. That's right, Senator.

Senator KYL. So the bottom line is there are numerous cases in which you have ruled in favor of minorities, in particular, African-Americans in discrimination situations, and also where you have dissented in a situation which your position was to support the claim of discrimination, and that it would be inaccurate to say that you have not taken that position in the 4,000 plus cases that you have decided; is that correct?

Judge ALITO. That's certainly correct, Senator.

Senator KYL. There has been a lot of talk about precedent and *stare decisis*. It is certainly something that we lawyers are familiar with. We regard it as a key principle in deciding cases. There was a case that was mentioned by a couple of my Democratic colleagues that I am sure will be discussed further, but I thought I would give you an opportunity to talk about it because it certainly seemed to me to be a case in which you were very—that you were trying to apply a Supreme Court precedent, the precedent being the *Lopez* v. *United States* case, a case, by the way, which I note that is one of those decisions that Justice O'Connor was in the majority, a 5–4 decision, which her position could be characterized as the swing vote.

Now you, in *United States* v. *Rybar*, agreed with Justice O'Connor and the way that the law should be applied relative to intrastate possession of a weapon. The *Lopez* case dealt with a congressional Act that said that weapons should not be possessed near schools. The Court struck that down, saying that that went beyond the Commerce Clause capability of commerce to legislate in matters of interstate commerce. In *Rybar*, what was the issue? You dissented.

By the way, one of the reasons why this case is interesting to me is because the Ninth Circuit Court of Appeals, again, which is my circuit, has subsequently ruled—and this is not a conservative court in most people's estimation—recently agreed with your dissent in a case called *U.S.* v. *Stewart*, a 2003 case, in which the Court overturned the defendant's conviction under the very same statute, holding that the law exceeded Congress's commerce powers.

It seems to me that it would be hard to argue that your position is per se unreasonable, but could you describe it in your own words?

Judge ALITO. My position in *Rybar* was really a very modest position, and it did not go to the question of whether Congress can regulate the possession of machine guns. In fact, I explained in the opinion that it would be easy for Congress to do that in a couple of ways that differed from the way in which it was done in *Rybar*.

The statute in *Rybar* was very similar to the statute that was at issue in *Lopez*. In fact, I think they are the only two Federal firearm statutes that have been cast in that mold. They simply prohibited the possession of firearms without either congressional findings concerning the effect of the activity on interstate commerce, or a jurisdictional element. And I knew from my experience as a Federal prosecutor that most of the Federal firearms statutes have a jurisdictional element right in the statute. What that means is that when the prosecutor presents the case in court, the statute that is used most frequently is the statute that makes it a crime for someone who's been convicted of a felony to possess a firearm.

And in that case, when the prosecutor presents the case in court, the prosecutor has to show that the defendant has been convicted of a felony, and that the firearm in question had some connection with interstate commerce.

Under Supreme Court precedent, a case called *Scarborough*, all that's necessary is to show that the firearm, at some point in its history, passed an interstate or foreign commerce, was manufactured in one State and then later turned up in another State, or manufactured in a foreign country and brought to the United States.

From my experience, this was never a practical problem, and this was how all the Federal firearms statutes had been framed. But for whatever reasons, the statute in *Lopez* and the statute in *Rybar* were lacking that jurisdictional element. So an easy way in would Congress could regulate the possession of a machine gun would be to insert a jurisdictional element. And as I pointed out, as I just pointed out, in my experience as the U.S. Attorney in New Jersey, that was never a practical problem.

The Supreme Court in *Lopez* said that there were three reasons why there was a problem with the statute there, and that case had been decided just the year before. And it was my obligation as a lower-court judge to follow it. The first was that it involved what the Court characterized as the noncommercial activity, and that was the possession of a firearm. And, of course, that was exactly the same activity that was at issue in *Rybar*. The second was the absence of a jurisdictional element, and there was no jurisdictional element in either statute. And the third was the absence of a con-

gressional finding connecting the activity that was being regulated with interstate commerce. And I pointed out in my opinion that I would have viewed the *Rybar* case very differently if there had been a congressional finding, or if the Justice Department, in presenting its argument to us, had been able to point to anything that showed that there was a substantial effect on interstate commerce, which is what the Supreme Court says is required.

Senator KYL. So this is one of those situations in which, if the result was not what was intended, you were willing to point out in your decision what Congress could relatively easily have done to get the result that it appeared that Congress wanted to achieve?

Judge ALITO. That's exactly correct.

Senator KYL. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Kyl.

Senator Kohl?

Senator KOHL. Thank you very much, Mr. Chairman.

Judge Alito, we heard a lot of discussion yesterday about the proper role of the judge in our system. Some said that a judge should favor neither the "big guy or the little guy, but simply apply the law and not make the law." Based on what you said yesterday, I believe that you would agree generally with this characterization.

However, to me it is not quite so simple. Just as no two umpires call the same game exactly, no two judges see a case in exactly the same way. Laws and the Constitution are often ambiguous and capable of many interpretations. Those interpretations are the result of judges with different judicial philosophies. Some judges have a more liberal judicial philosophy, while others are more conservative, and we are here trying to figure out what your judicial philosophy is. That is probably the principal point of this hearing.

If the law were so simple, we would not have as many 5–4 decisions. It seems to me that many of the most fundamental protections of civil rights and civil liberties that we take for granted today, things such as school integration, the principle of one person/one vote, the principle that the accused have a right to a lawyer in criminal cases, and the right of contraception, just to name a few, have come when judges have been willing to look beyond rigid legal doctrines that prevailed at the times of those rulings. The neutral approach, that of the judge just applying the law, is very often inadequate to ensure social progress, right historic wrongs, and protect civil liberties so essential to our democracy.

So isn't it true, Judge Alito, that a neutral judge would never have reached these conclusions? In fact, for decades, courts did not reach these conclusions. So would you agree that these cases were rightly decided, No. 1, and required, No. 2, that judges apply a more expansive, imaginative view of the Constitution?

Judge ALITO. I think that the Constitution contains both some very specific provisions, and there the job of understanding what the provision means and applying it to new factual situations that come up is relatively easy. The Constitution sets age limits, for example, for people who want to hold various Federal offices, and there can't be much debate about what that means or how it applies. But it also contains some broad principles—no unreasonable searches and seizures, the guarantee that nobody will be deprived

of life, liberty, or property without due process of law, equal protection of the laws. And in those instances, it is the job of the judiciary to try to understand the principle and apply it to the new situations that come before the judiciary.

I think the judiciary has to do that in a neutral fashion. I think judges have to be wary about substituting their own preferences, their own policy judgments for those that are in the Constitution. They have to identify the principle that is to be applied under these broader provisions of the Constitution and apply it, but I don't see that as being the same thing as the judge's injecting his or her policy views or preferences or ideas about the direction in which the society should be moving into the decisionmaking process.

Senator KOHL. These decisions to which I just referred push society into new directions, and they came about, didn't they, as a result of the Supreme Court's willingness to look at the Constitution in perhaps a different way, in a new way, and take a new approach and a new avenue, which is not entirely consistent with a neutral judge simply applying the law. The law is the law. It is not hard to find that out. As you somewhat suggested, if you are an umpire, a ball is a ball, a strike is a strike. I am suggesting that it is—and I think I would like to hope you would agree. It is somewhat, if not a lot more complex and sophisticated. If it weren't true, we could have a lot of views here today.

I think you are unique in many ways, and part of that is your complexity, your sophistication, your ability to look at the Constitution and, if necessary, see new meanings that weren't seen there before. Isn't that true?

Judge ALITO. Well, Senator, I would never say that it is an easy process. There are some easy cases, but there are a lot of very difficult cases. And once you have identified the principle, the job of applying it to particular cases is often not easy at all. But what the judge has to do is make sure that the judge is being true to the principle that is expressed in the Constitution and not to the judge's principle, not to some idea that the judge has. And sometimes this results in ground-breaking decisions. Sometimes that is because new issues come up. Sometimes it is because the principle that is embodied in a constitutional provision has long been neglected.

That was certainly true with respect to the Equal Protection Clause. There was a long period between *Plessy* v. *Ferguson* and *Brown* v. *Board of Education* when the true meaning of the Equal Protection Clause was not recognized in the decisions of the Supreme Court, and when *Brown* was finally decided, that was not an instance of the Court changing the meaning of the Equal Protection Clause. It was an instance of the Court righting an incorrect interpretation that had prevailed for a long period of time.

Senator KOHL. Judge Alito, one of the ways you get at a person's judicial philosophy is to look at the people whom they admire. In an interview that you gave in 1988, you were asked about your thoughts about Judge Robert Bork's nomination, and you said, and I quote, "Judge Bork was one of the most outstanding nominees of this century."

Many Americans do not share Judge Bork's narrow views about the Constitution, views that would undermine many of the rights that we now take for granted, Judge Alito. Judge Bork thought that Americans had no constitutional right to use contraception, saying, and I quote, "The right to procreate is not guaranteed explicitly or implicitly by the Constitution."

Judge Bork thought minorities had no constitutional right to have their votes counted equally, saying that in guaranteeing one man/one vote, the Court "stepped beyond its boundaries as an original matter."

In 1981, Judge Bork called *Roe* v. *Wade* "an unconstitutional decision, serious and wholly unjustifiable usurpation of State legislative authority."

In addition, he had an unreasonably broad view of Executive power, claiming that a law requiring the President to obtain an order from a court before conducting surveillance in the United States and against U.S. citizens for foreign intelligence purposes was "a thoroughly bad idea, and almost certainly unconstitutional."

Can we assume from your admiration of Judge Bork that you agree with some of these statements or at least that you support some of these beliefs if you were sitting on the Supreme Court? Frankly, it is curious to me that someone like yourself would consider someone with his views to be "one of the most outstanding nominees of this century."

Judge ALITO. Senator, when I made that statement in 1988, I was an appointee in the Reagan administration, and Judge Bork had been a nominee of the administration, and I had been a supporter of the nomination. And I don't think the statement goes beyond that.

There are issues with respect to which I probably agree with Judge Bork, and there are a number of issues on which I disagree with him. And most of the things that you just mentioned are points on which I would disagree with him. I expressed my view about *Griswold* earlier this morning. On the issue of reapportionment, as I sit here today in 2006—and I think that is what is most relevant—I think that the principle of one person/one vote is a fundamental part of our constitutional law. And I think it would be—I don't see any reason why it should be re-examined, and I don't know that anybody is asking for that to be done. Every legislative district in the country and every congressional district in the country has been reapportioned, has been redistricted numerous times in reliance on the principle of one person/one vote. And the old ways of organizing State legislatures have long been forgotten. So I think that is very well settled now in the constitutional law of our country.

Under the Fourth Amendment, I have no question about the decision in *United States* v. *United States District Court*, which held—and I think that is what you were referring to, which held that a warrant is required for domestic security surveillance, and that was the decision that led to the enactment of the Foreign Intelligence Surveillance Act.

Senator KOHL. Of course. I was only referring to or trying to refer to your quote with respect to him and the positions he held, which I suggested were at variance with the positions I thought

you held, which you are affirming here in your answer. So that the quote you are pointing out was something you made as an employee of the Reagan administration?

Judge ALITO. I was, and that was in—I saw that quoted in the paper yesterday. I think that was in 19—

Senator KOHL. Not necessarily expressing your own real views?

Judge ALITO. I was a supporter of the nominee of the administration, and he was the nominee of the administration. He was and is an accomplished scholar. He had contributed a great deal to constitutional debate with his writings. But I don't agree with him on a number of issues, and I mentioned—you hit some of the issues on which I would definitely disagree with him.

Senator KOHL. Very good.

Judge Alito, in a document appended to your job applications, you also wrote that, "I disagree strenuously with the usurpation by the judiciary of decisionmaking authority that should be exercised by branches of Government responsible to the electorate." The statement is especially troubling given that elsewhere in this application you wrote, "I developed a deep interest in constitutional law motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, Establishment Clause, and reapportionment."

Judge Alito, what Warren Court cases were you specifically talking about—*Miranda*, one person/one vote, any of the privacy decisions? What in particular were you talking about?

Judge ALITO. Well, Senator, I am happy to address that. The statement was made in that 1985 form, and, of course, that was written 20 years ago. And in the form, what I was doing was sort of outlining the development of my thinking about constitutional law, and I went so far as to go back to my college days, which were before, of course, I had even attended law school, much less practiced law or served as a judge.

I mentioned some of the leading areas that were covered by decisions of the Warren Court, and the decisions of the Warren Court really stimulated my interest in constitutional law. And I mentioned a book that had been published the time, Alexander Bickel's book "The Supreme Court and the Idea of Progress," which was probably the first book about what you might call constitutional theory that I had read. And he was someone who I think most people would describe as a liberal, but he was a critic of the Warren Court for a number of reasons. And he was a great proponent of judicial self-restraint, and that was the main point that I took from my pre-law school study of the Warren Court.

I spoke a bit about the reapportionment decisions. I don't believe that I—in fact, I am quite sure I never was opposed to the one person/one vote concept. I do recall quite clearly that my father's work at the time working for the New Jersey Legislature and working on reapportionment had brought to my attention the question of just how far that principle of one person/one vote had to be taken in drawing legislative districts.

The New Jersey Legislature and many other legislatures at the time were trying to redraw their districts in accordance with *Reynolds* v. *Sims*, which set out the one person/one vote principle. But it wasn't clear how exactly equal the districts had to be in popu-

lation. And in some of the late Warren Court decisions, the Court seemed to suggest—did say so for congressional districts that they had to be almost exactly equal in population. And this idea, if applied to the legislatures and to the New Jersey legislative plan, would have wiped the plan out because there were population deviations which, although not very large, were much larger than the Court had said they were going to tolerate in the case of congressional districts. And I do remember that quite specifically.

Professor Bickel made the argument that the Court had taken the one person/one vote principle too far, and I know my father had said that although he thought it was a good idea, the idea of trying to get the districts to be exactly equal in population at the expense of looking at other factors, such as the shape of the district and respecting county lines or municipal lines, was a bad idea.

Senator KOHL. Judge Alito, you stated in that same job application that one element of the conservative philosophy that you believe "very strongly" was the "legitimacy of a government role in protecting traditional values." What traditional values were you referring to? And who decides what is a "traditional value"?

Judge ALITO. Well, again, I'm trying to remember what I thought about that 20 years ago, and I'm trying to reconstruct it.

I think a traditional value that I probably had in mind was the ability to live in peace and safety in your neighborhood, and that was a big issue during the time of the Warren Court, and it was still a big issue in 1985 when I wrote that statement because that was a time of very high crime rates. I think that is a traditional value.

I think the ability of people to raise a family and raise their children in accordance with their own beliefs is a traditional value. I think the ability to raise a family, raise children in a way that they are not only subjected to—they are spared physical threats but also psychological threats that can come from elements in the atmosphere is a traditional value. I think that the ability to practice your own conscience is a traditional value.

That is the best I can reconstruct it now, thinking back to 1985.

Senator KOHL. Very good. Judge Alito, in *Casey* you argued that the requirement that a woman notify her husband did not impose an undue burden upon a woman. You reasoned in part that the number of married women who would seek an abortion without notifying their husbands would be rather small. In other words, only some women would be affected. The majority in that case disagreed with you and stated, "Whether the adversely affected group is but a small fraction of the universe, a pregnant woman desiring an abortion seems to us irrelevant to the issue."

This disagreement begs the question. Is a constitutional right any less of a right if only one person suffers a violation? Or should greater value be placed on that right if a larger number of people had that right violated?

Judge ALITO. Trying to apply the undue burden test at that time to the provisions of the Pennsylvania statute that were before the court in *Casey* was extremely difficult, and I can really remember wrestling with the problem and I took it very seriously and I mentioned that in my opinion and it presented some really difficult

issues. Part of the problem was that the law just was not very clear at that time.

The undue burden standard had been articulated by Justice O'Connor in several of her own opinions and there were just a few hints in those opinions about what she meant by it. But what she said was that an undue burden consisted of an absolute obstacle or an extreme burden. Those may not be exact quotes, but they're pretty close. And she did say that it was insufficient to show simply that a regulation of abortion would inhibit some women from going forward and having an abortion. Those were the—that was the information that was available in her opinions to try to understand what this test meant.

And so then the question became, how do you apply that to the numerous provisions of the Pennsylvania statute that were before us, and it was a difficult task. The plaintiffs argued that all the provisions constituted an undue burden, and when the case went to the Supreme Court, Justice Stevens agreed with that. He said they all were an undue burden. Things like a 24-hour waiting period, that was an undue burden because it would inhibit some women from having an abortion. An informed consent provision, Justice Stevens thought and plaintiffs argued that would be an undue burden.

The majority on my panel and the joint opinion on the Supreme Court found that most of the provisions of the statute did not amount to an undue burden, the 24-hour waiting period, the informed consent provision, and all of them. We disagreed on only one, and that was the provision regarding spousal notification with a safety valve provision there that no sort of notification was needed if the woman thought that providing the notification would present a threat of physical injury to her. And I wrestled with that issue, but based on the information that I had from Justice O'Connor's opinions, it seemed to me that this was not what she had in mind. Now, that turned out not to be a correct prediction about how she herself would apply the undue burden standard to that statutory provision, but that was the best I could do under the circumstances.

Senator KOHL. Judge Alito, in your 1985 job application memo again, you identified reapportionment as one of the three issued decided by the Warren Court with which you disagreed. You even stated that your disagreement was so strong that it was one of the reasons that you became a lawyer. The Supreme Court's Warren Court decisions on this topic, of course, stood for the fundamental principle of one person/one vote, meaning as a matter of constitutional law that each person's vote must count equally and each electoral district must have the same population.

These decisions were more than 20 years old by the time of your 1985 job application and these decisions stand for a fundamental principle of democracy. By 1985, virtually no serious scholar or constitutional lawyer could be found to disagree with the principle that each person's vote should count equally. So what was your disagreement with the Warren Court's decisions on this issue, Judge Alito, in 1985? Isn't one person/one vote a basic principle of democracy? Wasn't it in 1985?

Judge ALITO. Senator, I don't believe that I disagreed with the principle of one person/one vote in 1985. I was talking about how I got interested in constitutional law back in college and I was certainly stimulated at that time by my consideration of the issue of one person/one vote. But the issue that troubled me toward the end of the Warren Court, and this was during the time when I was in college, was the question of how far this principle went when it came to drawing legislative districts. Did they have to be almost exactly equal in population in accordance with the last census, or were larger population variations permitted?

In a case called *Kirkpatrick* v. *Preisler* and another one called *Wells* v. *Rockefeller* that were decided around 1969, which was right at the end of Chief Justice Warren's tenure on the Supreme Court, the Court held that in the case of congressional districts, they had to be almost exactly equal in population, and as I said, my father was deeply involved in this. When the issue came up again in the context of congressional districting in *Carcher* v. *Daggett*, which was around 1985, that was the case where he had been an expert witness and the Court struck down the New Jersey congressional districting plan even though the population variations were under 1 percent. Now, the Court also later said that when you're talking about legislative districts, considerably larger deviations are allowed and you can take into account municipal lines and county lines and things of that nature.

But as of the time when I was in college, as in the time of the two cases that I mentioned, it seemed likely—a lot of people thought, and certainly I as a college student thought that the rule was going to be the same for congressional districts as it was for legislative districts and that seemed to say that the districts would have to be almost exactly equal in population based on the last census.

Now, a problem with that is that while the census is very accurate, it's not perfect and it doesn't stay accurate throughout the 10-year period from census to census. People move around. The population grows. The population diminishes in certain areas. So it didn't seem to make a whole lot of sense, let's say in the middle of a decade, to insist on absolute population equality based on the last previous census when everybody knew that the census figures had changed, and in doing that, in insisting on practically equal population districts, districts of almost exactly equal population, you disregard municipal lines, you disregard county lines. People don't know which district they're going to be voting in. You introduce the possibility of other factors figuring into the districting plan.

Senator KOHL. OK. Family and Medical Leave Act, Judge Alito. In my view, one of the most important pieces of social legislation enacted in the last two decades was the Family and Medical Leave Act in 1993. Among other things, it gives employees the right to take up to 12 weeks of unpaid leave to care for a newborn child or an ill parent or a spouse. The statute also gives an employee the right to sue his or her employer for damages if the employer violates the employee's rights under this law.

I was disturbed to learn that in the *Chittister* case, Judge Alito, your ruling denied a State employee the ability to sue his employer

for money damages. Your reasoning was directly repudiated by the 2003 Supreme Court decision of *Nevada Department of Human Resources* v. *Hibbs*. In that case, the Supreme Court, in a decision written by Chief Justice Rehnquist, held that the Family and Medical Leave Act was congruent and proportional to Congress's interest in preventing discrimination based on gender, and therefore States could be sued for money damages under the law.

So we are concerned that your view shows a lack of understanding of the problems of ordinary working Americans and the right of women to be free of discrimination in the workplace. Isn't it true that under your view, potentially millions of working Americans would not get the protections that they rely on under the Family and Medical Leave Act? Judge Alito?

Judge ALITO. Well, Senator, I'm happy to address that because I think there's been some confusion about what the issue was in *Chittister* and how it relates to the Supreme Court's decision in *Nevada* v. *Hibbs*, and they're actually two entirely different provisions of the Family and Medical Leave Act.

The provision that was at issue in my case was not the one in *Hibbs* and at last count, seven circuits had decided that issue, the issue that was before my court in *Chittister*, exactly the same way we did. I counted up the number of Court of Appeals judges who endorsed that position and it's over 20. I think it's 22. And they include some of the most distinguished Court of Appeals judges in the country and judges who have been appointed by Presidents of both parties.

The issue in *Hibbs* had to do with a provision of the Family and Medical Leave Act that requires employers to provide employees with a certain amount of leave for the purpose of taking care of another family member. The provision—and that was the one that the Supreme Court addressed in the *Hibbs* case. The provision in the *Chittister* case is a provision that requires employers to give employees a certain amount of leave for personal illness. The standard that has to be applied here is the one the Supreme Court has set out, and it's a controversial standard, but as a lower court judge, it's the one I had to apply, and that was whether what was done was congruent and proportional to constitutional violations.

What the Court said in *Hibbs* was that there was a record of constitutional violations, and remember, here we're talking about the provision that has to do with leave to take care of another person, and what they said was that there were many instances in which employers, State employers, had plans that provided more leave for that purpose for women than for men and the reason was because of the stereotype that if somebody in the family got sick, it would be the woman, not a man, who would have to take off from work to take care of that person.

But the provision that was at issue in *Chittister* had to do with leave for one's own personal illness and there was no record that employers give—and a man was subjected to this, and there was no record that State employers, or for that matter any other employers, had plans that provided more sick leave for men than for women or that any stereotypes were involved in the situation. And so that was why I concluded, and the unanimous panel that I sat on concluded, and all of these seven other circuits concluded that

that provision did not satisfy the standard that the Supreme Court had established.

Senator KOHL. A last question. Judge Alito, I understand that you're reluctant to comment on cases that you would likely have coming before you in the future, but I'd like to ask you a question about a case that the Supreme Court certainly will never see again, the 2000 Presidential election contest between President Bush and Vice President Gore. Many commentators see the *Bush* v. *Gore* decision as an example of judicial activism, an example of the judiciary improperly injecting itself into a political dispute. Indeed, it appears to many of us who have looked at your record that *Bush* v. *Gore* seems contrary to so many of the principles that you stand for, that the President has said you stand for when making your nomination in talking about judicial restraint, not legislating from the bench and, of course, respecting the rights of the States.

So, Judge Alito, I'd like to ask you, was the Supreme Court correct to take this case in the first place?

Judge ALITO. Well, Senator, I think you're probably right and I hope you're right that that sort of issue doesn't come before the Supreme Court again. Some of the—the Equal Protection ground that the majority relied on in *Bush* v. *Gore* does involve principles that could come up in future elections and in future cases.

But as to that particular case, my answer has to be, I really don't know. I have not had the opportunity—I have not studied it in the way I would study a case that comes before me as a judge and I would have to go through the whole judicial process—

Senator KOHL. That was a huge, huge case and I would like to hope, and I would bet, that you thought about it an awful lot because you are who you are. And I would like for you to give an opinion from the convictions of your heart, as a person who's very restrained with respect to judicial activism, this being a case of extreme judicial activism. Were they correct in taking this case, in your opinion?

Judge ALITO. Well, there's the issue of whether they should have taken it and the issue of how it should be decided, and Senator, my honest answer is I have not studied it in the way I would study the issue if it were to come before me as a judge and that would require putting out of my mind any personal thoughts that I had on the matter and thinking about the—listening to all the arguments and reading the briefs and thinking about it in the way that I do when I decide legal issues that are before me as a judge. That's the only—that's the best answer I can give you to that question. It was obviously a very important and difficult and controversial case, and in a situation like that, the obligation of a judge all the more is to be restrained and not to—is to go through the judicial decisionmaking process, and only at the end of that reach a conclusion about the issue.

Senator KOHL. Thank you, Judge. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kohl.

Senator DeWine?

Senator DEWINE. Thank you, Mr. Chairman.

Judge, you have almost turned the corner here, so that's the good news. The bad news is, this is just the first round.

[Laughter.]

Senator DEWINE. Let me respond, if I could, Judge, to three things that I've heard so far during these hearings that have, frankly, disturbed me. First, I am bothered by what I consider to be distortions of your record, really in an effort to make you look like something that you are not.

I just read a very interesting article by Stuart Taylor from the National Journal about this issue, and I would like, Mr. Chairman, to make this a part of the record, this article, if I could.

Chairman SPECTER. Without objection.

Senator DEWINE. Mr. Taylor describes the opinions of a, quote, "right-wing jurist." This judge has consistently ruled against minorities, striking down affirmative action programs, making it harder for victims of race and gender discrimination to vindicate their rights.

Chairman SPECTER. Senator DeWine, your unanimous consent request is granted.

Senator DEWINE. Thank you, sir. This judge has struck down a Federal law to protect kids from guns, ruled that State and local governments cannot be sued under the Fair Labor Standards Act, leaving 4.7 million workers without a remedy in court. This judge has immunized the President from suit, even when he illegally wiretaps political opponents. This judge approved a police officer's fatal shooting in the back of an unarmed 15-year-old African-American boy. Finally, this judge has called abortion, and I quote, "morally repugnant" and declared *Roe* v. *Wade* to be on, quote, "on a collision course with itself."

Based on such a record, no right-thinking Democrat could ever support such a judge. But as Taylor tells us, this judge is none other than Sandra Day O'Connor, the same Sandra Day O'Connor who has been praised for the past few days as a model of moderation.

Judge, the point Mr. Taylor made is clear. You can distort and misrepresent anyone's record, and that, I believe, unfortunately, is what some of your opponents are doing to you. It is unfair, it is inaccurate, and it is just flat-out wrong.

Second, I would like to respond to the allegation that you have not written an opinion in favor of plaintiff alleging race discrimination on the job. You did a very good job a moment ago when Senator Kyl was talking to you in describing some of these cases. I think the facts of these cases are what is particularly interesting. In *Reynolds* v. *USX Corporation*, you ruled that an African-American woman whose coworkers and supervisors regularly made racial and sexual slurs against her and denied her training opportunities was, in fact, entitled to $124,000 in damages and in attorney fees.

In *Zubi* v. *AT&T Corporation*, you dissented. You dissented, arguing against a stringent limitations period which prevented a civil rights plaintiff from filing a claim, and your position was vindicated. You were vindicated by the United States Supreme Court unanimously a few years later.

In *Smith* v. *Davis*, you disagreed with the district court, which had dismissed an African-American employee's claim of discrimination. Instead, you found that there was evidence to support a find-

ing that the employer's stated reasons for firing the plaintiff were not genuine.

In *Goosby* v. *Johnson & Johnson*, you ruled that the plaintiff, an African-American woman, was entitled to a trial under claims of employment discrimination because you found that there was evidence that the employer was treating white male employees differently than it was treating the plaintiff. There are more cases, as you have testified to, but I think we make the point.

We would all be better off and this process, Mr. Chairman, would be better off and would be more instructive if we could evaluate your nomination, Judge, based on your full and complete record.

Finally, let me add my two cents on this *Vanguard* issue. I am going to take it from a little different perspective than has been done so far. To me, this is really a non-issue. In the so-called *Vanguard* lawsuit, two people were in a financial dispute. The plaintiff sued to force the defendant to turn over $170,000 held by him in some Vanguard accounts. The defendant went to court to prevent Vanguard from turning over the money.

Now, while Vanguard was technically part of the suit and was technically a defendant, it wasn't really a defendant in any sense of the term that would be used by the public or understood by the public. It was not accused of any wrongdoing, it didn't stand to lose anything.

Really, the only question was whether Vanguard would transfer some of the funds it held for one person over to another. It was simply being asked, who do I pay the money to, who do I give the money to. That is all Vanguard was being asked to do, so nothing in the classic sense of being a defendant. Nothing about this case could realistically have affected Vanguard as a company, let alone affected your mutual fund. It is a joke, it is ridiculous, it is absurd, and everybody on this panel knows that.

Now, for the sake of the process, I hope we can put these issues behind us. This hearing is really our opportunity to fully and fairly evaluate your qualifications for the High Court and to get some idea about how you think as a judge, how you process things, what kind of a judge you will be on the United States Supreme Court.

Now, let me turn to the substance. Judge Alito, I want to turn to an issue that is very important to me. In a number of recent cases, the Supreme Court of this country has restricted congressional power in a way that I think is not required by the Constitution.

In my opening statement, I mentioned the Supreme Court's decision in *Board of Trustees* v. *Garrett*, a five-to-four decision. To me, that case is the best example of this recent trend, and it is not a good trend, in my opinion.

Garrett involved a woman who claimed that she had been discriminated against because she was disabled. She was employed by the State of Alabama and she sued the State under the Americans with Disabilities Act. The Supreme Court threw out the suit, however, holding that Congress lacked the power to make the State subject to suit.

Now, Judge, as I see it, the problem with *Garrett* is that the Court ignored findings made by Congress. While we were considering the ADA, we held 13 hearings and even set up a task force

that held hearings in every State in the Union, attended by more than 30,000 individuals. Based on these hearings, we found hundreds of examples, hundreds of examples of people with disabilities being discriminated against by the States in employment decisions.

Further, we found that, and I quote, "Two-thirds of all disabled Americans between the ages of 16 and 64 were not working at all, even though a large majority of them were capable of doing so." And, finally, we found that this discrimination flowed from, and I quote, "stereotypic assumptions about people with disabilities," as well as, and I quote, "purposeful unequal treatment," end of quote. Sadly, however, in *Garrett* the Court said that this was just not enough. In fact, it held that we had not pointed to any evidence that the States discriminated in employment decisions against people with disabilities.

Judge Alito, from a review of your decisions, it appears to me that you tended to defer in close cases to the decisions of those individuals closest to the problem at hand. I applaud you for taking that approach.

Now, let me ask you, in your opinion, what role should a judge play when reviewing congressional fact-finding, and how can you assure us that you will show appropriate deference to the role of Congress as the representatives of the people in this democracy when we pass important legislation?

Judge ALITO. I think that the judiciary should have great respect for findings of fact that are made by Congress. And in the *Rybar* decision that I was discussing earlier, although it is controversial and it involved an application of the *Lopez* decision, I stated that that decision would have been very different from—that case would have been very different for me if Congress had made findings, and that is because of two things.

I am fully aware of the fact that the members of the judiciary are not the only officers in the United States who take an oath to support and defend the Constitution of the United States. Members of Congress take an oath to support the Constitution and officers of the Executive branch take an oath to support the Constitution, and I presume that they go about their work in good faith.

The second point—and this goes directly to the issue of findings—is that the judiciary is not equipped at all to make findings about what is going on in the real world, not this sort of legislative findings. And Congress, of course, is in the best position to do that. You have constituents. Members of Congress hear from their constituents. Congress can have hearings and examine complex social issues, receive statistical data, hear testimony from experts, analyze that and synthesize that and reduce that to findings. And when Congress makes findings on questions that have a bearing on the constitutionality of legislation, I think they are entitled to great respect.

Senator DEWINE. Well, Judge, I appreciate your response. We can't ask you, obviously, to decide any particular case, but what we are trying to do today is get a general idea of how you approach cases. And we have, as I said, looked at your previous cases. We have a good idea from that, but I appreciate this exchange.

Let me followup with this. *Garrett* is the law of the land today. Nonetheless, let me ask you whether, after *Garrett*, Congress might

still have a way to protect the disabled. Rather than focus on the problem caused by *Garrett*, let me focus on the solution. To me, even after *Garrett*, Congress still has the power to protect the disabled under the Spending Clause of the Constitution. I would like to explore maybe that with you, if I could. Let me give you an example of how this might work.

You, of course, are very familiar with *South Dakota* v. *Dole*. In that case, Congress had wanted to establish a national drinking age of 21. As you know, we, of course, don't have the power to require that under our Constitution. Therefore, Congress used its power under the Spending Clause. We said to the States, if you don't establish a 21-year-old drinking age, you will lose 5 percent of your Federal highway dollars.

This left the States with a choice: adopt a 21-year-old drinking age or lose 5 percent of their Federal money. When presented with such a choice, the States kept the money and changed their drinking age to 21. It seems to me that Congress might be able to use this same approach to require the States to waive their immunity from suit under statutes like the ADA.

Judge, based on your experience, could you give me your understanding of what Congress can do and what it can't do under its Spending Clause power, maybe just go back and look at some recent cases and give me a little—

Judge ALITO. Yes, certainly, Senator. Well, I think you have pointed to the leading case in this area, and that is *South Dakota* v. *Dole*. *South Dakota* v. *Dole* recognizes that Congress has broad powers under the Spending Clause, and that when Congress provides money to the States, Congress can attach conditions to that money, to the receipt of the money, provided that certain standards are met.

One thing that has to be done under the Supreme Court's cases is that there has to be a clear statement that the conditions are attached to the receipt of the money. And the Supreme Court views this like a contract, so that the parties need to have—the party receiving the notice has to have clear and fair notice about what it is agreeing to by taking the money. And then beyond that, the condition—if that is satisfied, then the condition has to be germane to the purposes of the funds.

And in *South Dakota* v. *Dole*, the Court found that the drinking age and the 55-mile-an-hour speed limit were germane to the purpose of the expenditures, and these, I believe, were Federal highway funds. So those are the standards that would be applied to any future legislation under the current precedents if the future legislation invokes Congress's broad power under the Spending Clause.

Senator DEWINE. That is helpful. Thank you, Judge.

During the confirmation hearing of Chief Justice Roberts, Chairman Specter showed us a chart stating that the Supreme Court had the opportunity to overrule *Roe* v. *Wade* in 38 cases. Because of this, the Chairman suggested that *Roe* was not only super precedent, but super duper precedent. The Chairman has made the same argument at the hearing today. In fact, he brought the chart out again today.

Now, Judge, just to show you that not all members of this panel are like-minded, I want to tell you that I disagree. To me, *Roe* is

not super precedent. I believe *Roe* is a precedent, but I don't believe it is super duper precedent or super precedent.

First, although the Court has applied *Roe* in 38 cases, it has not directly taken up the issue of whether to overrule *Roe* in every one of those cases. In fact, out of those 38 cases, I have only found 4 in which the Court directly addressed the status of *Roe* as binding precedent.

In *Webster*, the Court asked whether *Roe* should be reaffirmed, but ultimately avoided the issue. In three cases—*City of Akron*, *Thornburgh* and *Casey*—the Court did reaffirm *Roe*. But the last of these, *Casey*, did so in a way that hardly left *Roe* on firm footing. In fact, *Casey* altered *Roe* by eliminating the strict scrutiny standard of review and replacing it with a lesser undue burden test. The result has been that many restrictions on abortion have been upheld.

Second, just because *Roe* has been applied and reaffirmed does not make it a special form of precedent. Many other cases have been applied for decades before eventually being overruled. For example, *Plessy* v. *Ferguson*, the case establishing the principle of separate but equal, was upheld for nearly 60 years before it was overruled, and certainly discredited today.

Lochner v. *New York*, a case that greatly limited the power of the States to protect children and workers, was consistently applied for more than 30 years before it was overruled. And *Swift* v. *Tyson*, a case establishing the doctrine of Federal common law, was a bedrock principle of American law repeatedly applied and upheld for nearly 100 years before it too was struck down. Thus, the mere fact that *Roe* has been upheld for more than 30 years does not mean that it is entitled to special deference.

Third, from the start, *Roe* has been criticized by lawyers, scholars and judges, whether Democrats or Republicans and, to date, it does remain controversial.

Fourth, much has happened over the last 30 years to undermine the soundness of *Roe*. Senator Brownback has mentioned how the facts of *Roe* have changed. We now know that the plaintiff in *Roe* based her case on false statements and that she wants the case overturned. We also know much about the life of babies in utero that we did not know 30 years ago.

We even know something about the internal deliberations of the Justices who decided *Roe*. In an internal Supreme Court memo, Justice Harry Blackmun, the author of *Roe*, acknowledged that the trimester framework established in his opinion was, and I quote, "arbitrary." And Justice Lewis Powell said that he could not find a right to an abortion within the Constitution and decided instead to rely on his gut.

Finally, whatever the term "super precedent" means, I do not think that it describes *Roe*. In an article by William Landis and Richard Posner, super precedent was defined this way. It is a, and I quote, "precedent that is so effective in defining the requirements of the law that it prevents legal decisions arising in the first place, or if they do arise, induces them to be settled without litigation," end of quote. In other words, super precedent is precedent that is so firmly entrenched in our legal system that people simply don't question it.

Marbury v. *Madison*, the case establishing the power of judicial review, is super precedent. It is so well settled that litigants do not challenge it in court. In fact, it is one of the fundamental assumptions upon which our constitutional system is built. *Roe* is hardly *Marbury*. Is *Roe* Supreme Court precedent? Certainly, but in my view it is not super duper precedent or even super precedent. It is precedent, nothing more.

Judge, I want to turn now to another topic, to an issue that several Federal judges in Ohio have brought up to me during our conversations. As you know, the Supreme Court currently decides about 75 cases a term. This number is down dramatically from where it was just a generation ago. In 1976, for example, the Court decided almost 400 cases on the merits, more than five times what it does today.

This incredible shrinking Supreme Court docket has been the focus of much attention over the past few years, a lot of discussion. One result of the Court deciding fewer and fewer cases is that more and more circuit splits are left unresolved, which is what I want to talk to you about.

As we all know, a circuit split occurs when two or more Federal Courts of Appeals disagree on an issue of Federal law. As of late, circuit splits have become so pervasive that the Seton Hall Law School came out last year with a new Law Review dedicated exclusively to that issue. There is also a website written by a law professor at the University of Richmond, solely committed to identifying new circuit splits. Hardly a week passes when at least one does not emerge.

To me, these pervasive and unaddressed circuit splits create three problems: one, organizations that transact business across State lines, get caught in the cross-hairs of the his confusion, being subject to one interpretation of Federal law in California and a different one in the State of Ohio; second, Federal judges are placed in a difficult situation trying to figure out what the law requires. In fact, a number of Federal judges in Ohio have talked to me, as I said, about this; and finally, circuit splits undermine the goal of having uniformity in our Federal law.

Let me just ask what is your opinion about this issue? In your experience has the Supreme Court's shrinking docket caused problems for businesses, lower court judges, individuals? Is there a problem with the number of unresolved circuit splits? And if the Court takes more cases, do you think that will solve the problem?

Judge ALITO. Well, that's a difficult issue for me to address from my current position as a judge of a court of appeals because the Supreme Court is my boss, and I am reluctant to suggest that I think they should be doubling their workload.

[Laughter.]

Senator DEWINE. Oh, go ahead.

[Laughter.]

Judge ALITO. That's not the sort of—or even increasing it at all. That's not the sort of thing that subordinates generally do regarding superiors. But circuit splits are certainly undesirable, and I think everybody recognizes that, and that's one of the grounds for granting certiorari. I know that when Justice White was on the Court he regularly would dissent from denial of certiorari in cases

where there was a circuit split because he felt strongly that circuit splits should be resolved by the Supreme Court.

I have friends, former colleagues from prior times in my career, who are appellate attorneys who specialize in cases before the Supreme Court and in appellate litigation generally, and occasionally I hear them complain about unresolved circuit splits that are difficult for their clients. So I'm aware of their complaints.

I haven't personally kept track of the number of circuit splits that exist, but certainly they are undesirable thing, and it is a ground for granting certiorari, and I think one of the jobs that the Supreme Court has is to iron out circuit splits. There can be disagreements about whether there really is a circuit split, obviously, in a particular case, and there can be differences of opinion about the timing for resolving circuit splits. Sometimes the Supreme Court thinks it's advisable to wait and see how an issue plays out in a number of circuits before the Supreme Court decides to take on the issue, and that may improve their ability to resolve the issue when the case generally—when the case eventually comes before them.

Senator DEWINE. Judge, let me suggest that I think it is a problem and I think the Supreme Court needs to deal with it. Chief Justice Roberts indicated that he thought the Court could take on more, and I would suggest that they could. I appreciate your comments.

Judge Alito, let me ask you about Congress's power to protect our children from the proliferation of pornography on the Internet. This is an important issue. I raised it at the last hearing. It is one that I think is very troubling. Congress has tried several times to protect our children from being exposed to pornography on the Internet. In 1996, we passed the Communications Decency Act, but the Supreme Court struck it down, citing the First Amendment. A few years later we passed the Child Online Protection Act. Again, the Court struck it down.

What bothers me about these cases is they fail to account for something that to me seems relatively simple. At the core of the First Amendment is the protection of political speech, but it seems to me that pornography is altogether different. Unlike political speech, pornography has very little value if it has any value at all. It does not communicate a message other than one that degrades women. It does not contribute to the public debate, and actually causes harm to the victims who take part in making it, and those who use it.

There are, of course, a number of cases that seem to recognize that pornography is of lesser value speech. In *Young* v. *American Mini Theaters* the Court upheld zoning regulations on adult theaters. In doing so, Justice Stevens had this to say, and I quote, "Even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different and lesser magnitude than the interest and untrammeled political debate."

Let me ask you, Judge, what is your thinking on this subject? Is pornography lesser value speech, as Justice Stevens has seemed to

suggest, and are there, or should there be, different levels of speech under the First Amendment?

Judge ALITO. I think that the problem of protecting children from pornography on the Internet illustrates the fact that although the task of the judiciary is to apply principles that are in the Constitution and not make up its own principles, to apply those to different factual situations when the world changes, and in particular, in the First Amendment context, when means of communication changes. The job of applying the principles that have been worked out—and I think in this area worked out with a great deal of effort over a period of time—in the pre-Internet world, applying those to the world of the Internet is a really difficult problem, and I understand it. Congress has been struggling with it, and I know the judiciary has been struggling with it.

The law, of course, as you know, constitutional law draws a distinction between obscenity, which has no First Amendment protection but is subject to a very strict definition, and pornography, which is not obscenity but is sexually related materials, with respect to minors, the Supreme Court has said that it's permissible for a State to regulate the sale of pornography to minors, has greater authority there. I think that's the *Ginsburg* case. It has greater authority there than it does with respect to the distribution of pornography to adults.

Now, in the pre-Internet world, the job of preventing minors from purchasing pornography was a lot simpler. If they wanted to get it, I guess they would have to go to a store or some place and buy it. But on the Internet, of course, it's readily available from any computer terminal, and a lot of minors today are a lot more sophisticated in the use of computers than their parents, so the ability of parents to monitor what they're doing and supervise what they're doing is greatly impaired by this difference in computer aptitude. I can't say much more about the question than that. It is a difficult question. I think that there needs to be additional effort in this area, probably by all branches of Government so that the law fully takes into account the differences regarding communication over the Internet and access to materials over the Internet by minors.

Senator DEWINE. Judge, I have one last question. If confirmed to the Supreme Court, only part of your job will be hearing arguments and issuing opinions. An equally important part of the job will involve deciding which cases to hear in the first place. Each year the Supreme Court receives approximately 8,000 petitions for cert., cert. petitions, as they are called. These are petitions by a party to a lawsuit asking the Court to hear its case. Out of these 8,000 annual requests, the Court decides to hear only about 75 to 80. For many years individual Justices would review each cert. petition and cast a vote on whether to hear the case. Today, however, eight of the Justices are part of what is called the cert. pool. Here is how it works. All petitions are put into a pool. A single law clerk then picks up a petition, writes a memo recommending for or against hearing the case. That memo is then circulated to the eight Justices in the cert. pool who use it to cast their vote on whether to hear the case. Justice Stevens is the only one who does not participate in this pool. Instead he has his staff prepare a memo on

each case with a recommendation tailored to his own thinking on an issue. It would seem to me that the cert. pool greatly limits the exchange of ideas among members of the Court.

I wonder if you could tell me how you would intend to proceed, if you are going to use the pool or if you are going to do what Justice Stevens does, or if you have thought about it.

Judge ALITO. I have—I'm aware of the issue, but I have not thought past what might happen with these confirmation proceedings. So it's not the kind of issue that I have really thought through in my mind. If I'm fortunate enough to be confirmed, I think I would assess the situation at that time and talk to the Supreme Court Justices and see what their views are, the reasons why they're proceeding in one way or another.

I know from my perspective as a lower court judge, that there is a constant conflict between the obligation that we have to deal with a very heavy caseload and the need for the judge, as opposed to a law clerk or a staff employee of the Court to deal with the cases. We cannot delegate our judicial responsibility, but we do need to call on—we need to find ways, and we do find ways, of using—of obtaining assistance from clerks and staff, employees, so that we can deal with the large caseload that we have.

Senator DEWINE. Thank you, Judge.

Chairman SPECTER. Thank you, Senator DeWine.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Good afternoon, Judge. Because Sandra Day O'Connor was the fifth vote on both *Lopez* and *Morrison*, I think I would like to start with the Commerce Clause, and your views of federalism. Do you agree with the direction the Supreme Court took in *Lopez*?

Judge ALITO. Well, Senator that really relates to the next case in the *Lopez-Morrison* line of cases that might come before the Supreme Court, and so I don't know how I can address that question without knowing what that case is, and of course, my resolution of it would—

Senator FEINSTEIN. I was just asking you about *Lopez*, but—

Judge ALITO. Well, *Lopez* is—

Senator FEINSTEIN [continuing]. If you do not want to answer, that is OK.

Judge ALITO. *Lopez* is a precedent of the Court, and it's been followed in *Morrison*, and then it has to be considered within connection with the Supreme Court's decision in *Raich*, and I think that all three of those have to be taken into account together. I don't think there's any question at this point in our history that Congress's power under the Commerce Clause is quite broad, and I think that reflects a number of things, including the way in which our economy and our society has developed, and all of the foreign and intrastate activity that takes place, we do still have a Federal system of Government, and I think most people believe that that is the system that's set up by our Constitution.

Senator FEINSTEIN. Having said that, I pulled the *Rybar* case and read it over the noon break. Let me just see if we agree on the facts, and stop me if you think I am misquoting or misstating anything. The *Rybar* case essentially took place the year after *Lopez*. It involved Mr. Rybar, who was a federally licensed gun dealer who

went to a gun show in Pennsylvania and bought a Chinese type 54, 7.62-millimeter submachine gun one day, sold it to Mr. Baublitz, went back the next day and sold him a military M–3, 45 caliber submachine gun. The grand jury indicted him on two counts of unlawful possession of a machine gun in violation of the law, and two counts of unlawful transfer of an unregistered firearm. He changed his plea, pled guilty to two counts. I think he pled conditionally guilty to two counts.

When the case came before you, and I read with great interest your dissenting opinion, you said, and I quote, "If *Lopez*, which happened the year before, does not govern this case, then it may well be a precedent that's strictly limited to its own peculiar circumstances, but our responsibility is to apply Supreme Court precedent. That responsibility, it seems to me, requires us to invalidate the statutory provision at issue here in its present form."

And then you went on to say that the present form "might be sustainable in its current form if Congress made findings that the purely intrastate possession of machine guns has a substantial effect on interstate commerce, or if Congress or the Executive assembled empirical evidence documenting such a link. If, as the Government and the majority boldly insist, the purely intrastate possession of machine guns has such an effect, these steps are not too much to demand to protect our system of constitutional federalism."

So if I understand this, you essentially said that you wanted to follow precedent, newly established law in this area, and you left a little hedge that if the Congress did make findings in that law, then that might be a different situation. If Congress did make findings, would you have agreed that that statute would have been constitutional?

Judge ALITO. Well, what I said in the opinion and what I will reiterate this afternoon is that it would have been a very different case for me. I don't think I can express an opinion on how I would have decided a hypothetical case.

Senator FEINSTEIN. It is not hypothetical. I am just asking you if there were findings, as you said, you might have sustained the law—

Judge ALITO. And I read it like that. I think it would have been—

Senator FEINSTEIN. I am just asking you, would you have sustained the law for findings—

Judge ALITO. I don't think that I can give you a definitive answer to the question because that involves a case that's different from the case that came before me. But I repeat what I said there, it would have been a very different matter if Congress had made findings. I have the greatest respect for findings. This is an area where Congress has the expertise and where Congress has the opportunity to assemble facts and to assess the facts. We on the appellate judiciary don't have that opportunity. So if Congress had made findings—and I didn't insist on findings. If the Executive branch, which was defending the statute, had pointed to testimony at hearings—and that's been done in other Commerce Clause cases—or statements by responsible Government officials with expertise in the area of firearms control, or any other evidence that

substantiated this, it would have been a very different case for me, and of course, if there had been a jurisdictional element, then I think it's perfectly clear under the precedents that it would have been constitutional.

Senator FEINSTEIN. I accept that with one exception. I think most people know that guns, particularly machine guns, do affect interstate commerce, and there is generally no question about that. With one look at the gun trace, even before Mr. Rybar had the gun, the likelihood was that it came across State lines, particularly the Chinese model. So I think that is a difficult extrapolation for me to understand, but that is not necessarily dispositive.

Let me go on. At the conclusion of your dissent, you wrote that, "Even today, the normative case for federalism remains strong." Now, federalism is often used to describe the strengthening of State powers at the expense of the Federal Government. What exactly did you mean by that statement?

Judge ALITO. I meant that there are activities that—and I think there is general agreement on this, and it goes beyond what the Constitution requires into areas of policy that I think Congress respects. I think there is general agreement that there are some activities that have traditionally been handled by the States and by local governments. Those are areas in which they have taken the lead because the view has been that they are in the best position to deal with that. And that was the issue that was directly addressed by Justice Kennedy's concurrence in *Lopez*. He relied in large part on the fact that—he put heavy reliance on the fact that what was involved in *Lopez* was a law relating to schools. And although the Federal Government certainly has a role in education, traditionally that has been regarded as something that is primarily to be handled at the State and local level.

Senator FEINSTEIN. OK. Now, you cited a law review article by a professor named Stephen Calabrese. In that article, he argues that *Lopez* was a revolution that shattered forever the notion that after 50 years of Commerce Clause precedent, we could never go back to the days of limited national power. Do you agree with that?

Judge ALITO. I agree that *Lopez* was a startling development for a lot of people. When I was in law school, I think the traditional wisdom was that the commerce power reached everything, that there was no limit to the power, that nothing could ever exceed the power. And *Lopez* and the *Lopez* line of cases have not made huge inroads on that principle, but it was the first time in a long time that a statute had been held to exceed Congress's commerce power. So to that extent, yes, it was a revolution, but how big of a one—

Senator FEINSTEIN. See, I would say not yet has it made that kind of a dent, and that is why your nomination is so important, because you could be a decisive vote in this area.

Do you believe that the Supreme Court's Commerce Clause decisions in the 50 years preceding *Lopez* are settled law?

Judge ALITO. I think that—I'd have to talk about individual cases, but I do think most of those are—the ones that come to my mind I think are well-settled precedents.

Senator FEINSTEIN. OK. Now, unlike the machine gun law in *Rybar*, the Family and Medical Leave Act in *Chittister* did include

congressional findings of fact, as the Supreme Court confirmed, and yet you authored the majority opinion to invalidate the law.

Judge ALITO. Well, in *Chittister*—

Senator FEINSTEIN. Do you see a contradiction in that?

Judge ALITO. I don't, Senator. I don't believe that there were congressional findings in *Chittister* that went to the issue in *Chittister*.

Senator FEINSTEIN. OK. That is good. Now, let me ask you some questions. Is it enough for Congress to provide findings of fact in a statute, or do the findings of fact need to be deemed sufficient by a court?

Judge ALITO. Well, what the Supreme Court has said is that findings of fact are very helpful when they are provided. And the Court will certainly treat them with respect. But they are neither—they are not necessarily definitive, and they also are not necessary. Congress doesn't have to make findings. It is helpful when it does it, and under the Supreme Court's cases, the findings are not necessarily definitive. That is what the Supreme Court has said about this.

Senator FEINSTEIN. Yes, but you struck down *Rybar*. Essentially, you said it would have a much better chance with you if it had findings of fact. And this was a case where prior laws had major findings of fact with respect to machine guns. I mean, this wasn't a new thing.

Judge ALITO. Senator, I looked very carefully at all of the materials that were cited by the other judges in *Rybar* and that were provided by the Government. And the things that were cited from the legislative history of the prior statutes did not, in my view, go to the issue in *Rybar*. All of those prior statutes were statutes that had jurisdictional elements in them. All that I was looking for was some evidence that the possession of a machine gun—not the transfer of a machine gun or the sale of a machine gun, but the mere possession had a substantial effect on interstate commerce. That is what I understood the Supreme Court precedent to require. And it is not a very heavy burden to show that something has a substantial effect on interstate commerce, but that is what I understood the Supreme Court precedent to require and that is what I was looking for.

Senator FEINSTEIN. OK. Let's move to the issue of a woman's right to choose and *Roe*. This morning, Senator Specter talked about how *Casey* reaffirmed the original soundness of *Roe* and then put emphasis on precedent. And he then asked, "How would you weigh that consideration were this issue to come before you, if confirmed?" And in response, you said, and I would like to quote, "Well, I agree that in every case in which there is prior precedent, the first issue is the issue of *stare decisis*, and the presumption is that the Court will follow its prior precedents. There needs to be a special justification for overruling a prior precedent."

Can you give us a few examples of a special justification, not including *Brown* v. *Board of Education*, which you think would qualify?

Judge ALITO. There are a number of factors that figure in the application of *stare decisis* in particular cases. There are factors that weigh in favor of *stare decisis*, and there are factors that weigh against *stare decisis*. Factors that weigh in favor of *stare decisis* are

things like what the initial vote was on the case, the length of time that the case has been on the book, whether it has been reaffirmed, whether it has been reaffirmed on *stare decisis* grounds, whether there has been reliance, the nature and the extent of the reliance, whether the precedent has proven to be workable. Those are all factors that have to be considered on an individual basis.

Senator FEINSTEIN. But I am asking you what the special justification would be, that you mentioned this morning, to overcome precedence and reliance?

Judge ALITO. Well, I think what needs to be done is a consideration of all of the factors that are relevant. This is not a mathematical formula. It would be a lot easier for everybody if it were. But it is not. The Supreme Court has said that this is a question that calls for the exercise of judgment. They have said there has to be a special justification for overruling a precedent. There is a presumption that precedents will be followed. But it is not—the rule of *stare decisis* is not an inexorable command, and I don't think anybody would want a rule in the area of constitutional law that pointed in that—that said that a constitutional decision, once handed down, can never be overruled.

So it's a matter of weighing all of the—taking into account all of the factors and seeing whether there is a strong case based on all the relevant—

Senator FEINSTEIN. My question was a different one, respectfully.

Judge ALITO. I am sorry, Senator.

Senator FEINSTEIN. It was, can you give me a few examples of what you think would qualify as a special justification for overruling prior precedent? And the reason I ask you this is in our private conversation, you said to me that you did not think there had been any case you could think of that had been more tested than *Roe*.

Judge ALITO. Well, *Roe* has—sorry.

Senator FEINSTEIN. What special circumstance would there be which would overcome this kind—whether you call it super precedent or super duper or anything, but this kind of protracted testing over a 33-year period of time?

Judge ALITO. Senator, I'm sorry if I didn't understand your question previously. One situation in which there is a special justification for overruling a precedent is if the rule has proven to be unworkable. An example where the Supreme Court thought that a rule had proven to be unworkable is provided by *National League of Cities and San Antonio Transit Authority* v. *Garcia*. *National League of Cities* asked whether something was traditionally a sovereign function. And that resulted in a whole series of cases in the lower courts, a large number of cases in the lower courts, and a number of cases in the Supreme Court in which the courts had to decide whether something was on one side of this line or not, and it proved in the view of the Supreme Court to be a very difficult standard to work with. And, finally, in *Garcia*, they said this is unworkable, and we are going to overrule *National League of Cities*, and we are going to leave it to Congress to deal with the federalism issue that is presented here. This is an example of the Supreme Court saying there is a federalism concern here, but it is one that Congress rather than the Court would have to deal with.

Sometimes changes in the situation in the real world can call for the overruling of a precedent. An example of that is provided by *Katz* v. *United States*, which I was talking about this morning in relation to wiretapping. The old rule under *Olmstead* was that in order for there to be a search, you had to look to property law. You had to see whether there was an invasion of a property interest. And then with the development of electronic communications and electronic surveillance, wiretapping or other forms of electronic surveillance, which is what was involved in *Katz*, the Supreme Court said this isn't a sensible way to apply the Fourth Amendment principle under the conditions of the modern world, and they said famously that the Fourth Amendment protects people, not places. So they shifted—they found the doctrinal underpinnings of the old *Olmstead* rule to be undermined by developments in the society, and they shifted the focus from property law to whether somebody had an expectation of privacy.

So those are examples.

Senator FEINSTEIN. Well, and you did say that you believe the Constitution provides a right of privacy.

Judge ALITO. I did say that. The 14th Amendment protects liberty. The Fifth Amendment protects liberty. And I think it is well accepted that this has a substantive component, and that that component includes aspects of privacy that have constitutional protection.

Senator FEINSTEIN. Let me ask you about your dissent in *Casey*. You reasoned that most women seeking abortions are either unmarried or would tell their husbands and, therefore, few would be harmed if spousal notification was required. Justice O'Connor, on the other hand, ruled, and I quote, "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."

Why did you propose a different approach than Justice O'Connor?

Judge ALITO. Well, I mentioned the fact in my opinion that this provision applied only to married women, but I don't think that was really the focus of what I was getting at. I think—and I agree with her that you look at the group that's affected, not the group that's unaffected, and the standard that she had—so that would be women who fell within this provision of the Pennsylvania law. And the standard that she had articulated in the earlier cases was, as I described it a couple of minutes ago, that an undue burden in her view had to be an absolute obstacle or an extreme obstacle, and it could not be simply something that inhibited some women. The "some women" phrase was her phrase, not my phrase.

Senator FEINSTEIN. Now, I am going to ask you about one other quote that some of my colleagues may disagree with what Justice O'Connor said, but she said it, and that is, "The State may not give to a man the kind of dominion and control over his wife that parents exercise over their children." Do you agree with that?

Judge ALITO. I never equated the situation of an adult woman who fell within the notification provision of the Pennsylvania statute with the situation of a minor who was required to provide notice. There is an analogy, and the earlier case that Justice O'Connor had decided, the *Hodgson* case, was a minor notification stat-

ute. But I think I made it quite clear in my opinion that this was nothing more than an analogy and that there was no close—these situations were very distinct, and I was aware of that, and I think I pointed that out.

Senator FEINSTEIN. Let me move on, if I might. One of the core principles of *Roe* is that a woman's health must be protected. In *Casey*, Justice O'Connor specifically wrote that after viability, the State may, if it chooses, regulate and even proscribe abortion, except where it is necessary in appropriate medical judgment for the preservation of the life of the mother. This requirement to protect a woman's health was also reaffirmed in *Stenberg* v. *Carhart*, where it was said the Court rejects Nebraska's contention that there is no need for health exception.

Do you agree, if the statute restricts access to abortion, that it must protect the health of the mother in order for it to be constitutional?

Judge ALITO. Well, I think that the case law is very clear about protecting the life and the health of the mother is the compelling interest throughout pregnancy. I think that's very clear in the case law.

Senator FEINSTEIN. Thank you. I appreciate that.

In 1985, at the time you wrote the strategy memo on *Thornburgh*, the Court had already held in *Roe*, *Akron*, and eventually 30 other cases, that a woman had a constitutional right to choose whether to continue a pregnancy. In addition, in your memo, you specifically wrote that in the *Akron* case, the Supreme Court reaffirmed *Roe*. However, despite this, your memo outlined a strategy to eventually overturn *Roe*.

My question is a little different from what you discussed somewhat yesterday. What was your view of precedent at the time you wrote that memo?

Judge ALITO. Well, I think there are two things that I should say in response to that. The first is that I did not advocate in the memo that an argument be made that *Roe* be overruled, and therefore, the whole issue, had the Government proceeded with the argument that I recommended, the issue of *stare decisis* wouldn't have been presented and so there wasn't any occasion for me to talk about *stare decisis* in the memo and I did not talk about it. I think there's a mention of it in a footnote. So I didn't address it and there wasn't an occasion to address it.

The second thing I would say is that *stare decisis* is a concern for the judiciary much more than it is for an advocate. An advocate is trying to achieve a result, and so an advocate is—for an advocate, *stare decisis* can be either a great benefit if it is in your favor or an obstacle to get over. But it isn't the kind of issue that needs to be grappled with in the way in which a court has to grapple with *stare decisis*.

Senator FEINSTEIN. OK. In *Casey*, you wrote about the harms caused by spousal notification to the practical effect that the law will not amount to an undue burden unless the effect is greater than the burden imposed on minors. Just to go back to that, is this what you meant?

Judge ALITO. Well, Senator, I don't—I do not equate the situation of a married woman with the situation of a minor—

Senator FEINSTEIN. I know you keep saying that, but I keep going back to the words and they seem to say something else.

Judge ALITO. Well, I think if you look at the words, I actually said that I don't equate these two situations. I was mindful of the fact that they are very different situations. But often, the law proceeds on the basis—legal reasoning is based on analogy, and so if you take a situation that's quite different and yet has some relationship to a situation that comes up later, you can draw some analogies while still recognizing that the two situations are very different.

If you're talking about the potential for abuse, that certainly is something that can come up in either of these two contexts and it's a tragedy in either context. If a single minor is abused as a result of notification, that's a tragedy. If a single adult woman is abused as a result of notification, it's a tragedy.

But what I think I'm getting at there is that this is what we had. This is what I had. This was the information that I had to work with to try to understand what this provision meant. And so you work with what you've got and that's what I had and I was trying to see to what degree the prior situation was relevant and to what degree it wasn't relevant to the issue that was before me.

Senator FEINSTEIN. I'd like to quickly just switch subjects for a moment just to clarify something you said this morning, and this has to do with electronic surveillance of Americans. As you know, in 1978, the Congress, after a lot of introspection, passed a bill called the Foreign Intelligence Surveillance Act, which we call FISA, which essentially set up the parameters for all electronic surveillance within the United States. It's very specific, if you read it. There is a great concern right now because of what's been happening with respect to electronic surveillance, quite possibly involving Americans as well as foreigners.

You said something interesting this morning. You said, generally, there has to be a warrant issued by a neutral and detached magistrate before a search can be carried out. Now, with respect to the FISA law, Senator Birch Bayh, the Chairman of the Intelligence Committee at the time, spells out in the Committee Report that this covers all surveillance in the United States. And then President Carter, when he signed the law, said this covers all surveillance within the United States. So there is a burgeoning question as to whether the President now has the authority to wiretap Americans without going to the FISA court.

When you said, generally, there has to be a warrant, what that said to me was you were providing for an exception. Is that correct? Are you providing for an exception?

Judge ALITO. I think that what I was addressing when I said that was what the Fourth Amendment means, the general principle that is set out in the Fourth Amendment, and the case law under the Fourth Amendment says that a warrant is generally required, but there are well-recognized situations in which a search can be carried out without a warrant. Exigent circumstances is a situation that comes immediately to mind if—

Senator FEINSTEIN. Well, let me stop you here. Do you recognize Justice Jackson's comment in the 1952 steel case where he set up that tripartite framework—

Judge ALITO. I do—

Senator FEINSTEIN [continuing]. Of Presidential authority and when it is at its weakest is when Congress has legislated? And in 1978, Congress did legislate and covered the horizon, so to speak?

Judge ALITO. Yes, Senator, I recognize that and I think that's a very useful framework for addressing issues of Executive power. Now, there is a question about what the meaning of what Congress did, and that would be a statutory question. What is the meaning of the provision of FISA in question, and maybe there's no substantial argument about what was meant there, but maybe there would be an issue about what was meant there, and certainly there could be an issue about the meaning of the authorization on the use of military force. How far was that intended to go?

And so the statutory question, I think, would—that certainly would be an issue that could come up in this situation and probably you would need to—I think you would have to resolve the statutory question before you could figure out which of the three categories that Justice Jackson set out the case fell into.

Senator FEINSTEIN. Thank you. I've run out of time. I'll continue this next session. Thank you.

Judge ALITO. Thank you, Senator.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator Sessions?

Senator SESSIONS. Thank you, Mr. Chairman. We've got a good hearing, I believe. A lot of exchanges have occurred. I will agree with Senator Biden. I can't remember a nominee being this forthcoming. You have gone into more detail about questions that may come up before you without going too far, in my opinion, than we have seen before. You have been very open and I have been very impressed with your analytical spirit and your ability to handle these cases.

We need an aggressive hearing. I agree with those who say that questions need to be propounded to the nominee because this is the only chance that, politically, that we will have, that you will ultimately be on the bench for life, unaccountable to the political process. So it is good to ask questions.

My concern is similar to that of Senator DeWine, that many of the accusations and allegations are unfounded or distortions are really not fair, and some of the things that have been said about you are not correct. If they were correct, you would not receive the overwhelming support of your colleagues and have that admiration so totally as you do.

Judge Alito, we talk about the role of a judge and how you handle cases that come before you. You were asked, what is your opinion on *Lopez*, and you said, well, I haven't studied that case precisely, or at least the background of it. I didn't sit on it. Would you explain to us, as an appellate judge, as you do today, but also even more so as a Supreme Court Justice, how cases come to you and what you should do before you make a decision or express an opinion on the ultimate outcome of a case, why you should be careful and what this great legal system that we have arranges for before a judge makes that final decision?

Judge ALITO. Well, certainly, Senator. We have an adversary system and that means that both sides get the opportunity to present

their arguments, and we have established judicial procedures and they are time consuming and they are burdensome and maybe some people would say that some of them are old fashioned. But I think they work well and they are designed to make sure that there's the vigorous presentation of both sides of the issue that is presented in the case at hand, not some abstract issue that might be addressed in a law review article or a broad issue that might be addressed in a piece of legislation, but an actual concrete case, a dispute between real parties that comes before the court. Both sides have the opportunity to present the arguments that they think have a bearing on that case. The judges get the opportunity to read the briefs, and then in—

Senator SESSIONS. Can I interrupt you there? And you are talking about the appellate court.

Judge ALITO. That's correct.

Senator SESSIONS. There has been a trial with jurors and witnesses and trial judges and those kinds of things that has already occurred. It is now on appeal. No witnesses are being called, but the transcript is available and one side or the other is alleging that they weren't treated fairly, is that correct?

Judge ALITO. That's correct.

Senator SESSIONS. So you decide whether or not a fair trial occurred. Continue now with the process and how you ultimately come to make a decision.

Judge ALITO. Well, we receive briefs and the briefs are well thought out by the attorneys and it provides, if the case is well briefed, a strong presentation of the positions on both sides of the question, and if it's an issue of great public importance, there may be other people who file briefs, so called friends of the court. On the Supreme Court now these days, they get a lot of those on both sides of many of the big issues that come before them. So that ensures that they have a strong presentation of all the arguments that can be made on both sides of the issue, both sides of the case.

The first step in the process would be to read all of those and then there would be an oral argument. At that point, the Justices of the Supreme Court or the judges of my court—

Senator SESSIONS. Now, oral argument means the lawyers for each party come and orally argue the case before the court, is that correct?

Judge ALITO. That's right, and—

Senator SESSIONS. Now, you should not have made up your mind even at that point, should you?

Judge ALITO. You shouldn't. I think very often, I come into an oral argument with a tentative idea about how the case should be decided. I've thought through the issue as much as I can, but my mind is open to the possibility that something will happen during the oral argument or later in my discussion with the other judges that might change my mind.

So we have the oral argument and the lawyers will make their presentation. In that situation, I have the opportunity to ask questions, unlike today. That's a better situation to be in, but it gives me a chance to explore the issues in the case that are troubling to me and I can pose hypotheticals to the lawyers and try to explore how far their arguments go.

And after we have the argument, the judges get together in what's known as the conference. That's a private meeting when just the judges are present. And we each discuss the case, and very often one of my colleagues will say something that makes me think about the case differently than I did going into the conference. But at the end of the conference, if we've all voted, then we exchange our views and we come to a conclusion about how a case should be decided.

And it's only at the end of that process that we actually have a vote on the decision, and then somebody is given the job of writing an opinion and sometimes things even change during the opinion writing process. There have been numerous cases in which I've had the opinion and I've been given the job of writing an opinion to affirm and in the process of—or the reverse, and in the process of writing the opinion, I see that the position that I had previously was wrong. I changed my mind. And then I will write to the other members of the panel and I will say, I have thought this through and this is what I discovered and now I think we should do the opposite of what we agreed, and sometimes they'll agree with me and sometimes they won't.

So it's a long process and it's only at the end of that whole process that I think a judge is in the position, when the opinion is actually going to be issued, the judge is in the position to say, now I've done everything I can with this and this is how I analyze the issue.

Senator SESSIONS. And you said in your opening statement that one of the habits that a good judge should develop is the habit of delaying reaching conclusions until everything has been considered, and I suppose that's why you would be somewhat reluctant to express an opinion on *Lopez* or *Bush* v. *Gore* or some of these other great decisions, because you would know before you rendered such an important decision in a case like that that you've given it the most thorough analysis and you've read all the briefs and considered all the arguments of the parties involved, is that correct?

Judge ALITO. That's an important part of the legal process. If anybody has sat on a jury, they've probably been instructed by the judge not to reach any conclusions about the case until they've heard all the evidence, not to reach premature conclusions, and judges have the same obligation. Now, it doesn't mean you don't think about things. You do think about them, but you don't reach your final conclusion until you've gone through this entire process.

Senator SESSIONS. You said earlier that no person in this country, no matter how high or powerful, is above the law, and no person is beneath the law. Can you assure us that you have the courage and the determination to rule according to your best and highest judgment of the value of the case, regardless of whether or not the person who appointed you or the Congress who confirmed you or any other political pressures that may fall upon you?

Judge ALITO. I can, Senator. I would do that to the best of my ability. That is what I've tried to do on the court of appeals, and if I'm confirmed, that's what I would do on the Supreme Court.

Senator SESSIONS. I believe you will. That is your reputation. That is what other lawyers say about you. That is what professionals who know you conclude. I think it is an important commitment that you have made to us.

You know, we have arguments about a number of cases and the *Rybar* case has come up a good bit. It involves the machine gun. I was a United States Attorney, as you were, and I prosecuted machine gun cases for years. The Supreme Court said, on Section 922, there is no jurisdictional element. Now, historically, criminal statutes of Federal law have jurisdictional elements. The most common statutes historically that were prosecuted were interstate transportation of stolen motor vehicles. It is not a stolen motor vehicle, it is the interstate transportation that makes it a Federal crime, or the interstate transportation of a stolen property, or kidnapping. Kidnapping within a State is not a Federal crime, it is only kidnapping that goes interstate.

So I guess I would ask you to explain for those who may be listening today what this historical procedure is that requires a jurisdictional element of an interstate nexus for the Federal Government to be able to prosecute a crime in some State or county in America.

Judge ALITO. Yes, Senator. Certainly. Well, let me start with the Constitution. The Constitution gives the legislative branch certain powers, and they're enumerated in the Constitution. One of those powers is the power to regulate interstate and foreign commerce, and a great deal of legislation that Congress passed during the 20th century was regulation that was based on its power to regulate interstate and foreign commerce, and many of the criminal statutes that Congress has passed, the Federal criminal statutes, are based on Congress's power to regulate interstate and foreign commerce.

So it's necessary for each of these statutes to fall within this power to regulate interstate and foreign commerce, and one of the ways of ensuring that each exercise of this power falls within Congress's authority under the Commerce Clause is to require that the jurisdictional element be proven in the case. In the case of firearms, as I mentioned earlier, the Supreme Court has said it's enough to show that the firearm at some point in its history traveled in interstate and foreign commerce, and my experience as a U.S. Attorney and before that as an Assistant U.S. Attorney was that this is not a difficult burden for prosecutors to meet. I can't recall a case during the time I was U.S. Attorney where anybody expressed the slightest problem with satisfying this. So this is a very simple way of satisfying the interstate commerce element in the case of firearms offenses.

Senator SESSIONS. I couldn't agree more, and that is what all the traditional firearms laws call for and that is how we proved every case that I prosecuted. I approved it once because it said, "Made in Italy" on the gun. But you prove that the gun has been transported in interstate commerce and that is an element that gives the Federal jurisdiction. As I understand your opinion, you said if the Congress had simply put that in the statute as an element of the offense, then it would have met constitutional muster.

So I guess I would say to my colleagues on the other side and others, maybe we ought to check this law out and write a piece of legislation that puts in the jurisdictional element like all the other historic criminal offenses have and we get this thing done instead of fussing about it. I feel strongly about that.

But when you don't make it a jurisdictional element, then it is not a matter of proof, is that not right, Judge Alito, and therefore, the defendant does not have all the elements of the case proven beyond a reasonable doubt to the jury that here is the case? That is why it is important.

Judge ALITO. That is correct.

Senator SESSIONS. We talked about a lot of these cases. I would just generally like to express my disagreement with those who criticize the *Garrett* case. It did involve the University of Alabama. I believe that the Attorney General of Alabama was correct to assert that the plaintiff could sue, could get back wages, could get their job back, but under the Sovereign Immunity Doctrine that protects States from lawsuits, that under the way that statute was passed, they could not get money damages against the State of Alabama. I think that was the core issue in it.

I also would like to join with Senator DeWine in his very cogent analysis of precedent and super precedent. I think that was insightful for us and would like to be on the record as joining with that.

Judge Alito, back 20 years ago, you wrote a memorandum to Solicitor General Charles Fried, who was a law professor, I guess, before he became Solicitor General and went back to Harvard and is there now, a brilliant legal mind. He was the Solicitor General. You worked for him. You submitted a memorandum on a Pennsylvania case, a case that came out of Pennsylvania, and it seemed to me to be a preliminary analysis of that issue and the question of whether or not that case should be—whether the Department of Justice should intervene in that case and file a friend of the court brief. Was it a preliminary overview of the issue and not the final brief or final summary of argument for the appeal?

Judge ALITO. And that's the *Thornburgh* case that you're referring to, Senator.

Senator SESSIONS. *Thornburgh*.

Judge ALITO. Yes. It wasn't a brief. It was a memorandum about whether the government should file a brief as a friend of the court.

Senator SESSIONS. And you pointed out a number of points in that decision that was being questioned that I thought were—the court had overreached and gone too far. A number of them are quite erroneous, it appeared to me, and you analyzed that very carefully. But before you concluded your argument, you suggested, and not suggested, you stated that you did not think a frontal assault on *Roe* v. *Wade* would be appropriate, is that correct?

Judge ALITO. Yes, that's correct.

Senator SESSIONS. And was it not the position of President Reagan and the Attorney General of the United States at that time that *Roe* v. *Wade* was wrongfully decided and they would seek the opportunity at some point to seek the overruling of it?

Judge ALITO. That was the express position of President Reagan himself. He had spoken on the issue and he had written on the issue.

Senator SESSIONS. So your opinion to the Solicitor General as a young staff attorney in the Solicitor General's office was, in some ways, contrary to that of the President of the United States?

Judge ALITO. Well, I was doing what I thought my job was as an advocate, which was to outline the litigation strategy that would be in the best interests of my client, given what my client was interested in, and it seemed to me that the strategy that I recommended was the best strategy to be followed.

Senator SESSIONS. And did they follow your suggestions?

Judge ALITO. No, they did not. They argued that *Roe* v. *Wade* should be overruled and the Supreme Court rejected that—

Senator SESSIONS. They, in fact, carried out a frontal assault and it was not approved by the Court. So I think that, to me, plus your other decision in which you ruled that Health and Human Services funds could be utilized to fund an abortion for those who qualified was a closed question, that case was, I thought. There was a dissent in it, but you ruled in favor of the pro-choice, the pro-abortion side of that case even though a dissent argued that it was in error, is that correct?

Judge ALITO. That is correct. That's what I thought the law required. I thought we were required to defer to the Department of Health and Human Services's interpretation of the statute and so that's how I voted. And if I'd been out to implement some sort of agenda to strike down—to uphold any abortion regulation that came along, then I would not have voted the way I did in that *Elizabeth Blackwell* case.

Senator SESSIONS. Back in your memorandum in 1985 on the question of abortion, one of the provisions of the Pennsylvania law that was struck down by the court of appeals simply said that there must be a humane and sanitary disposal of aborted fetuses, and you thought that was unwise and you pointed out that there's a Federal statute already on the books that mandates the humane disposal of excess wild free-roaming horses and burros, did you not?

Judge ALITO. Yes, that's correct. That was the statute.

Senator SESSIONS. So this idea that every time a court rules on a pro-abortion opinion, that they're always correct, I think is not true. I think the court has been awfully arrogant and dismissive of the States' rights and legitimate concerns in some of these questions that we're dealing with.

Judge Alito, you know the salary that a Federal judge makes, is that right?

Judge ALITO. I do, all too well.

[Laughter.]

Senator SESSIONS. You know what it would be on the Supreme Court?

Judge ALITO. I actually don't know exactly, no.

Senator SESSIONS. It's a little more, I think, not much. Do you think you can live on that?

Judge ALITO. I can. I've lived on a Federal judge's salary up to this point.

Senator SESSIONS. You've been accused of favoring an all-powerful Executive a couple of times in this Committee. Can the President cut your pay?

Judge ALITO. No, he can't do that. That's in—the Constitution says that, fortunately. Well, nobody can. The President certainly can't and Congress can't, either.

[Laughter.]

Senator SESSIONS. Have a sigh of relief there. They can increase it, though, right?

Judge ALITO. They can, yes.

[Laughter.]

Senator SESSIONS. Well, we have a tight budget. Senators and Congressmen feel, sometimes privately they will tell you they think they need to be paid more, but we are paid pretty generously, in my view, and maybe we need to set some examples about financial management. Maybe we would like to do more, but it is difficult.

But I raise that point because a Supreme Court can declare null and void a legislative enactment by the Congress, can it not, if it violates the Constitution—

Judge ALITO. Yes. Yes, it can.

Senator SESSIONS [continuing]. In their opinion?

Judge ALITO. Yes.

Senator SESSIONS. Does anybody review the Supreme Court's review?

Judge ALITO. No. No.

Senator SESSIONS. And Congress can cut off money for any program they want to. In fact, the Anti-Deficiency Act says it is a crime for any agency of government to spend money that has not been appropriated by Congress. Is that a reviewable Act by anyone, for Congress not to fund a program or agency of the U.S. Government?

Judge ALITO. No, I don't think that's reviewable.

Senator SESSIONS. And aren't there things that the Executive branch can do that are not reviewable?

Judge ALITO. There are certainly some things that are not reviewable. Vetoes are not reviewable. Pardons are not reviewable.

Senator SESSIONS. So the mere allegation that an act of the President is unreviewable may not be as disastrous as it sounds or as bad as it sounds, because certain branches are given certain powers.

Judge ALITO. That's correct.

Senator SESSIONS. I would like to talk a little bit about this question of activism, and I want to be frank about it. Some of our liberal colleagues have correctly made the point that conservatives can be activists, too. And if you take the definition of activism as an action by a judge who allows their personal, political, or social or moral values to override their commitment to the law, do you believe that a judge who is conservative can be an activist just as easily as one who is liberal?

Judge ALITO. Yes, I do. I don't think that activism has anything to do with being a liberal or being a conservative. It has to do with not following the proper judicial role. It has to do with a judge's substituting his or her own views for what the Constitution means and for what the laws mean.

Senator SESSIONS. Now, if a statute passed by Congress plainly violates the Constitution, is it an activist decision if the Court strikes it down, in your opinion?

Judge ALITO. No, I think that's been settled since *Marbury v. Madison* back at the beginning of the 19th century, that when a case is presented to the Supreme Court and there is a question

raised about the constitutionality of a statute and the Court concludes that the statute is unconstitutional, it's the obligation of the Court to follow the Constitution and not the statute.

Senator SESSIONS. Well, if you take the definition of activism I think that Senator Hatch and others have used that indicates, as we just discussed, that it is departing from the faithful application of the law, I think you can have liberal and conservative activists. But I would just say to you the mere striking down of a statute that is unconstitutional is not activism, not if you are faithful to the Constitution and to the laws of the land.

And I would say this: I believe on our side of the aisle, the deep concern that we have about judicial activism is a legitimate one. We believe that there has been a liberal social agenda being promoted too often by the courts that is foreign to our history and contrary to the wishes of the American people. I believe your philosophy is not one to enforce a conservative activism. I believe your philosophy is simply to follow the law and let the political branches debate these issues and decide them through the proper political process.

Is that fair to say?

Judge ALITO. That's exactly correct. The judiciary should do what it is supposed to do, but it has to have respect for the political process. And our constitutional system sets up a Government under which most of the decisions, the policy decisions, the things that affect people in their daily lives—the spending of money, taxing, decisions about foreign policy, and many other areas—are to be made by the political branches of the Government, and the judiciary's role is confined to enforcing the Constitution and enforcing the laws and not going beyond that.

Senator SESSIONS. As you analyze how to interpret the Constitution of the United States or a statute passed by the U.S. Congress, do you believe that authoritative insight can be obtained by reading the opinions of the European Union?

Judge ALITO. I don't. I don't think that it's very helpful—in fact, I don't think it is helpful to look at the decisions of foreign courts for the interpretation of our Constitution. I think we can do very well with our own Constitution and our own judicial precedents and our own traditions. And I don't say that with disrespect to the other countries. But I don't think that there are insights to be provided on issues of American constitutional law by examining the decisions of foreign courts.

I think that it's very interesting from a political science perspective to see what they've done, and I've personally been interested in this over the years. And I think it's flattering to us that so many other countries have followed our judicial traditions. But on issues of interpretation of our Constitution, I don't think that that's useful.

Senator SESSIONS. Judge Alito, this is a big deal in our country today. Millions of Americans believe that the Court is losing discipline, that it is not remaining faithful to the Constitution. And, in fact, I share many of those views. A lot of people do.

Do you think that if a court, in fact, is not faithful to the law but allows personal or political or social views to influence their decisions, that this could in the long run endanger public respect for

law and even undermine the great heritage of the rule of law that we have in this country?

Judge ALITO. I think that everybody who holds a public office under the Constitution has a solemn responsibility to follow the Constitution and the laws that define the role that that person, that officer is supposed to play. And I think that the continued success of our constitutional system and public respect for the constitutional system are dependent on people who have the public trust doing that, making a really strong effort to follow the provisions of the Constitution and other laws that define the role that they are supposed to play.

Senator SESSIONS. I would like to just once more touch on this *Groody* case in which there was a search of a young girl. A warrant was issued, was it not, by a Federal magistrate? Was it a Federal magistrate?

Judge ALITO. It was a State magistrate.

Senator SESSIONS. A State magistrate. And the police officers go to the State magistrate, and they get a warrant, and the magistrate says that the affidavit is made a part of the search warrant. And the officers take it, and in their search warrant, they made affidavit that the individuals in this house known for distributing drugs often had drugs on their persons. And they then went and executed the warrant after going to the court and getting approval. And they find people on the premises, and there were two females, and a female officer took the two females into an upstairs bedroom and did a quick search by asking them to pull down their outer garments—not all their garments—pull up their blouse, and determined they had no contraband or weapons on them. And that was that. And the case came before you, years later, I suppose, on a lawsuit against the police officers. And that is what you were ruling on, were you not?

Judge ALITO. That's right, whether they were liable for money damages. And under the law, if they had a reasonable belief that they were authorized by the warrant to search people who were found on the premises, then they should not be liable for civil damages. The warrant had been—the warrant had incorporated the affidavit for purposes of establishing probable cause, and the officers had said in the affidavit that there is probable cause to believe that people on the premises may have drugs on their possession, and the magistrate judge had accepted that by incorporating the affidavit for purposes of probable cause. And under those circumstances, I thought that at a minimum it was reasonable for the officers to believe that the judicial officer, the magistrate, had said that they were to do exactly what they did.

Senator SESSIONS. I agree.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Sessions. Thank you, Judge Alito.

At this point we will take a break until 5 minutes to 5.

[Recess 4:39 p.m. to 4:55 p.m.]

Chairman SPECTER. We now turn to Senator Feingold for 30 minutes.

Senator FEINGOLD. Judge, thank you for all your patience today and throughout this process.

Judge ALITO. Thank you, Senator.

Senator FEINGOLD. There has already been a lot of discussion of this topic today, but I would like to be sure I understand your opinion about whether the President, as Commander in Chief, can ignore or disobey an express prohibition that Congress has passed. The Torture Statute is one example, but, obviously, I could imagine a variety of others as well, as I am sure you could.

So here is the question: what are the limits, if any, on the President's power to do what he thinks is necessary to protect national security regardless of what laws Congress passes?

Judge ALITO. Well, when you say regardless of what laws Congress passes, I think that puts us in that third category that Justice Jackson outlined, the twilight zone, where according to Justice Jackson, the President has whatever constitutional powers he has under—he possesses under Article II, minus what is taken away by whatever Congress has done, by an implicit expression of opposition or the enactment of a statute. And to go beyond that point, I think we need to know the specifics of the case. We need to know the constitutional power that the President—the type of Executive power the President is asserting and the situation in which it's being asserted, and exactly what Congress has done.

Senator FEINGOLD. Then let us take a more concrete example. Does the President, in your opinion, have the authority, acting as Commander in Chief, to authorize warrantless searches of Americans' homes and wiretaps of their conversations in violation of the criminal and Foreign Intelligence Surveillance statutes of this country?

Judge ALITO. That's the issue that's been framed by the developments that have been in the news over the past few weeks, and as I understand the situation, it can involve statutory questions, the interpretation of FISA, and the provision of FISA that says that no wiretapping may be done except as authorized by FISA or otherwise authorized by law, and the meaning of the authorization for the use of military force, and then constitutional questions. And those would be—those are issues, as I said this morning, that may well result in litigation. They could come before me on the Court of Appeals for the Third Circuit. They certainly could come before the Supreme Court. And before—those are weighty issues involving two of the most important considerations that can arise in constitutional law, the protection of a country and the protection of people's fundamental rights, and I would have to know the specifics and the arguments that were made.

Senator FEINGOLD. They are indeed important questions, and that is why it is so important for me to try to figure out where you would be heading on this kind of an issue, and in fact, the question I just asked you was not something I formulated right now. It is the question that I asked word for word of the Attorney General of the United States at his confirmation hearing in January 2005. He answered as follows: "Senator, the August 30th memo—that's the memo that we sometimes refer to as the torture memo—has been withdrawn. It has been rejected, including that section regarding the Commander in Chief authority to ignore the criminal statutes. So it's been rejected by the Executive branch. I categorically reject it. And in addition to that, as I've said repeatedly today,

this administration does not engage in torture and will not condone torture. And so what you're really discussing is a hypothetical situation," was the end of his quotation.

Well, we now know, of course, that it was not a hypothetical situation at all, and when the Attorney General said he categorically rejected the torture memo, including the section regarding the Commander in Chief's authority to ignore criminal statutes, he was also not being straight with this Committee. So I would like you to try to answer this question. Can the President violate or direct or authorize others to violate the criminal laws of the United States?

Judge ALITO. The President has the obligation, under Article II of the Constitution, to take care that the laws are faithfully executed. And the laws mean, first and foremost, the Constitution of the United States. That applies to everybody. It applies to the President. And the President, no less than anybody else, has to abide by the Constitution. And it also means that the President must take care that the statutes of the United States that are consistent with the Constitution are complied with, and the President has an obligation to follow those statutes as well.

Those are the important general principles, and the application of them in a particular case depends on the facts of the case and the arguments, and a judge needs to know the arguments that are being made on both sides before reaching a conclusion about the result. Those are the overriding considerations.

Senator FEINGOLD. I take that answer—and, obviously, you may not be able to comment on it because of the possibility of it coming before you—I take that to be a pretty serious answer in terms of the President's responsibilities to uphold and make sure that the laws are followed, including the criminal laws of the United States. So given the fact that this interpretation of the FISA law may well come before you at some point, I take it, as you have indicated, that would not only be an initial part of your analysis, but an awfully important analysis of whether the President has the power to override these criminal statutes. I certainly want to say for the record I do not believe the President has the ability to do that in this case, and in fact, I think, it would be almost impossible to interpret the FISA law in any other way than it clearly states, that it is the exclusive authority with regard to wiretapping outside of the criminal law.

You said earlier today, Judge, in response to Senator Leahy, that these types of gravely important constitutional questions very often do not end up being resolved by the judiciary, but rather by the other two branches. So what is the proper role of the judiciary in resolving a dispute over the President's power to disobey an express statutory prohibition?

Judge ALITO. Well, the judiciary has the responsibility to decide cases and controversies that are presented to the judiciary, and that means that there has to be a concrete dispute between parties, and the parties have to have standing under the Constitution, and there's a whole doctrine that's called the Political Question Doctrine, but it's a very misleading term for people who are not lawyers. It doesn't mean that a dispute has something to do with politics or anything like that, it means that the dispute—in the sense

in which people usually use the term "politics"—it means that it's a kind of dispute that the Supreme Court has outlined as being not a proper dispute to be resolved by the judiciary, involving a constitutional issue that should be resolved often between the branches of Government.

And I was talking earlier about some things that the President does that are not reviewable, vetoes, pardons, et cetera. There are things that Congress does that are not reviewable, impeachment, et cetera. In *Baker* v. *Carr*, Justice Brennan's opinion outlined a whole list of factors that inform the analysis of whether something is a justiciable dispute, and sometimes these disputes between the branches of Government are held by the Supreme Court to fall into that category of being disputes that can't properly be resolved by the courts.

Senator FEINGOLD. Do you expect that this matter of the warrantless searches is likely to be resolved with regard to the initial political question doctrine, or do you think it would be likely to be resolved on the merits with regard to the statute and the Constitution?

Judge ALITO. I don't think I could answer that without providing sort of an advisory opinion about something that could well come up. If this does come up in litigation, then the courts have an obligation to decide whether it's a justiciable dispute.

The Political Question Doctrine, this doctrine of issues that are not justiciable, often involves conflicts between the branches of the Government, and when a person is asserting the person's individual rights are violated, that is the type of case that is often resolved, I mean typically resolved by the judiciary.

Senator FEINGOLD. Judge, are we not going to be in kind of a tough spot if we find out the Supreme Court cannot help us figure out whether the FISA law is an exclusive authority or not? Is that not going to be hard to resolve between the Executive and the Congress?

Judge ALITO. Well, Senator, when I was—when I referred—when I said in reference to Senator Leahy's question that often disputes between the two branches are resolved without resorting to the courts, I don't think I was referring specifically to this issue, and if I gave that impression, that was a false impression.

I think I was—what I meant to say, and what I hope that I did say, was that separation powers disputes in general sometimes fall within this doctrine.

Senator FEINGOLD. You noted a few times today that the questions of the President's power in the wiretapping area and other areas will likely come before the courts, including the Supreme Court. You just did that. As I understand it, you have prepared for these hearings over the past few months with a variety of practice sessions. Some have called them moot courts or murder boards. Was the question of the President's power in time of war to take action contrary to a Federal statute ever raised in any way during any of the practice sessions for these hearings?

Judge ALITO. I have had practice sessions on a great variety of subjects, and I don't know whether that specific issue was brought up. It may have been. But what I can tell you—

Senator FEINGOLD. You do not recall whether this issue or the question of—

Judge ALITO. Well, exactly—no, the issue of FISA certainly has been something that I have studied, and FISA is not something that has come before me as a judge.

Senator FEINGOLD. But you do not recall whether or not this was covered in the practice session?

Judge ALITO. No, no. The specific question that you raised about the conflict between the President's authority to say that a statute enacted by Congress should not be followed, but the general area of wiretapping and foreign intelligence surveillance wiretapping—

Senator FEINGOLD. And in fact, the recent events that have led to this dispute—

Judge ALITO. And the recent—

Senator FEINGOLD [continuing]. And the possibility—

Judge ALITO. And the recent events.

Senator FEINGOLD [continuing]. That it may come before you, right, Judge?

Judge ALITO. That's correct, but—

Senator FEINGOLD. OK. Who was present at these practice sessions where these questions were discussed, and who gave you feedback or suggestions or made any comment whatsoever on the answers you gave?

Judge ALITO. Nobody at these sessions or at any of the sessions that I had has ever told me what to say in response to any question, and—

Senator FEINGOLD. I just asked—were there no comments or—

Judge ALITO. The comments that I've received—

Senator FEINGOLD. No advice?

Chairman SPECTER. Let him answer the question, Senator Feingold.

Judge ALITO. The advice that I've received has gone generally to familiarizing me with the format of this hearing, which is very different from the format of legal proceedings in which I have participated either as a judge or previously when I was arguing a legal issue as a lawyer. But nobody has told me what to say. Everything that I have said is an expression of my own ideas.

Senator FEINGOLD. And I do not question that. Judge, I asked you though whether anybody gave you any feedback or suggestions or made any comment whatsoever on the answers you gave in the practice session?

Judge ALITO. In general, yes, they've given me feedback, mostly about the form of the question—the form of the answers.

Senator FEINGOLD. Have you received any other advice or suggestions, directly or indirectly, from anyone in the administration on how you should answer these questions?

Judge ALITO. Not as to the substance of the question, no, Senator.

Senator FEINGOLD. Only as to the style?

Judge ALITO. That's correct, as to the format, not as to the—not as to what I should say I think about any of these questions, absolutely not. I've been a judge for 15 years, and I've made up my own mind during all that time, and—

Senator FEINGOLD. And again, I am not suggesting that. I am asking whether or not—

Judge ALITO. No, I just want to make that clear.

Senator FEINGOLD [continuing]. Somebody talked about the possible legal bases that the President might assert with regard to the ability to do this wiretapping outside of the FISA statute. Was that kind of a discussion held?

Judge ALITO. Nobody actually told me the bases that the President was asserting. I found the letter that was released last week or the week before by an Assistant Attorney General, setting out arguments relating to this, on the Internet myself, and printed it out, and I studied it to get some idea of some of the issues that might be involved here. And I looked at some other materials that legal scholars have put out on this issue, but nobody in the administration actually has briefed me on what the administration's position is with respect to this issue.

Senator FEINGOLD. Does it strike you as being inappropriate for members of the Department of Justice or the White House staff, who are currently defending the President's actions and the NSA domestic spying program, to be giving you advice on how you might handle questions about that topic in the hearing?

Judge ALITO. It would be very inappropriate for them to tell me what I should say, and I wouldn't have been receptive to that sort of advice, and I did not receive that kind of advice.

Senator FEINGOLD. Thank you, Judge. I want to come back to *Mitchell* v. *Forsythe*, in which you participated in the Solicitor General's Office. As we have already heard, that case considered the Government's argument that President Nixon's Attorney General, John Mitchell, should be granted absolute immunity for authorizing warrantless wiretaps, and you signed the Government's brief, making that argument. The Supreme Court rejected the claim of absolute immunity, noting that the Attorney General, acting in the inherently secretive national security context, has few built-in restraints. Justice White, writing for the Court in *Mitchell*, said, "The danger that high Federal officials will disregard constitutional rights in their zeal to protect national security is sufficiently real to counsel against affording such officials an absolute immunity."

Now, that statement still has a lot of relevance today, does it not?

Judge ALITO. Yes, it does. Absolute immunity is quite restricted under our legal system, but there are some high-ranking officials in all three branches of the Government, who do have absolute immunity just from civil damages, not from criminal liability or from impeachment, or removal from office, but for—or for injunctive relief, they can be ordered to comply with the Constitution, but as far as civil damages are concerned.

Senator FEINGOLD. But when you were at the Solicitor General's Office you wrote this memo about the case, saying, "I do not question the Attorney General should have this immunity for authorizing warrantless wiretap." Why did you not question the Attorney General's absolute immunity?

Judge ALITO. First of all, because it was the position that our client, whom we represented in an individual capacity, and it was his money that was at stake here, wanted to make. So we had an obli-

gation that was somewhat akin to the obligation of a private attorney representing a client.

Second, it was an argument to which the Department was committed. It has been made in *Kissinger* v. *Halperin* in the Carter administration. It was repeated in *Harlow* v. *Fitzgerald* in the Reagan administration. In *Harlow* v. *Fitzgerald*, the Supreme Court, while rejecting the idea that cabinet officers in general should have absolute immunity from civil damages, had said something like, and I'm not going to be able to provide an exact quote, but something like, but the situation could well be different for people who are involved in sensitive national security matters or foreign matters.

Senator FEINGOLD. But you said in your memo that, quote, "I do not question the Attorney General's absolute immunity." You did not say it is, quote, "it is the position of our office," or as you were just saying, this administration has argued this in the past. You, in effect, injected yourself into the statement. Clearly, you were expressing your personal opinion on this legal issue, were you not?

Judge ALITO. Senator, I actually don't think I was expressing a personal opinion. I was saying that in my capacity as the writer of this memo who was recommending that the argument not be made, even though it was one that our client wanted to have made, I wasn't disputing the general argument to which the Department was committed. But I thought that we should take a different approach, that we should just argue the issue of appealability. But that was not the approach that was taken.

Senator FEINGOLD. Let us go on to the Solicitor General's brief in the *Mitchell* case, which you signed. That brief argues strongly for the need for absolute immunity, arguing that it is far more important to give the Attorney General as much latitude as possible in the national security context than to, as the brief puts it, quote, "defer the occasional malevolent official," from violating the law. Now, I find this statement particularly troubling today in light of the current administration's warrantless wiretapping in the name of national security. Do you agree with that statement in the brief, that broad deference is warranted even if some Attorneys General may abuse their power?

Judge ALITO. I think the issue of the scope of the immunity that the Attorney General has is now settled by *Mitchell* v. *Forsythe*. That is the law. It was considered—the argument was considered by the Supreme Court and they decided the question.

Judges have absolute immunity for their judicial decisions. Members of Congress and their staff have absolute immunity for things that they do that are integral to the legislative process. The President has absolute immunity from civil damages for the President's official acts. But absolute immunity is used very sparingly because of just the considerations that you're referring to. But the consideration on the other side is that people who are involved in lots of things that make other people angry—judges deciding cases, Members of Congress passing legislation, Presidents doing all sorts of things—would otherwise be subjected to the threat of so many political reprisals that they would be driven from office. It's a policy judgment that our law has made that some people should have absolute immunity, but it's used very sparingly.

Senator FEINGOLD. I find your comments interesting because, of course, the argument is often fairly made that after 9/11, we have to recognize the important role that our Executive plays in protecting the American people. But I would also argue that it is a particularly compelling time to make sure there isn't undue deference, given the types of powers that the Executive may seek to use in trying to fight this threat.

In your class notes from a seminar you gave at Pepperdine Law School on "Civil Liberties in Times of Emergency," you repeatedly raised the question of whether the judiciary has the capability to review certain types of determinations made by the Executive branch in national security cases in particularly factual issues, and we have recently seen an example of a court evidently expressing its frustration at a national security case when the facts presented to it by the Executive, which it had accepted, apparently did not hold up. Of course, I am talking about the Fourth Circuit's serious concern it hadn't been told that Jose Padilla needed to be held militarily as an enemy combatant because he had plotted to use a dirty bomb in the United States, and then finding out that three-and-a-half years later, the Justice Department wanted to transfer him to law enforcement authorities to stand trial for entirely different and much less serious crimes. In *Padilla*, the Fourth Circuit was originally willing to defer to the Executive's assertion that it needed to hold Padilla militarily. It was quite upset, and justifiably, I think, to find out that it might not have deserved such deference.

I am not going to ask you about that case because I know that case is coming before the Supreme Court, but I do want you to say something about the role of the judiciary in evaluating the facts presented to it in national security cases by the Executive branch. How does a court decide whether to rely on the facts presented to it by the Executive in a national security case?

Judge ALITO. What I was doing in that talk at Pepperdine was framing that question, and it's a lot easier to frame the question and to ask students to think about it and give me their reactions than it is to answer it. We've had examples of instances in which the judiciary in the past has had to confront this issue of reviewing factual presentations of the Executive in times of national crisis and there have been instances in which the judiciary has accepted—and I'm thinking of the Japanese internment cases, has accepted, which were one of the great constitutional tragedies that our country has experienced—has accepted factual presentations by the political—by the Executive branch that turned out not to be true, and from my reading of what went on, were not believed to be true by some high-ranking Executive officials at the time.

But there is the problem of judicial fact finding, which I was talking about earlier, and the context of things that may be taking place on the battlefield, for example, or things that are taking place in wartime probably are more difficult for the judiciary to evaluate than other factual questions. So that's the dilemma and I can't say that I can provide a clear answer to it.

Senator FEINGOLD. I do appreciate your referencing the *Korematsu* case and the problem there and how this is going to become an even more serious issue.

I want to switch to something else, the matter of the *Vanguard* case and the recusal. This has been characterized today as a non-issue. One Senator said it is a joke, it is ridiculous. Another one said it is an absurd, just plain absurd. And another, the same Senator said it was a blatant tactic to torpedo your nomination.

Well, Judge, I was the Senator that asked Judge Roberts very searching questions about whether or not he should have recused himself in the *Hamdi* case. I am sure he didn't enjoy it. I didn't particularly enjoy asking the questions, but in the end, I voted for him.

So let me just say to my colleagues, I reject this idea that when we come here to do our job of examining a nominee, that asking questions about an ethical issue is somehow a political game or an attempt to torpedo a nomination. You know, this idea of insulating yourselves and insulating the nominee before we even ask questions about a subject really is not conducive to the kind of process that this Chairman and this Ranking Member have made possible on the first nomination and this one, as well. So I think this is our job and I ask you these questions in this spirit. I might add, although my time is limited, that when you hear the actual facts of it, whatever conclusions we draw, it is certainly not a trivial matter. It is something that I think we ought to cover.

So let me begin by following up on Senator Kennedy's question regarding the promise you made to the Committee. In 1990, in your Senate questionnaire at the time of your nomination to the Third Circuit, you were asked how you would handle potential conflicts of interest. You told the Committee that you did not believe conflicts of interest relating to your financial interests were likely to arise. Nevertheless, you wrote, quote, "I would, however, disqualify myself from any cases involving the Vanguard Companies, the brokerage firm Smith Barney, or the First Federal Savings and Loan of Rochester, New York." You also wrote that you would disqualify yourself from any case involving your sister's law firm and from any case in which you participated or that was under your supervision in the United States Attorney's Office. Now, whether or not such recusals were required under the Federal recusal law, your statement to the Committee was clear, unambiguous, and not time limited. Now, I think for that reason alone, it is more than legitimate to ask some questions in front of this Committee about this.

This morning, Senator Hatch read from a letter from the ABA, apparently received yesterday, although we did not see it until today. That letter talked about what you told the ABA when you asked about Vanguard and the other ethics issues. You also answered a number of questions from Senator Hatch about the case.

But your responses to both the ABA, as far as we can tell from the letter, and Senator Hatch did not say anything at all about your promise to this Committee. Instead, you responded by saying that you didn't notice the recusal issue because you did not get so-called clearance sheets in this case because it was a *pro se* case and that you didn't, quote, "focus" on the issue of recusal. You also didn't mention something that the clerk of your court told us in a letter, that all judges have standing recusal lists that all cases—all cases—both *pro se* cases and cases where the parties are rep-

resented by counsel are checked against before they are sent to judges.

So my first question is this. After you were sworn in as judge, did you notify the court of your commitments to the Senate and request that the Vanguard Companies, Smith Barney, and First Federal Savings and Loan be included on your standing list of parties whose involvement in a case would require your recusal?

Judge ALITO. Senator, I don't have a copy of the initial computer list, so I can't answer that question. At some point, Vanguard—the computer lists that are available from, I think, 1992 and 1993 do not have Vanguard on it and I don't know why that is so—

Senator FEINGOLD. So you don't recall whether you notified them or not?

Judge ALITO. I do not know.

Senator FEINGOLD. Judge, we know you notified the court in 1990 that the U.S. Attorney's Office and your sister's law firm should be on your standing recusal list because you recused yourself from a number of such cases in the first several years you were on the bench. And we also finally received additional documents just yesterday from the court. These documents show that the Vanguard Companies and the other financial entities you listed in 1990 were not on your standing recusal list, which you approved in 1993, 1994, 1995, or 1996. Do you remember removing them from your standing recusal list, or is it fair to assume—or is it your belief that they were never put on your recusal list?

Judge ALITO. Senator, I don't know. I don't know whether I—whether they were removed. I don't think I ever told the clerk's office, take them off. It may be that at some point, I submitted a new list and they were not on the list. I do think it's important to keep in mind that this list is just an aid for the judge. This is not a comprehensive list of everything that will cause a judge to recuse himself.

Senator FEINGOLD. I understand. I just want to get the facts down. So to be clear on the facts, there is no evidence that you requested that Vanguard appear on your standing recusal list before 2003 when you informed the clerk that Vanguard and apparently also Smith Barney should be added, and you don't have any independent recollection of adding them to the list before then, either—

Judge ALITO. That's correct.

Senator FEINGOLD [continuing]. Isn't it?

Judge ALITO. That's correct.

Senator FEINGOLD. Now, you explained to the ABA that the problem in these cases was that the conflict screen system was not working in these cases and you told Senator Kennedy and Senator Hatch this morning that there were some oversights in this case, and you wrote in a November 10 letter to Senator Specter, due to an oversight, it did not occur to you that Vanguard's status might call for your recusal. But it seems that the problem was not that the screening program was not working or that there was a computer glitch, as you and the White House originally suggested, but either that Vanguard was not on your recusal list and you didn't remember your promise, or that you did not recognize that Vanguard was a party in the case. Isn't that a fair characterization?

Judge ALITO. Well, there was an oversight and the oversight was on my part in not focusing on the issue of recusal when I first received the case.

Senator FEINGOLD. So there wasn't—so the problem really—you can admit now, can't you, that this was not a computer glitch or a failure of the screening system. You are really saying something very different at this point.

Judge ALITO. I am not saying something different as to the screening system. The screening system was exactly what I described this morning, and I described that to the ABA, involving—

Senator FEINGOLD. But you don't think it was a computer glitch anymore, do you?

Judge ALITO. It was not a complete computer glitch, and if I could just explain, the origin of that was that when I was down here shortly after the President announced his intention to nominate me, I started to be—I started to receive questions about this Vanguard issue and I was receiving information from our clerk's office, and that based on the information that I received, it was my impression that there had been a computer glitch and that was the origin of that statement and that information that constitutional—

Senator FEINGOLD. Let me ask you this in my last few seconds. When you wrote to Judge Scirica indicating that you would recuse yourself from the *Monga* v. *Ottenburg* case, why did you feel the need to argue that you weren't, in fact, required to do so? Why not just admit you made a mistake, agree to recuse, and move on? Why didn't you just do that when the issue was raised here instead of coming up with these different explanations that in some cases, I think, have become unconvincing?

Judge ALITO. Well, Senator, when the recusal motion came in, I was disturbed by it and I wanted to see what the Code of Conduct exactly required in this context. Twelve years had gone by and no Vanguard case had come up and I hadn't had an occasion to look at this issue. And when I looked at it, it—the recusal motion was very harsh and it accused me of unethical conduct and I took it seriously and I wanted to see what the Code required, and I researched it and it was my conclusion that I was not required by the Code to recuse, but then I went on and said, but I still don't want to participate in this case and I would like to have the initial decision vacated and make sure that Ms. Maharaj had an entirely new appeal, and that's what I asked for and that's what was done.

Senator FEINGOLD. Thank you, Judge.

Senator HATCH. Mr. Chairman?

Chairman SPECTER. Senator Hatch?

Senator HATCH. On this particular issue, could I take just 2 minutes out of my next round?

Chairman SPECTER. If you want to comment, you may, and Senator Feingold can have an opportunity to respond.

Senator HATCH. Sure. On your form that you filled out, the question was, explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated. Now, this case arose 12 years later, didn't it?

Judge ALITO. Yes, it did, Senator.

Senator HATCH. That is hardly your initial service. To be held to that type of a standard, especially in a case that every ethics professor I know of says you didn't do anything wrong in, seems to me is going a little bit beyond the pale here and it is overblown. Frankly, I think you have got to read the whole thing. You are a good lawyer and you have agreed to do it, but it was during your initial service. Now, I guess you could interpret initial service to be a year or two or 3 years, but 12 years? I don't think so.

Senator FEINGOLD. Mr. Chairman?

Chairman SPECTER. Senator Feingold, do you care to—

Senator FEINGOLD. Yes. I mean, the fact is the nominee continues to have the holdings in Vanguard. They have appreciated in value. The time hasn't changed that. I think the Judge here was at least trying to suggest there might have been some mistake made here and instead we are getting sort of after-the-fact justifications that put some kind of a time limit on the promise he made to this Committee, and there was no time limit on the promise that was made to the Committee.

Senator HATCH. I still have 30 seconds left. Judge, No. 1, you have researched it and you didn't have to recuse yourself. You concluded that?

Judge ALITO. Yes, I did.

Senator HATCH. No. 2, these ethics professors have concluded that, right?

Judge ALITO. That is right.

Senator HATCH. No. 3, you have tried to comport with the highest standards of ethics during your whole 15 years on the bench, right?

Judge ALITO. I have tried to do that and to go beyond what—

Senator HATCH. No. 4, I believe we will have judges from that court who will say that you have.

Chairman SPECTER. Senator Feingold?

Senator FEINGOLD. Mr. Chairman, I am curious if this isn't a situation where he felt the need to recuse himself why he wouldn't have put Vanguard on the list as something he should recuse himself from—

Senator HATCH. Because he was mistaken, that is why.

Chairman SPECTER. We are going to move on now. I think that this slight exchange is permissible as an exception to our general rules. It livens up the afternoon.

[Laughter.]

Senator HATCH. I want my 2 minutes back.

Chairman SPECTER. Anything at about 5:30 in the afternoon is welcome.

[Laughter.]

Chairman SPECTER. Senator Graham?

Senator GRAHAM. That was an interesting exchange. I guess there is no rule against beating a dead horse or we would all have quit a long time ago, so—

[Laughter.]

Senator GRAHAM [continuing]. So in the next 30 minutes, I am going to ask you the same questions you have been asked for a whole day, and I hope you will understand if any of us come before

a court and we can't remember Abramoff, you will tend to believe us.

[Laughter.]

Senator GRAHAM. Now I know why they give you a lifetime appointment for doing this. I was skeptical before, but I think once is enough in a lifetime.

For what it is worth, I think you have done a great job. You have been very forthcoming. You have seldom used—I may have to decide that you have answered a lot of questions and I particularly enjoyed Senator Feingold's questions about Executive power and I will pick up on that.

No. 1, from a personal point of view, do you believe the attacks on 9/11 against our Nation were a crime or an act of war?

Judge ALITO. That is a hard question to answer and—

Senator GRAHAM. Good.

Judge ALITO. That is a way of buying 30 seconds while I think about the answer. Senator, I think that what I think personally about this is really not something that would be—that would inform anything that I would have to do as a judge.

Senator GRAHAM. Well, Judge, I guess I disagree because I think we are at war and the law of armed conflict in a wartime environment is different than dealing with domestic criminal enterprises. Do you agree with that?

Judge ALITO. It certainly is.

Senator GRAHAM. We have laws on the books that protect us, the Fourth Amendment included, from our own law enforcement agencies coming against our own citizens. But we also have laws on the books during a time of war to protect or country from being infiltrated by foreign powers and bodies who wish to do harm to us. That is a totally different legal concept. Is that correct?

Judge ALITO. I am reluctant to get into this because I think that things like act of war can well have particular legal meanings in particular contexts and, you know, under the Constitution.

Senator GRAHAM. Do you doubt that our Nation has been in an armed conflict with terrorist organizations since 9/11, that we have been in an undeclared state of war?

Judge ALITO. In a lay sense, certainly we have been in a conflict with terrorist organizations. I am just concerned that in the law all these phrases can have particular meanings that are defined by the cases.

Senator GRAHAM. That is very important, and let's have a continuing legal education seminar here about the law of armed conflict in the *Hamdi* case. The *Hamdi* case is precedent. Is that correct? It is a decision of the Supreme Court.

Judge ALITO. It certainly is, yes.

Senator GRAHAM. And it tells us at least two to three things. No. 1, it tells us something that I find reassuring that the Bill of Rights, the Constitution, survive even in a time of war.

Judge ALITO. That is certainly true.

Senator GRAHAM. So there is a holding in that case that I want to associate myself with, and I think Senator Feingold does, that even during a time of war when your values are threatened by an enemy who does not adhere to those values, they will not be threat-

ened by your Government unless there is a good reason. Do you agree with that?

Judge ALITO. Senator, I agree that the Constitution was meant to deal with all of the contingencies that our country was going to face. And I think the Framers hoped that we would not get involved in many wars, but they were students of history and I am sure they realized that there would be wars. They provided for war powers for the President and for Congress, and the structure is meant to apply both in peace and in war.

Senator GRAHAM. And you said in your previous testimony that no political figure in this country is above the law, even in a time of war.

Judge ALITO. That is correct.

Senator GRAHAM. There is another aspect of the *Hamdi* case that no one has picked up upon, but I will read to you. "In light of these principles, it is of no moment that the authorization to use military force does not use specific language of detention, because detention to prevent a combatant's return to the battle field is a fundamental incident of waging war. In permitting the use of necessary and appropriate force, Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here, and those circumstances were a person alleged by the Executive branch to be an enemy combatant."

And one of the principles we found from the *Hamdi* case is that because we are, in my opinion, at war and Congress has authorized the President to use force against our enemies, the Executive branch, according to the *Hamdi* case, inherent to his power of being Commander in Chief, can detain people who have been caught on the battle field.

Does that make sense to you? Do you agree that is the principle of the *Hamdi* case?

Judge ALITO. That is the principle of the *Hamdi* case.

Senator GRAHAM. And it makes perfect sense because if we catch someone in Afghanistan or Iraq or any other place in the world who is committing acts of violence against our troops or our forces, or we catch people here in the United States who have infiltrated our country for the purpose of sabotaging our Nation, there is no requirement in the law to catch and release these people, is there?

Judge ALITO. Well, *Hamdi* speaks to the situation of an individual who was caught on the battlefield.

Senator GRAHAM. In the history of our Nation, when we captured German and Japanese prisoners, was there ever a legal requirement anybody advanced that after a specific period of time you have to let them go?

Judge ALITO. It is my understanding that the prisoners of war who were taken in World War II were held until the conflict was over.

Senator GRAHAM. It would be an absurd conclusion for a court or anyone else to tell the executive branch that if you caught somebody legitimately engaged in hostile activities against the United States that you have to let them go and go back and fight us again. That makes no sense, does it?

Judge ALITO. Well, I explained what my understanding is about how this matter of holding prisoners was handled in prior wars.

This issue was addressed in *Hamdi*, in what was discussed in *Hamdi* in the context of—

Senator GRAHAM. In the *Padilla* case, they held an American citizen who was engaged in hostile activities against the United States allegedly as an enemy combatant and the Fourth Circuit said the President, during a time of hostility, has the ability to do that.

Do you agree that that is a part of our jurisprudence?

Judge ALITO. That was the holding in *Padilla*.

Senator GRAHAM. Yes.

Judge ALITO. Yes, that was the holding of the lower court in—of *Padilla*, yes.

Senator GRAHAM. Now, the point I am trying to make is that when you are engaged in hostilities, there are some things that we assume the President will do. If we don't kill the enemy, we capture the enemy. The President, as the Commander in Chief, will make sure they don't go back to the battle.

No. 2, if we catch someone and there is a question to their status, whether or not you are prisoner of war under the Geneva Conventions, are you an enemy combatant, who traditionally in our constitutional democracy determines whether or not—the status of a person engaged in hostilities?

Judge ALITO. Well, *Padilla*—I am sorry—*Hamdi* said that a person who is being detained, an unlawful person who is asserted to be an unlawful combatant and who is being detained, has the right—has due process rights. And the issue of the type of tribunal—and they explained to some degree how that would be handled, but the identity of the particular tribunal that would be required to adjudicate that was not an issue that was decided in *Hamdi* or any of the other cases.

Senator GRAHAM. Can you show me an example in American jurisprudence where the question of status, whether a person was a lawful combatant or an unlawful combatant, was decided by a court and not the military?

Judge ALITO. I can't think of an example. I can't say that I am able to survey the whole history of this issue, but I can't think of one.

Senator GRAHAM. Can you show me a case in American jurisprudence where an enemy prisoner held by our military was allowed to bring a lawsuit against our own military regarding their detention?

Judge ALITO. I am not aware of such a case.

Senator GRAHAM. Is there a constitutional right for a foreign non-citizen enemy prisoner to have access to our courts to sue regarding their condition of confinement under our Constitution?

Judge ALITO. Well, I am not aware of a precedent that addresses the issue.

Senator GRAHAM. Do you know of any case where an enemy prisoner of war brought a habeas petition in World War II objecting to their confinement to our Federal judiciary?

Judge ALITO. There may have been a lower court case. I am trying to remember the exact status of the individual and it was—

Senator GRAHAM. Well, let me help you. There were two cases. One of them involved six saboteurs, the In Re *Quirin*—

Judge ALITO. *Quirin* case, yes.

Senator GRAHAM. Would you agree with me that that case stood for the proposition that in a time of war or declared hostilities, an illegal combatant, even though they may be an American citizen—the proper forum for them to be tried in is a military tribunal and they are not entitled to a jury trial as an American citizen in a non-wartime environment?

Judge ALITO. Well, those were a number of German saboteurs who landed by submarine in the United States and they were taken into custody and they were tried before a military tribunal and the case went up to the Supreme Court. The Supreme Court sustained their being tried before a military tribunal. At least one of them claimed to be an American citizen, and most of them—I think all but one or two actually were executed.

Senator GRAHAM. And our Supreme Court said that is the proper forum during a wartime environment to try people who are engaged in illegal combat activities against our country. Is that correct?

Judge ALITO. Well, they sustained what was done under the circumstances that I described.

Senator GRAHAM. Well, that would be a precedent, then, wouldn't it?

Judge ALITO. It is the precedent, yes.

Senator GRAHAM. OK. There was a case involving six German soldiers captured in Japan and transferred to Germany, and they brought a habeas petition to be released in the *Eisen*—I can't remember the—

Judge ALITO. *Eisentrager*.

Senator GRAHAM. Well, you know it. Tell me what the court decided there.

Judge ALITO. Well, they were—as I recall, they were Germans who were found in China assisting the Japanese—

Senator GRAHAM. China and not Japan. You are right.

Judge ALITO [continuing]. Assisting the Japanese after the termination of the war with Germany, and they were unsuccessful in their habeas petition. And that was interpreted prior to the Supreme Court's decisions a couple of years ago to mean that there was a lack of habeas jurisdiction over them because they were being held in territory that was not U.S. territory.

Senator GRAHAM. For those who are watching who are not lawyers, generally speaking in all of the wars that we have been involved in, we don't let the people trying to kill us sue us, right? And we're not going to let them go at an arbitrary time period if we think they are still dangerous because we don't want to go have to shoot at them again or let them shoot at us again.

Is that a good summary of the law of armed conflict?

Judge ALITO. The precedent—I don't know whether I would put it quite that broadly, Senator.

[Laughter.]

Judge ALITO. The precedent that you—*Johnson* v. *Eisentrager*, of course, has been substantially modified, if not overruled. *Ex Parte Quirin*, of course, is still a precedent. There was a lower court precedent involving someone who fought with the Italian Army and I can't remember the exact name of it, and that was the case that

I thought you were referring to when you first framed the question. But those are the precedents in the area.

Then if you go back to the Civil War, there is *Ex Parte Milligan* and a few others. Now, in *Hamdi*—

Senator GRAHAM. We don't have to go back that far.

Judge ALITO. Well, in this area, I think it is actually instructive to do it. But in *Hamdi*, the Court addressed this question of how long the detention should take place and they said—because they were responding to the argument that this situation is not like the wars of the past which had a more or less fixed—it was not anticipated that they would go on for a generation and they said we will get to that if it develops that way.

Senator GRAHAM. Who is better able to determine if an enemy combatant, properly held, has ongoing intelligence value to our country? Is it the military or a judge?

Judge ALITO. On intelligence matters, I would think that is an area where the judiciary doesn't have expertise. But we do get into this issue I was discussing with Senator Feingold about the degree to which—the balance between the judiciary's performing its function in cases involving individual rights and its desire not to intrude into areas where it lacks expertise particularly in times of war and national crisis.

Senator GRAHAM. So having said that, if we have a decision to make as a country when to let someone go who is an enemy combatant, I guess we have got two choices: we can have court cases, or we can allow the military to make a determination if that person still presents a threat to the United States, and whether or not that person has an intelligence value by further confinement.

Do you feel the courts possess the capabilities and the competence to make those two decisions better than the military?

Judge ALITO. The courts do not have expertise in foreign affairs or in military affairs, and they certainly should recognize that. And that is one powerful consideration in addressing legal issues that may come up in this context. But there is the other powerful consideration that it is the responsibility of the courts to protect individual rights in cases that are properly before the Court, cases where they have jurisdiction in one way or another, cases that are fit for judicial resolution.

Senator GRAHAM. I totally understand that, but our courts have not by tradition gotten involved in running military jails during time of war. I can't think of one time where a prisoner of war housed in the United States during World War II, a German Nazi or a Japanese prisoner was able to go and sue our own troops about their confinement. I think there is a reason there is none of those cases. It would lead to chaos.

Now, when it comes to treating detainees and how to treat them, I think the Congress has a big, big role to play, and I think that the courts have a big role to play. Are you familiar with the Geneva Convention?

Judge ALITO. I have some familiarity with it.

Senator GRAHAM. Do you believe it has been good for our country to be a signatory to that convention?

Judge ALITO. I think it has, but it's not really my area of authority. That's Congress's area of authority.

Senator GRAHAM. Well, just as an American citizen, are you proud of the fact that your country has signed up to the Geneva Convention and that we have laid out a system of how we treat people who fall into our hands and how we will engage in war?

Judge ALITO. I think the Geneva Convention—and I'm not an expert on the Geneva Conventions, but I think they express some very deep values of the American people, and we have been a signatory of them for some time, and I think that—

Senator GRAHAM. Now, let's go back to the legal application of the Geneva Convention. If someone was captured by an American force and detained, either at home or abroad, would the Geneva Convention give that detainee a private cause of action against the U.S. Government?

Judge ALITO. Well, that's an issue, I believe, in the *Hamdan* case, which is an actual case that's before the Supreme Court. It goes to the question of whether a treaty is self-executing or not. Some treaties are self-executing.

Senator GRAHAM. Has there ever been an occasion in all the wars we have fought where the Geneva Convention was involved whether the courts treated the Geneva Convention as a private cause of action to bring a lawsuit against our own troops?

Judge ALITO. I'm not familiar with such a case, but I can't say whether there might be some case or not.

Senator GRAHAM. Now, when it comes to what authority the Executive has during a time of war, we know the Supreme Court has said it is implicit from the force resolution that you can detain people captured on the battlefield. *Hamdi* stands for that proposition. Is that correct?

Judge ALITO. That's what was involved in *Hamdi*.

Senator GRAHAM. The problem that Senator Feingold has and I have and some of the rest of us have is does that force resolution—does it have the legal effect of creating the exception to the FISA court? And I know that may come before you, but let's talk about generally how the law works.

You say that the President has to follow every statute on the books unless the statute allows an exception for the President. Is that a fair statement? Just being President, you cannot set aside the law.

Judge ALITO. The President has to follow the law, and that means the Constitution and the laws that are enacted consistent with the Constitution.

Senator GRAHAM. There is a statute that we have on the books against torture. Are you familiar with that statute?

Judge ALITO. The Convention Against Torture, well, the statutes implementing the Convention Against Torture.

Senator GRAHAM. And the statute provides the death penalty for somebody who violates the conventions as a possible punishment.

Judge ALITO. That's right. If death results, the death penalty is available.

Senator GRAHAM. So this idea that Senator McCain somehow banned torture is not quite right. The Convention on Torture and the statute that we have implementing that convention were on the books long before this year. Is that correct?

Judge ALITO. Yes, they were.

Senator GRAHAM. Do you believe that any President, because we are at war, could say, "The statute on torture gets in the way of my ability to defend the United States, therefore, I don't have to comply with it"?

Judge ALITO. The President has to comply with the Constitution and the laws of the United States that are enacted consistent with the Constitution. That is the principle. The President is not above the Constitution and the laws.

Now, there are issues about the interpretation of the laws and the interpretation of the Constitution, but—

Senator GRAHAM. Are you a strict constructionist?

Judge ALITO. I think it depends on what you mean by that phrase, and if you—

Senator GRAHAM. Well, let's forget that. We will never get to the end of that.

[Laughter.]

Senator GRAHAM. Have you heard the term used?

Judge ALITO. I have heard the term used.

Senator GRAHAM. Is it fair to say that when it is used by politicians, people like me, we are trying to tell the public we want a judge who looks at things very narrowly, that does not make a bunch of stuff up? Is that a fair understanding of what a strict constructionist may be in the political world?

Judge ALITO. Well, if a strict constructionist is a judge who doesn't make things up, then I'm a strict constructionist.

Senator GRAHAM. There you go.

[Laughter.]

Judge ALITO. I agree with that, Senator.

Senator GRAHAM. Now, if there is a force resolution that Congress passes to allow any President to engage in military activity against someone trying to do us harm, and the force resolution says the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or just make it generic, if someone argued that that declaration by Congress was a blanket exemption to the warrant requirement under FISA, would that be a product of strict constructionist legal reasoning?

Judge ALITO. I think that a strict constructionist, as you understand it, would engage in a certain process in evaluating that question, and a strict constructionist, a person who interprets the law—and that's how I would put it. A person who interprets the law would look at the language of the authorization for the use of military force and legislative history that was informative, maybe past practices—were there prior enactments that are analogous to that? What was the understanding of those? And a host of other considerations that might go into the interpretive process.

Senator GRAHAM. I guess what I am saying, Judge, is I can understand when the Court ruled that the President has it within his authority to detain people on the battlefield under this force resolution, that makes sense. I understand why the President believes he has the ability to surveil the enemy at a time of war. And the idea that our President or this administration took the law in their own hands and ignored precedent of other Presidents or case law and

just tried to make a power grab I don't agree with. But this is really not about you, so you don't have to listen. I am talking to other people right now.

[Laughter.]

Senator GRAHAM. The point I am trying to make is what Justice Jackson made, that when it comes to issues like this, when we surveil our enemy and we cross our own borders and we have information about our own people, we need, in my opinion, Judge, to have the President at the strongest. And that would be when Congress through collaboration with the President comes up with a method of dealing with that situation, and that it could be very dangerous in the long run if we overinterpret war resolutions, because I have got a problem with that. And I believe that if we don't watch it and we overinterpret these resolutions, we will have a chilling effect for the next President. The next President who wants to use force to protect us in a justifiable manner may be less likely to get that resolution approved if we go too far.

And, Judge, you are likely to rule on these issues, and my hope is before you rule that we all sit down between the Executive and the legislative and we talk about this. Because as you said before, our Nation, not only our legal system, is strongest when we work together. Executive power, the Constitution allows the President to nominate judges. If Congress tried to change that by statute and say that we would like to pick the judges, what would happen, hypothetically?

Judge ALITO. I have a certain self-interest in the answer to that question.

Senator GRAHAM. I thought you might.

[Laughter.]

Judge ALITO. I think that—

Senator GRAHAM. Clearly—clearly—the statute would fall to the Constitution. A veto is not reviewable by courts because that is basically a political decision. Under the Constitution, what is the vote requirement to get confirmed to the Supreme Court?

Judge ALITO. It is a majority.

Senator GRAHAM. Hypothetically speaking, what if the Senate passed a statute or had a rule that said you cannot get a vote to be on the Supreme Court unless you get 60 votes? How does that sit with you?

Judge ALITO. Speaking in my personal capacity or in my judicial capacity?

[Laughter.]

Senator GRAHAM. Your judicial capacity.

Judge ALITO. Senator, I just don't think I should answer questions like—constitutional questions like that. I need to know—

Senator GRAHAM. What if the Senate said during an impeachment that we don't want a two-thirds vote of the Senate, we want a majority vote, would the Senate's action fall to the Constitution?

Judge ALITO. Well, when—there are certain questions that seem perfectly clear, and I guess there is no harm in answering—

Senator GRAHAM. Is there any doubt in your mind the Constitution requires a majority vote to be on the Supreme Court or any other Federal judicial office?

Judge ALITO. You know what? I remember this phrase from law school—

Senator GRAHAM. Is that a super duper precedent?

Judge ALITO. I think it's what we call in law school "the slippery slope," and if you start answering the easy questions, you're going to be sliding down the ski run and into the hard questions, and that's what—

Senator GRAHAM. Well, then—

Judge ALITO.—I'm not too happy to do.

Senator GRAHAM. That is what I tried to get you to do, and I am glad you didn't do it.

The bottom line to this exercise is you have got a job, I have got a job, and what disturbs me a bit is that we are beginning to hold the lawyer responsible for the client. And in my remaining time here, what damage could be done to the legal profession or the judiciary if people in my profession start holding your client's position against the advocate?

Judge ALITO. Well, I think it has been traditionally recognized that lawyers have an obligation to their clients. That's how our legal system works. Some lawyers have private clients. Some lawyers work for Government agencies, and the lawyer-client relationship there is not exactly the same. But, still, there is a lawyer-client relationship. And I think our whole system is based on the idea that justice is best served—

Senator GRAHAM. If you were an Attorney General representing a State that passed a ban on partial-birth abortion, would it be fair to that Attorney General if they came before this Committee to hold that against them if you disagreed with them on the subject matter?

Judge ALITO. I think that Attorneys General—I can speak to the issue of the Attorney General of the United States because I know there's a statute and there's an understanding about what the Attorney General of the United States will do when an Act of Congress is called into question, and the obligation of the Attorney General is to defend the constitutionality of the Act of Congress unless no reasonable—

Senator GRAHAM. A lawyer's obligation is to defend their client's interest. Is that an accurate statement of what a lawyer is supposed to do?

Judge ALITO. It certainly is, yes.

Senator GRAHAM. No matter whether that client is popular or not or the position is popular or not. Is that correct?

Judge ALITO. Consistent with ethical obligations and professional responsibility, yes, indeed.

Senator GRAHAM. What has this process been like for you and your family? And in a short period of time, could you tell us how to improve it?

Judge ALITO. Well, it's been a combination of—at times it's been a thrill and at times it's been extremely disorienting. I spent the last 15 years as a judge on the court of appeals, and you probably could not think of a more cloistered existence than a judge on the court of appeals. Most of the time nobody other than the parties pays attention to what we do. When an article is written in the paper about one of our decisions, it's "a Federal appeals court in

Philadelphia" or in whatever city. And this has been a strange process for me. I made some reference to that yesterday, but I understand the reason for it. And I am reluctant in my current capacity as a nominee to offer any suggestions about the process. I think that's—you're carrying out your responsibility. I spoke about the fact that different people under the Constitution have different obligations, and you have the advice and consent function, Congress, the Senate does. And I think it's for the Senate to decide what it should do in this area.

Chairman SPECTER. Thank you, Senator Graham.

Senator Schumer?

Senator SCHUMER. Thank you, Senator Specter. And I want to thank you, Judge Alito. It has been a long day.

Judge Alito, in 1985 you wrote that the Constitution—these are your words—does not protect a right to an abortion. And you said to Senator Specter a long time ago, I think it was about 9:30 this morning, 9:45, that those words accurately reflected your view at the time.

Now let me ask you, do they accurately reflect your view today? Do you stand by that statement? Do you disavow it? Do you embrace it? It is OK if you distance yourself from it and it is fine if you embrace it. We just want to know your view.

Judge ALITO. Senator, it was an accurate statement of my views at the time. That was in 1985, and I made it from my vantage point as an attorney in the Solicitor General's Office, but it was an expression of what I thought at that time. If the issue were to come before me as a judge, if I am confirmed and if this issue were to come up, the first question that would have to be addressed is the question of *stare decisis*, which I have discussed earlier, and it's a very important doctrine and that was the starting point and the ending point of the joint opinion in *Casey*. And then if I were to get beyond that, if a court were to get beyond the issue of *stare decisis*, then I would have to go through the whole judicial decision-making process before reaching a conclusion.

Senator SCHUMER. But sir, I am not asking you about *stare decisis*. I am not asking you about cases. I am asking you about this, the United States Constitution. As far as I know, it is the same as it was in 1985 with the exception of the 27th Amendment, which has nothing to do with what we are talking about. Regardless of case law, in 1985, you stated—you stated it proudly, unequivocally, without exception—that the Constitution does not protect a right to an abortion. Do you believe that now?

Judge ALITO. Senator—

Senator SCHUMER. I am not asking about case law. I am not asking about *stare decisis*. I am asking your view about this document and whether what you stated in 1985 you believe today, you have changed your view, you have distanced your view. You can give me a direct answer. It doesn't matter right now which way you answer, but I think it is important that you answer that question.

Judge ALITO. The answer to the question is that I would address that issue in accordance with the judicial process as I understand it and as I have practiced it. That is the only way I can answer that question.

Senator SCHUMER. Sir, I am not asking for the process. Obviously, you would use a judicial mindframe. You have been a judge for 15 years. I am asking you, you stated what you believed the Constitution contained. You didn't say the Constitution as interpreted by this or that. You didn't say the Constitution with this exception or that exception. It was a statement you made directly. You made it proudly. You said you are particularly proud of that personal belief that you had. Do you still believe it?

Judge ALITO. And Senator, I would make up my mind on that question if I got to it, if I got past the issue of *stare decisis*, after going through the whole process that I have described. I would need to know the case that was before me and I would have to consider the arguments, and they might be different arguments from the arguments that were available in 1985—

Senator SCHUMER. But sir, I am not asking you about case law. Now, maybe you read a case and it changed your view of the Constitution. I am asking you, and not about the process you would use. I am asking you about your view of the Constitution, because as we all know, and we are going to talk about *stare decisis* in a few minutes, that if somebody believes, a judge, especially a Supreme Court Justice, that something is unconstitutional, even though *stare decisis* is on the books, governs the way you are and there is precedent on the books for decades, it is still important to know your view of what the Constitution contains.

And let me just say, a few hours ago, in the same memo, I can't remember who asked the question, but you said you backed off one of the statements you had written. You said it was inapt, which taught me something. I didn't know that there was a word that was inapt, but you said that it was inapt to have written that the elected branches are supreme. So you discussed that, your view on that issue, without reference to case law because there was no reference to case law when you wrote it. There was no reference to case law when you wrote this.

Can you tell us your view, just one more time, your view about the Constitution not protecting the right to an abortion, which you have talked about before and you said you personally proudly held that view. Can you?

Judge ALITO. The question about the supremacy—the statement about the supremacy of the elected branches of government went to my understanding of the constitutional structure of our country, and so certainly that's a subject that it is proper for me to talk about. But the only way—you are asking me how I would decide an issue—

Senator SCHUMER. No, I am not. I am asking you what you believe is in the Constitution.

Judge ALITO. You are asking me my view of a question that—

Senator SCHUMER. I am not asking about a question. I am asking about the Constitution, in all due respect, and something you wrote about before—

Judge ALITO. The Constitution contains the Due Process Clause of the Fifth Amendment and the 14th Amendment. It provides protection for liberty. It provides substantive protection. And the Supreme Court has told us what the standard is for determining whether something falls within the scope of the protection—

Senator SCHUMER. Does the Constitution protect the right to free speech?

Judge ALITO. Certainly, it does. That is in the First Amendment.

Senator SCHUMER. So why can't you answer the question of does the Constitution protect the right to an abortion the same way, without talking about *stare decisis*, without talking about cases, et cetera?

Judge ALITO. Because answering the question of whether the Constitution provides a right to free speech is simply responding to whether there is language in the First Amendment that says that the freedom of speech and freedom of the press can't be abridged. Asking about the issue of abortion has to do with the interpretation of certain provisions of the Constitution.

Senator SCHUMER. Well, OK. I know you are not going to answer the question. I didn't expect really that you would, although I think it would be important that you would. I think it is part of your obligation to us that you do, particularly that you stated it once before. So any idea that you are approaching this totally fresh without any inclination or bias goes by the wayside.

But I do have to tell you, Judge, your refusal, I find troubling. It is sort of as if I asked a friend of mine 20 years ago, if a friend of mine 20 years ago said to me, he said, "You know, I really can't stand my mother-in-law," and a few weeks ago I saw him and I said, "Do you still hate your mother-in-law?" He said, "Well, I'm now married to her daughter for 21 years, not 1 year." I said, "No, no, no. Do you still hate your mother-in-law?" And he said, "Mmm, I can't really comment." What do you think I would think?

Judge ALITO. Senator, I think—

Senator SCHUMER. Let me just move on. You have a very nice mother-in-law. I see her right here and she seems like a very nice person.

[Laughter.]

Senator SCHUMER. OK.

Judge ALITO. I have not changed my opinion of my mother-in-law. That's a question—

Senator SCHUMER. I am glad you haven't. She seems nice.

Judge ALITO.—I can answer that question.

Senator SCHUMER. Let me go now to *stare decisis*, because what you have said is you start out with *stare decisis*, although I think a lot of people would argue you start out with the Constitution upon which *stare decisis* is built. OK. Now, you have tried to reassure us that *stare decisis* means a great deal to you. You point out that prior Supreme Court precedents like *Roe* will stand because of the principle. While you are on the Third Circuit, of course, you can't overrule precedents of the Supreme Court, but when you are on the Supreme Court, you have a little bit more flexibility.

I just want to ask you this. *Stare decisis* is not an immutable principle, right? You have said that before in reference to Senator Feinstein. When Chief Justice Roberts was here, he said it was discretionary. So it is not immutable, is that right? You have told us it is not an inexorable command. It doesn't require you to follow the precedent.

Judge ALITO. It is a strong principle—

Senator SCHUMER. Correct.

Judge ALITO [continuing]. And in general, courts follow precedents. They need a special—the Supreme Court needs a special justification for overruling a prior case.

Senator SCHUMER. But they have found them, and I think you went over this. I can't recall if it was Senator Kohl or Senator Feinstein, but you went through some cases. In recent years, the Court has overruled various cases in a rather short amount of time. You mentioned, I think it was, *National League of Cities* about fair labor standards and it was overruled just 9 years later by *Garcia*. *Stanford* v. *Kentucky* was overruled by *Roper* v. *Simmons*. *Bowers* v. *Hardwick* was overruled by *Lawrence* v. *Texas*. And, of course, *Brown* v. *Board* was overruled by *Plessy*. So the bottom line, I mean, we can go through this—

Senator HATCH. *Plessy* was overruled by *Brown*.

Senator SCHUMER. I mean, *Plessy* was overruled by *Brown*. I apologize.

So the only point I am making is that despite *stare decisis*, it doesn't mean a Supreme Court Justice who strongly believes in *stare decisis* won't ever overrule a case, is that correct? You can give me a yes or no on that. It is pretty easy.

Judge ALITO. Yes.

Senator SCHUMER. Of course. OK. So now let us try this another way. Here is a quote: "*Stare decisis* provides continuity to our system. It provides predictability, and in our process of case-by-case decisionmaking, I think it is a very important and critical concept." The statement sounds reasonable to me. It sounds to me like it is something you said to Senator Specter and others, right?

Judge ALITO. I agree with the statement.

Senator SCHUMER. Yes. Let me show you who said that statement. It was Justice Thomas. Justice Thomas came before us and stated that, and yet when he got on the Supreme Court, he voted to overrule, or expressed a desire to overrule, a whole lot of cases, including some very important ones on the Court. Here are some quotes. "*Casey* must be overruled." "*Buckley* v. *Valeo* should be overruled." "*Bacchus*," just last year, "should be overruled." And as you can see, it is a very large number of cases, and these aren't all of them. In fact, Justice Thomas said that a 1789 unanimous case by the Supreme Court, *Calder* v. *Bull*, which no one talked about for centuries, should be overruled. So what do you think of Justice Thomas's theory of *stare decisis* and how he applies it?

Judge ALITO. Well, Senator, I have explained my understanding of the doctrine of *stare decisis* and it is important to me. I think it is an important part of our legal system. It is—

Senator SCHUMER. How about what Justice Thomas—what do you think of what he is doing?

Judge ALITO. Well, I don't think I should comment on all of those cases.

Senator SCHUMER. OK. Let me just say this. You may not want to comment, but his fellow Justice, Justice Scalia, did. Here is what Justice Scalia said about Justice Thomas and *stare decisis*, and remember what he said when he was sitting in the same chair you are sitting in. He pledged fealty to *stare decisis*.

Justice Scalia said, Justice Thomas, quote, "doesn't believe in *stare decisis*, period. If a constitutional line of authority is wrong,

he would say, let us get it right." Then Justice Scalia said, "I wouldn't," speaking of himself, "I wouldn't do that." And it is particularly relevant, because if you believe something is not in the Constitution, at least the way Justice Thomas talks about *stare decisis*, he would let the Constitution overrule it and *stare decisis* would go by the wayside, and I am not saying Justice Thomas was disingenuous with the Committee when he was here. I am just saying that *stare decisis* is something of an elastic concept that different judges apply in different ways.

So let me go to another one here. I think I have covered everything I want to do with Justice Thomas. Here is another quote. "There is a need for stability and continuity in the law. There is a need for predictability in legal doctrine and it is important that the law not be considered as shifting every time the personnel of the Supreme Court changes." That again sounds reasonable to me, quite a lot like what you said. You don't have any dispute with that statement, do you?

Judge ALITO. No, I don't.

Senator SCHUMER. OK. Well, let us see who said that one. It was Robert Bork when he came before this Committee to be nominated. Now, here is what Judge Bork wrote in the National Review Online just a few weeks ago. He wrote, quote, "Overturning *Roe* v. *Wade* should be the *sine qua non* of a respectable jurisprudence. Many Justices have made the point that what controls is the Constitution itself, not what the Court has said about it in the past." And even before his hearing, by the way, he sort of cut back on what he said at the hearing, I guess. It may have been in a different context, but here is a quote that he said a year, I think, before he came before us. He said, "I don't think that in the field of constitutional law precedent is all that important." He said, in effect, that a Justice's view of the Constitution trumps *stare decisis*. That is not an unrespectable view. It is probably not the majority view of Justices, but it is there.

So, for example, it was his view, similar to Justice Thomas, that the Constitution does not protect a right to—that if the Constitution does not protect the right to an abortion, as you wrote in 1985, but we are not talking about how you feel today, it would be overruled. It should be overruled despite *stare decisis*. And one of the things I am concerned about here is that what you wrote, and I think Senator Kohl went over it a little bit, is what you wrote about Judge Bork in 1988. And by the way, this was not when you were working for someone or applying for a job. As I understand it, you were the U.S. Attorney in New Jersey, well ensconced, a very good U.S. Attorney, and it was with some New Jersey news outlet. I saw the cite, but I didn't know what it was. You said that, about Justice Bork, "I think he was one of the most outstanding nominees of this century. He's a man of unequaled ability," and here's the key point, "understanding of constitutional history, and then someone who has thought deeply throughout his entire life."

Now, first, one of the most outstanding of the 20th century with Oliver Wendell Holmes and Benjamin Cardozo, and people you have expressed admiration for, Frankfurter, and Brennan and Harlan, I find it disconcerting that you would say that he is a great

nominee of the 20th century in his understanding of constitutional law, and yet he so abjectly rejects *stare decisis*.

Judge ALITO. Well, I certainly was not aware of what he had said about *stare decisis* when I made those comments. I have explained those comments. They were made when I was an appointee of President Reagan, and Judge Bork was President Reagan's—

Senator SCHUMER. Excuse me. You were not working in the White House. You were a U.S. Attorney prosecuting cases. There was no obligation for you to say what you said, right?

Judge ALITO. No, but I had been in the Department of Justice at the time of—

Senator SCHUMER. I know, but it was a voluntary interview with some New Jersey news outlet, is that correct?

Judge ALITO. And I was asked a question about Judge Bork, and I had been in the Department at the time of his nomination, and I was an appointee of President Reagan, and I was a supporter of the nomination.

Senator SCHUMER. Let's go to the next line of questioning here, but again, the point being judges, Justices, overrule cases despite *stare decisis*, particularly when they think the Constitution dictates otherwise. And now I want to turn to your own record in the Third Circuit, something you mentioned yesterday and today. When you have been on the Third Circuit, of course, you had to follow Supreme Court precedent, and you professed a whole lot of times your desire to do that, and I am not disputing that here. But it is also true that when you were on the Third Circuit, a more apt analogy in terms of *stare decisis* would be about Third Circuit precedents, because if you should get on the Supreme Court, *stare decisis* will apply to Supreme Court decisions the way *stare decisis* to a Third Circuit Judge applies to Third Circuit decisions. That is pretty fair, right?

Judge ALITO. Yes, and I've tried to follow Third Circuit precedents while I've been—

Senator SCHUMER. Although you have dissented more than most of your fellow judges, but we will leave that aside. What I want to show here is how many times, when you were on the Third Circuit, your fellow judges on the Third Circuit—who I am sure have high respect for you. I know a lot of them are coming here in a few days, and I think that is nice, I do not have any problem with that.

[Laughter.]

Senator SCHUMER. Well, there has been some criticism about it, not by me.

I just want to show you what they have said when it comes to their view of your respect for Third Circuit precedent, *stare decisis*, as relevant as we can find it to you. So I am going to read a few. There are a whole bunch. But in *Dia* v. *Ashcroft*—they are all on this chart I guess. There are too many so the print is not large enough for most people to see. I wish there were fewer. In *Dia* v. *Ashcroft* the majority of your court said that your opinion "guts the statutory standard and ignores our precedent." *In LePages, Inc.* v. *3M* your opinion was criticized as "being contrary to our precedent and that of the Supreme Court." In *RNS Services* v. *Secretary of Labor* you again dissented, and the majority again argued that, "Your dissent overlooks our holding in the instant case and prior

cases." In *Riley* v. *Taylor*, the en banc majority argued that your view ignored case after case relied by the majority, and "accords little weight to those authorities." In *Texas Eastern Transmission Corp.*, a panel criticized your opinion because, "It does not comport with our reading of the relevant case law." In *Bray* v. *Marriott Hotels*, the majority noted that binding circuit precedent made your analysis improper in a discrimination case.

And the list goes on and on. I do not have to—but other cases that are mentioned here, *United Artists* v. *Warrington*, *Beauty Time* v. *VU Skin Systems*. Here is a final one, *Rappa* v. *New Castle County*, Judge Garth, the man I think you clerked for and is regarded as a mentor to you, wrote that your majority opinion was "unprecedented" in its "disregard of established principles of *stare decisis*." "Nothing," Judge Garth wrote, "in the jurisprudence of the Supreme Court or in ours suggests that a three-judge panel of a court of appeals is free to substitute its own judgment for that of a four-justice plurality opinion, let alone that of the entire court."

So those are just some of the cases in which your own colleagues said you did not follow *stare decisis*. Now, there may have been good reason. I am not—you are much more expert on these cases than I am. There may have been good reason for you to do it, but I think it shows something, and that is, you, if we have to project as to what kind of a Supreme Court Justice you will be, are not going to be as reluctant as some to overturn precedent even by the rules of *stare decisis*. And so you wonder if you are as willing as you are to depart from precedent on the Third Circuit, what is going to happen if you should get on the Supreme Court? Your response because I mentioned a whole lot of cases here.

Judge ALITO. You did, Senator, and I think that you need to examine each of the cases to see whether what I did was justified. Let me just take one that struck me when you read from it, and that was the *United Artists* case. What I said there was that a Supreme Court decision that had come up, that had been handed down after the most recent Third Circuit decision relating to the issue, superseded what our court had said. So I was following an aspect of *stare decisis* there. I was following what we call horizontal—I'm sorry—vertical *stare decisis* following the Supreme Court, and I don't think there's any dispute that when the Supreme Court hands down a decision that's in conflict with one of our earlier cases, we have to follow the Supreme Court.

Senator SCHUMER. Yes, but there is no question that in that situation, Judge Cowen said your opinion was, "wrong to revisit an issue that has already been decided and failed to give respect and deference to the circuit's well-established jurisprudence employing the improper motive test in the substantive due process land use context. It is rather complicated, but he is sure saying you did not follow, in his view, you did not follow court precedent.

Judge ALITO. And, Senator, there was this body of Third Circuit precedent, and then—and it said that it's proper for a Federal court to get involved in a zoning dispute, which is traditionally a local matter, if there is simply an improper motive, whatever that might be. And in the—after that the Supreme Court, in an opinion by Justice Souter, emphasized that the test under substantive due process in an area like this, an area that the other judge in the ma-

jority and I thought was like this, is whether what was done shocks the conscience.

And so you have a Supreme Court decision intervening, and in that situation I thought it was our obligation—and I wrote the majority opinion there—to follow what the Supreme Court had said.

Senator SCHUMER. But my only point being here is one judge's view of what *stare decisis* requires, and another judge's view of what *stare decisis* requires, are not always the same. The concept has some degree of elasticity, and when, in reference to questions by people, you say, well, how do you feel about this case—and particularly *Roe*, which has been where we started off here—"I believe in *stare decisis*," it means that you are going to take precedent into account, but it certainly does not necessarily mean where you would come out.

Let me tell you where I conclude where you would come out, just sort of summarizing this argument. First, again, greatly disturbing I think to many Americans would be that you will not distance yourself from your 1985 view that the Constitution does not protect a right to a woman's right to choose, that that view has not changed, that you have refused to say, unlike you did in another part of that 1985 memo, that you think it is wrong now, which would lead one to think that you probably believe in it.

Second, you have told us you respect precedent and *stare decisis*, but we have seen that the stated respect for *stare decisis* hardly determines whether a Supreme Court Justice will vote to uphold precedents, not because when they come here they are being disingenuous with us. I do not think that at all. But because the concept is somewhat elastic, because it does not guarantee that you will uphold precedent, and particularly does not guarantee it when the Constitution conflicts with *stare decisis*, with the precedents of the Court.

And finally, to top it off, we have seen that your Third Circuit record can hardly provide a great deal of comfort in this area either, that many of your fellow judges criticized you for ignoring, abandoning, or overruling precedent.

Taken together these pieces are very disturbing to me. Your blanket 1985 statement, not distanced from, that the Constitution does not protect the right to an abortion; the fact that respect for precedent and stability does not prevent overruling of a past decision; and your own record of reversing or ignoring precedent on the Third Circuit lead to one inevitable conclusion.

We can only conclude that if the question came before you, it is very likely that you would vote to overrule *Roe* v. *Wade*.

I yield back my time.

Judge ALITO. Well, Senator, could I just respond to that—

Senator SCHUMER. Please, the time is yours.

Judge ALITO [continuing]. To that question. My Third Circuit record, in looking at abortion cases, provides the best indication of my belief that it is my obligation to follow the law in this area and in all other areas. If I had had an agenda to uphold any abortion regulation that came along, I would not have voted as I did in my Third Circuit cases.

Now, I've testified here today about what I think about *stare decisis*. I do think it's a very important legal doctrine, and I've ex-

plained the factors that figure into it. It would be the first question that I would consider if an issue like this came before me.

Senator SCHUMER. Let me just say though, you have ruled on certain cases. Many of them were on technicalities. And in all of them as a Third Circuit Judge, you were bound by Supreme Court precedent. You never, in the Third Circuit, were squarely presented with the question that I asked, which is a decisive question, which is whether the Constitution protects a woman's right to choose. You were never asked in the court, you were never asked to overturn *Roe* v. *Wade*. And even if you were in the Third Circuit, you could not, because you were bound by the precedent of the Court. I do not think your Third Circuit rulings are dispositive on what you would do should you become a U.S. Supreme Court Justice.

Thank you, Mr. Chairman.

Judge ALITO. If the matter were to come up before me on the Supreme Court, I would consider the issue of *stare decisis*, and if the case got beyond that, I would go through that entire judicial decisionmaking process that I described. That's not a formality to me. That is the way in which I think a judge or a Justice has to address legal issues, and I think that is very important, and I don't know a way to answer a question about how I would decide a constitutional question that might come up in the future, other than to say I would go through that whole process.

I don't agree with the idea that the Constitution always trumps *stare decisis*—

Senator SCHUMER. Does not always, but sometimes—

Chairman SPECTER. Let him finish his answer, Senator Schumer.

Senator SCHUMER. I am sorry.

Judge ALITO. I don't agree with the theory that the Constitution always trumps *stare decisis*. There would be no need for the—there would be no room for the doctrine of *stare decisis* in constitutional law if that were the case.

Senator SCHUMER. But, sir, it can trump *stare decisis*, does not always, but can. Is that correct?

Judge ALITO. It certainly can, and I think that is a good thing because otherwise, *Plessy* v. *Ferguson* would still be on the books.

Senator SCHUMER. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Schumer.

Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman.

Judge Alito, are you familiar with the question that lawyers sometimes pose to demonstrate how unfair a question can be: "When did you stop beating your wife?"

Judge ALITO. I am familiar with that question.

Senator CORNYN. And I suppose the reason why—

[Laughter.]

Senator CORNYN. Since someone was picking on your mother-in-law, I thought we would inject your wife into this. But the point is this: it is an unfair question because it implies, regardless of what your response has been, that at one time you did, when, in fact, you have not.

And I just want to explore, to start with, Senator Schumer's questions about what is written in this Constitution about abortion. Does the word abortion appear anywhere in the Constitution?

Judge ALITO. No. The word that appears in the Constitution is "liberty."

Senator CORNYN. And outside of, let's say, the Fourth Amendment, perhaps, does a right to privacy appear, explicitly stated, in the Constitution?

Judge ALITO. There is no express reference to privacy in the Constitution, but it is protected by the Fourth Amendment and in certain circumstances by the First Amendment and in certain circumstances by the Fifth and the 14th Amendments.

Senator CORNYN. And the reason it is protected is because the Supreme Court has so interpreted the Constitution. Isn't that correct, sir?

Judge ALITO. That is correct. It is a question of interpretation rather than simply looking at what is in the text of the document.

Senator CORNYN. So to ask you whether the right to free speech, which is explicitly protected under the First Amendment of the Constitution—to ask you whether that is in there and then just ask you in the same question, or at least same series of questions, whether the right to abortion on demand is in the Constitution, one is explicitly stated in the First Amendment; the other is the product of Court interpretation. Isn't that accurate, sir?

Judge ALITO. Yes, that is my view of it.

Senator CORNYN. And to be more specific, it is what the courts have called penumbral rights. In other words, *Griswold,* I believe it was, talked about this being the penumbra of the emanations from stated rights in the Constitution. Can you clarify that for us so we can get it right?

Judge ALITO. Yes. *Griswold* talked about emanations and penumbras, and *Griswold* has later been understood by the Supreme Court as being based on the protection of liberty under the Fifth Amendment and the 14th Amendment.

Senator CORNYN. Well, I was particularly troubled by the exchange of questions and answers because the suggestion is that you have somehow been unresponsive. And as I said in my opening statement, I do think that there are those who have already decided to vote against your nomination and are looking for some reason to do so. And I think one of the reasons that they may claim is that you have been nonresponsive. But I thought it was telling that Senator Schumer said he didn't expect you to answer that question.

I would like to refer back to Senator Biden's comments where he praised you at the close of his remarks. He said, "I appreciate you for being responsive."

I agree with him. I cannot remember a nominee being this forthcoming. I appreciate that you have answered nearly every question put to you. Thank you for being so responsive. And indeed, according to one count, you have answered more than 250 questions thus far today.

So I think in all fairness, the question is not a fair one to ask you whether the right to an abortion is written in this document. The fact is, and the reason why you apply the doctrine of *stare de-*

cisis is because you recognize the precedential effect, the authoritative effect of the Supreme Court's interpretation of this document as the law of the land, do you not, sir?

Judge ALITO. That is correct.

Senator CORNYN. And you mentioned *Plessy* v. *Ferguson*. I think it was Daniel Patrick Moynihan, a Democrat Senator from Senator Schumer's State, who said if it weren't for the ability of the courts to go back and revisit these decisions, how would you ever correct a mistake? And I think the fact is that you have mentioned one of the instances where, thank goodness, the Court has gone back and revisited a terrible decision which has been a scar on our country and our jurisprudence, *Plessy* v. *Ferguson*.

And if the Court, in *Brown* v. *Board of Education*, had felt prohibited from revisiting that mistake, then we would still be living under that scar and I think we can all agree that that would be a terrible thing. And thank goodness, we have a Supreme Court that has had the courage to go back, in accordance with the principles of *stare decisis*, and revisit terribly wrong decisions and to correct them and to bring us where we are today.

You know, it must be strange to have people listen to the questions and answers here because on one hand, you will hear rather complimentary comments. On the other hand, even Senators who are still at least for the record undecided—I hate to think what it would be like if they had actually determined to vote against you already—making rather strong critical statements.

But it means a lot to me to know that the people who know you best, the people who have worked with you on the Third Circuit Court of Appeals, are very complimentary. I happen to believe that we ought to look to the people that know you best as being in the best position to judge your character, your integrity, your competence, and not this caricature that happens during these confirmation proceedings by the attack dogs, the interest groups who pay a lot of money, spend a lot of time trying to tear down that reputation for integrity and competence that you have worked so hard to build during your lifetime.

But I was struck—and we will hear more about the judges who have served with you on the Third Circuit—but I was struck by a quote that I read from your former colleague, the late Judge Leon Higginbotham.

Who is Judge Higginbotham, by the way, or who was he?

Judge ALITO. Well, he was the former Chief Judge of the Third Circuit and he was a Federal judge for many years and greatly respected.

Senator CORNYN. Well, this is what the Harvard Journal of African-American Public Policy—how it described him, in part. They said, "Higginbotham was appointed to the Federal circuit bench by President Jimmy Carter in 1977. Higginbotham is also former president of the Philadelphia Chapter of the NAACP."

And would it be fair to say that you and Judge Higginbotham, while you served together, you tended to look at the Constitution differently? In other words, could he fairly be described as a liberal?

Judge ALITO. I think probably most people would describe him that way. I thought we got along very well, and we generally

agreed. There were cases in which we disagreed and cases in which I dissented from an opinion that he wrote. And I think there were cases in which he dissented from opinions that I wrote.

Senator CORNYN. Well, I wonder if you are aware of one thing that he was quoted as having said. This is out of the Los Angeles Times, comments he made about you to Judge Timothy Lewis, quoted in the Los Angeles Times, "Sam Alito is my favorite judge to sit with on the court. He is a wonderful judge and a terrific human being. Sam Alito is my kind of conservative. He is intellectually honest, he doesn't have an agenda, he is not an idealogue."

Were you aware that Judge Higginbotham had said that about you?

Judge ALITO. No, I wasn't. I was not.

Senator CORNYN. Well, I am pleased to tell you he did say it, according to the Los Angeles Times, and I think it is a high compliment that someone who would have perhaps such a divergent view and perhaps different political beliefs than you would say those sorts of things about you and your record on the Third Circuit Court of Appeals.

Now, I have some charts, too, like Senator Schumer. I like my charts better than his, but we will let others be the judge. But I want to ask you a little bit about Justice Sandra Day O'Connor. You had some very high compliments about her yesterday. Senator Kyl, her fellow Arizonan, said some wonderful things about her, and I am confident that all of those accolades are well deserved. Some have called her the model Supreme Court Justice, and that is high praise, it really is.

And I would like to submit for my colleagues' consideration that if Sandra Day O'Connor was in the mainstream, then Sam Alito is, too, and this is why. For example, Justice O'Connor and Judge Sam Alito both set limits on Congress's commerce power. Sandra Day O'Connor and Sam Alito both struck down affirmative action policies that had strict numerical quotas, and both—this ought to be a shocker to some based on what we have heard here today—both Justice Sandra Day O'Connor and Judge Sam Alito have criticized *Roe* v. *Wade*.

In fact, this is pretty astonishing to me. According to the Harvard Law Review, over the last decade Justice O'Connor agreed more often with Chief Justice Rehnquist, 80 percent of the time, than with any other Justice. And let's go through these individually.

First of all we talk about whether it can be a Federal crime to possess a machine gun that doesn't implicate trafficking or some aspect of interstate commerce. But, you know, all we have to do is go back to a little bit of the history we all learn in high school to remember the Articles of Confederation and the fact that the States were all-powerful. The national Government was crippled because it really had no power and was subject to the unanimous vote of the states before it could do things that were very important.

And so then in Philadelphia, the delegates there wrote, and ultimately ratified, a Federal Constitution. But you already alluded to this earlier. This Constitution takes into account that not only will

the national Government have certain powers, but there will also be some powers still reserved to the States.

It is a fact, is it not, sir, that when we talk about federalism, really what we are talking about is the fact that our Federal Government, our national Government is one of enumerated powers that are set out in the Constitution and all powers that are not enumerated or necessary and proper to the execution of those enumerated powers as a general rule are reserved to the states?

Judge ALITO. Yes, that is the structure of the Constitution. The Federal Government has certain—has enumerated powers. Some of them are broad, but those are the powers the Federal Government has and the theory—and the structure is that everything else was reserved for the States.

Senator CORNYN. And so when someone suggests that you are taking a crabbed or cramped or unorthodox view toward congressional power because you say that it is not clear from the statute or the crime with which an individual is charged that interstate commerce is implicated, aren't you enforcing that original understanding of what powers were expressly or otherwise delegated to the Federal Government and what powers were reserved to the States?

Judge ALITO. Well, that is what *Lopez*, as I understand it, tried to do. It said that although the commerce power is broad, it is not all-encompassing. It involves the regulation of interstate and foreign commerce, and this statute that we have in *Lopez* goes beyond that. And my case, the *Rybar* case, seems to me to be as close to the situation in *Lopez* as any case that I was aware of.

Senator CORNYN. Well, I know my constituents back in Texas, and I suspect people all across the country would be glad to know that you don't believe that all wisdom and all power is centered in Washington, D.C., but that under our Federal system the State and Federal governments are partners, and that enforcing this structure that is a product of our history and a product of our Constitution is an important thing for judges to do.

But it is interesting because if Sandra Day O'Connor was in the mainstream on the interpretation of the Commerce Clause, then so is Judge Sam Alito. As a matter of fact, I believe in *Rybar* you said the question before the court is whether *Lopez* is a constitutional freak, or words to that effect, because as you pointed out, it was a little bit of a shock to everyone's system to see the Supreme Court was actually serious about recognizing the authority of the States and that there are limits to congressional power. But *Lopez* reestablished or perhaps restated that understanding.

Judge O'Connor joined the majority in the *Lopez* decision, did she not, sir?

Judge ALITO. Yes, she did.

Senator CORNYN. And so she shared at least to that extent your conviction that there is some limit to congressional power and that there was some point beyond which Congress's authority could not reach unless it was made clear that it was pursuant to one of the powers enumerated under the Constitution. Did I say that roughly correctly?

Judge ALITO. I agree with that she said that Congress's power under the Commerce Clause is not all-encompassing. And my job

as a court of appeals judge is not to say that a decision of the Supreme Court should be limited to its facts; in other words, not applied as a precedent in any other comparable situation that comes along. My job is to take those precedents seriously and that is what I tried to do.

Senator CORNYN. So when Justice O'Connor held in *Lopez* that Congress could not prohibit the possession of handguns near schools because mere possession is not commerce, you were doing your very best to stick to that precedent established by the U.S. Supreme Court when you wrote your opinion in *Rybar*. Is that correct?

Judge ALITO. That's correct. In *Lopez*, the Supreme Court said that possession of a firearm, mere possession is not a commercial activity, and the interstate commerce—the Commerce Clause authorizes the regulation of interstate commerce, and the activity involved in *Rybar* was the possession of a firearm. So it followed that if it was a noncommercial activity in *Lopez*, it must be a noncommercial activity in *Rybar*. That's how I saw it.

Senator CORNYN. And you didn't say the State couldn't criminalize possession of a machine gun, did you?

Judge ALITO. No. The State could, and I think a great majority of States, if not—the great majority certainly have legislation of that nature.

Senator CORNYN. And you pointed out here that if the Congress had been a little more careful in showing the basis upon which mere possession could affect interstate commerce, that that would be a different case, and perhaps the outcome might have been different in *Rybar*.

Judge ALITO. Yes, that was a strong point that I made in the dissent, that if Congress had made findings, it would have been a very different case for me.

Senator CORNYN. You know, the interesting thing to me about *Rybar* as well, you have been accused of always ruling for the big guy or the government. But in *Rybar* you decided for the person accused of illegally possessing the machine gun.

Judge ALITO. Well, that's correct. He was a criminal defendant.

Senator CORNYN. You didn't rule for the government?

Judge ALITO. No, I did not. I thought the government had not come forward with evidence to support the position that they were arguing.

Senator CORNYN. Well, there is another question about affirmative action cases. We have alluded a little bit to that. And Justice Sandra Day O'Connor, the model Supreme Court Justice who is clearly in the mainstream, you and Justice O'Connor both agreed to strike down affirmative action policies which set numerical quotas which resulted in reverse discrimination. She did in *Wygant* v. *Jackson Board of Education* in 1986. You did in *Taxman* v. *Board of Education* in 1996. Would you agree with that, sir?

Judge ALITO. I would. *Taxman* was a case that our court considered en banc, that is, all the judges were sitting, and I sit on a very moderate court that is certainly not unreceptive to the concept of affirmative action in general. But the vote in that case was 8–4. It wasn't a close vote. And I joined the opinion that was written

by my late colleague, Judge Mansmann, holding that that particular affirmative action plan was in violation of Title VII.

Senator CORNYN. Let's talk again about *Roe* v. *Wade*. Now, this is going to be a shocker for some people based upon what has gone on before, because it has been suggested that but for Sandra Day O'Connor, *Roe* v. *Wade* may be overruled; that this is really what lies in the balance here during your confirmation proceedings. But the fact is that Justice Sandra Day O'Connor, the model Supreme Court Justice, wrote in *The City of Akron* v. *Akron Center for Reproductive Health*, "The trimester three-stage approach adopted by the Court in *Roe* cannot be supported as a legitimate or useful framework." *Roe*, she said, "is clearly on a collision course with itself."

And in the memorandum for which you have been disparaged many a time when you were in the Solicitor General's office, you recommended, "Don't mount a frontal attack on *Roe* v. *Wade* but instead use the opportunity to nudge the Court toward the principles in Justice O'Connor's *Akron* dissent."

So when you had an opportunity to urge the reversal of *Roe* v. *Wade*, even as a lawyer for the administration, you urged a more cautious approach and one consistent with Justice O'Connor's opinion at the time. Isn't that correct, sir?

Judge ALITO. Yes, Justice O'Connor's opinion in *Akron*, which was the last previous big Supreme Court decision at that time, was one of the things that influenced me in the memo that I wrote in *Thornburgh*. She analyzed *Roe*, and I was quite persuaded by the points that she made in the *Akron* decision. And the general approach—the arguments that I was recommending that the Government make in the *Thornburgh* case were along the lines of the undue burden standard I think that was later—that she later adopted. I was arguing that the particular provisions should be challenged on their own terms. One of the provisions was an informed consent provision that was virtually identical to the informed consent provision that later came up in *Casey*, and in *Casey* it was upheld.

Senator CORNYN. Well, let's talk about *Casey*. That was a 1992 decision by the U.S. Supreme Court. Isn't that correct, sir?

Judge ALITO. Yes.

Senator CORNYN. And in *Casey*, Justice Kennedy, Justice Souter, and Justice O'Connor, the model Supreme Court Justice, essentially scuttled the principal argument in favor of the right to abortion based on this trimester approach, which Justice O'Connor criticized and which has also been criticized by people like Justice Ginsburg, former counsel to the American Civil Liberties Union, who now serves on the Court; Laurence Tribe, a well-known liberal legal scholar at Harvard. The fact is *Roe* v. *Wade*, the writing itself, the justification for the decision has been widely criticized by legal scholars all across the spectrum, has it not, sir?

Judge ALITO. It certainly had been at the time of the 1985 memo, and although I wasn't recommending that the Government get into that issue, I mentioned in the memo some of the authors who had criticized *Roe*'s reasoning.

Senator CORNYN. Well, and in 1992, the only thing that really survived in *Roe* v. *Wade*, which was written 33 years ago, was the

essential holding—I guess you could call it that—and there have been some quotes about the importance of reliance interests in terms of observing—giving it the benefits of *stare decisis* or precedent. But essentially the whole legal scheme or basis upon which abortion was protected was changed to an undue burden standard. Isn't that right, sir?

Judge ALITO. In *Casey*, the Supreme Court moved away from the trimester approach, and they adopted the undue burden standard, which had been set out in some earlier opinions by Justice O'Connor and the joint opinion in *Casey* made it clear that that was now the governing standard under Supreme Court law.

Senator CORNYN. But the plurality opinion—Justice O'Connor, Justice Kennedy, Justice Souter—did not say you can have abortion without limitation. It did recognize the right of the States to pass laws which regulate abortion as long as it did not create an undue burden on a woman's right to have an abortion, according to that decision. Isn't that roughly what the plurality said?

Judge ALITO. Yes, that's what they held.

Senator CORNYN. Let's get the other chart.

My point is that if on at least three counts, on the basis of does Congress's commerce power, limitations on congressional authority in the affirmative action area, and in terms of criticizing the basis upon which *Roe* v. *Wade* was decided 33 years ago, you and Justice O'Connor bear a lot of similarities. I would just ask that if Justice O'Connor is a model Supreme Court Justice and, therefore, by definition is not outside the mainstream, then it strikes me that Sam Alito is not outside the mainstream, either.

Another thing you have been criticized for is your unlimited view of Presidential power, that is the way it has been phrased, the suggestion that somehow you are always going to defer to the President and the Executive branch when the legislative branch and the Executive branch vie for authority, whether it is in the intelligence gathering area, the National Security Agency and this electronic eavesdropping, which is really an early warning system to try to identify terrorists so we can protect ourselves against another 9/11, or other acts of Presidential power.

Senator Graham talked a little bit about the *Hamdi* decision, where the U.S. Supreme Court interpreted the use of force authorization that was issued by Congress after the 9/11 attack authorizing the President to use necessary force to defeat the Taliban and al Qaeda, the supposed perpetrators of the 9/11 attacks. The question came up in *Hamdi* whether that included an authorization by Congress to detain terrorists without charging them with a crime. My understanding is in that case that the Supreme Court, it was fractured, but the plurality opinion that Justice O'Connor wrote said that that authorization of use of force was a congressional Act which trumped the statutory limitation that Congress had previously passed about detaining American citizens without charging them with a crime. Did I get that roughly correct?

Judge ALITO. Yes, that's exactly correct. Eighteen U.S.C. 4001, which is called the anti-detention statute, says that nobody may be detained without authorization, and in *Hamdi*, Justice O'Connor's opinion concluded that the authorization for the use of military

force constituted statutory authorization to detain a person who had been taken prisoner as an unlawful combatant in Afghanistan.

Senator CORNYN. Well, I appreciate you pointing out that one of the other important statements in *Hamdi* was that people who are detained have certain due process rights and that the President cannot exercise his powers as Commander in Chief without judicial review or without anyone else looking at it, including a court or military tribunal under appropriate circumstances. But the fact is, Justice O'Connor took a view of Presidential power there that some might consider to be rather broad, the power to detain an American citizen who is a suspected terrorist without actually charging them with a crime for the reasons that Senator Graham stated, that if that person who was actually captured in Afghanistan and brought to Guantanamo Bay, if they were released, then they likely would return to the battlefield and plot and plan and execute lethal attacks on American citizens.

Interestingly, people like to characterize judges as conservative or liberal. One interesting thing to me about that is Justice Scalia, who you have been likened to, actually dissented and held that it was unconstitutional for the President to detain these individuals without charging them with some crime, like treason or something else, isn't that correct, sir?

Judge ALITO. Yes, that's correct. This is a case where Justice O'Connor's view of the scope of Executive power was broader, considerably broader, than Justice Scalia's. Justice Scalia's position was that unless habeas corpus is suspended, and there are only limited circumstances in which that can take place, then there would have to be a criminal trial.

Senator CORNYN. Judge Scalito, my—Alito, excuse me. After talking about Judge Scalia—you know what I was thinking in the back of my mind, a nickname that you have acquired sometimes, and I apologize.

But the fact is that people try to characterize judges as being somewhere on the political spectrum or making results-oriented decisions based on some ideology. But the fact is, and I will just ask you if you agree with this, whether good judges who try to apply the law to cases and facts that come before them on an individual basis without regard to who wins and who loses, their decisions could be characterized as liberal, conservative, and anywhere in between. Has that been your experience?

Judge ALITO. I think that is correct, Senator. I think that all these labels when you are trying to describe how judges behave, how they do their work, have their limitations and different people use them in different ways.

Senator CORNYN. Thank you very much.

Chairman SPECTER. Well, thank you very much, Senator Cornyn, for that round of questions. When Senator Cornyn misstates even one word, with his competency, you know it is getting late.

[Laughter.]

Chairman SPECTER. Thank you, Judge Alito, for your—we can all agree, there may be some areas of controversy among the 18 of us, but I think we can all agree about your stamina and your poise and your good humor and even some subtle humor.

Your family has shown the same kind of stamina. The crowd has pretty well emptied out, but the Alitos are all still here and they have provided not only support but occasion for a comment or two. I noticed a big smile on your wife's face when you were asked if you stopped beating your wife.

[Laughter.]

Judge ALITO. I wasn't asked whether she had stopped beating me.

[Laughter.]

Chairman SPECTER. Now that is some of that subtle humor that your profiles talk about. We would like to see a little more of it, Judge. Perhaps if we went 11 hours instead of 10 hours, we would get to that.

Senator LEAHY. Oh, please don't.

[Laughter.]

Chairman SPECTER. I have been vastly—

Senator LEAHY. I will certify that he is very, very funny. Just don't do the other two hours.

[Laughter.]

Chairman SPECTER. That raises the question as to what else you will certify to, Senator Leahy.

Senator LEAHY. That is enough for today.

[Laughter.]

Chairman SPECTER. I want to make one comment, which I have been pondering as to whether I ought to make it, but there is a story which is inapplicable to you, Judge Alito, so I think I can make it. The question is always raised, who is behind a successful man, and the answer is a surprised mother-in-law.

[Laughter.]

Chairman SPECTER. But you have negated that infrequently told story.

So I want to thank you for your testimony today and I want to thank my colleagues for what we are proceeding to do here in accordance with our commitment to have a full, fair, and dignified hearing. I think we are on the way. These proceedings are being very broadly covered. You can't pick up the front page of any newspaper in America without seeing your smiling face, Judge. In an era where the media is filled with criticism about the Congress, I think it is a good day for the U.S. Congress to have these proceedings because people have been watching them and they see long hours and they see seriousness and they see important issues and they see the kind of dignity which we have had here today. I thank my colleagues and I thank you, Judge Alito.

We will resume this hearing tomorrow morning at 9:30.

[Whereupon, at 7:03 p.m., the Committee was adjourned, to reconvene on Wednesday, January 11, 2006, at 9:30 a.m.]

NOMINATION OF SAMUEL A. ALITO, JR., OF NEW JERSEY, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, JANUARY 11, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m., in room 216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Grassley, Kyl, DeWine, Sessions, Graham, Cornyn, Brownback, Coburn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin.

Chairman SPECTER. The Judiciary Committee will now proceed with the confirmation hearing for Judge Alito for the Supreme Court of the United States.

Welcome back, Judge Alito.

We have three members who have not had their first round of questioning of 30 minutes, and we will proceed there, and then we will have a second round of questioning for 20 minutes each. I expect we will need to work a long day today. It is my hope that we might finish the questioning of Judge Alito. That might be overly optimistic, but we will see how things go.

Senator Durbin, you are recognized for 30 minutes.

Senator DURBIN. Thank you very much, Mr. Chairman.

Senator LEAHY. Before we start the clock on Senator Durbin, if I might say on the questions, one, I admire the stamina both of the nominee and his family, but a number of us have been troubled by what we see as inconsistencies in some of the answers, and we are going to want to go into those in some depth, on the issue of one person/one vote, Vanguard recusal, unitary theory of Government, CAP and so on.

I want to clear up in my mind and in the minds of many over here what we see as inconsistencies. I know many have announced up here exactly how they are going to vote before they even ask questions. I am one of the one who likes to make up my mind after asking the questions, so there will be a number more.

Chairman SPECTER. Thank you, Senator Leahy. I appreciate the comment. There are many issues. Judge Alito has responded for about 7½ hours so far, and we are going to have another hour and a half on opening statements, and then with each Senator having 20 minutes on a second round, six more hours. So we will see if

he has covered the waterfront, and this will be a full and fair hearing. We will give every opportunity to ask the questions.

Senator LEAHY. Mr. Chairman, with you as Chairman, I know it will be a full and fair hearing, and that is one thing that every single Democrat on this side is aware of.

Chairman SPECTER. I think that is very important for the nominee, for the Committee and for the country, and we will do that. The adjunct to full, fair is dignified, and I think so far we are on track.

OK, Senator Durbin, keep us on track. Senator Durbin is recognized. We will start the clock at 30 minutes.

Senator DURBIN. Thank you very much, Mr. Chairman.

Judge Alito, thank you for coming for the second day and not quite the end of the first round. I thank your family for their patience, listening to all of our questions, and I hope that at the end of the day we will feel that we have really added something to the process of choosing a person to serve in a lifetime appointment to the highest Court in our land.

I listened to you carefully yesterday address an issue which is very important to me, the *Griswold* case, because I think that it is a starting point for me when it comes to appointments to the Supreme Court. If I had any doubt in my mind that a Supreme Court nominee recognized the basic right of privacy of American citizens as articulated in *Griswold*, I could not support the nominee. And I listened as you explained that you supported that right of privacy and that you found the *Griswold* decision grounded in the Fifth Amendment as well as the 14th Amendment.

I would ask you at this point—you obviously support *Brown* v. *Board of Education*, do you, and the finding of the Court in that?

Judge ALITO. Certainly, Senator.

Senator DURBIN. Do you believe that the Constitution protects the right of children in America to be educated in schools that are not segregated?

Judge ALITO. Absolutely, Senator. That was one of the greatest, if not the single greatest thing that the Supreme Court of the United States has ever done.

Senator DURBIN. As you read that Supreme Court decision, that historic decision, they find the basis for that decision was the Equal Protection Clause of our Constitution.

Judge ALITO. Yes, they did, and that was, I think—of course, we fought a Civil War to get the 14th Amendment and to adopt the constitutional principle of equality for people of all races.

Senator DURBIN. The reason I ask you about those two cases is that neither of those cases referred to explicit language in the Constitution. Those cases were based on concepts of equality and liberty within our Constitution, and the *Griswold* case took that concept of liberty and said it means privacy, though the word is not in our Constitution, and the *Brown* v. *Board of Education* case took the concept of equality, equal protection, and said, that means public education will not be segregated. I raise that because I listened carefully as Senator Schumer asked you yesterday about *Roe* v. *Wade*, and I could not understand your conclusion. You conceded the fact that we have free speech because it is explicit in our Constitution, a protected constitutional right, and yet, when Senator

Schumer asked you repeatedly, "Do you find that *Roe* v. *Wade* established and recognized a constitutional protection for a woman to make this most private decision," you would not answer. You would not give a direct answer. On two Supreme Court cases, *Griswold* and *Brown* now, you have said, just as we started this hearing, that you believe there is a constitutional basis for this protection and for this right, and yet when it came to *Roe* v. *Wade* you would not.

Most of us are troubled by this 1985 memo. You said yesterday you would have an open mind when it came to this issue. I am sorry to report that your memo seeking a job in the Reagan administration does not evidence an open mind. It evidences a mind that, sadly, is closed in some areas. Yesterday when you were asked about one man/one vote, you clarified it, said those were my views then, they are not my views now. When Senator Kohl asked you about the power and authority of elected branches as opposed to others, no, you said, I want to clarify that is not my view now.

And yet, when we have tried to press you on this critical statement that you made in that application, a statement which was made by you that said the Constitution does not protect the right to an abortion, you have been unwilling to distance yourself and to say that you disagree with that. I think this is critically important, because as far as I am concerned, Judge Alito, we have to rely on the Supreme Court to protect our rights and freedoms, especially our right to privacy. For you to say that you are for *Griswold*, you accept the constitutional basis for *Griswold*, but you cannot bring yourself to say there is a constitutional basis for the right of a woman's privacy when she is making a tragic, painful decision about continuing a pregnancy that may risk her health or her life, I am troubled by that.

Why can you say unequivocally that you find constitutional support for *Griswold*, unequivocally you find constitutional support for *Brown*, but cannot bring yourself to say that you find constitutional support for a woman's right to choose?

Judge ALITO. *Brown* v. *Board of Education*, as you pointed out, is based on the Equal Protection Clause of the 14th Amendment, and the 14th Amendment, of course, was adopted and ratified after the Civil War. It talks about equality. It talks about equal protection of the law, and the principle that was finally recognized in *Brown* v. *Board of Education*, after nearly a century of misapplication of the 14th Amendment, is that denying people the opportunity, people of a particular race the opportunity to attend schools, or for that matter, to make use of other public facilities that are open to people of a different race, denies them equality. They're not treated the same way. An African-American is not treated the same way as a white person when they're treated that way, so they're denied equality, and that is based squarely on the language of the Equal Protection Clause and on the principle, the principle that was—the magnificent principle that emerged from this great struggle that is embodied in the Equal Protection Clause.

Griswold concerned the marital right to privacy, and when the decision was handed down, it was written by Justice Douglas, and he based that on his theories of—his theory of emanations and pe-

numbras from various constitutional provisions, the Ninth Amendment and the Fourth Amendment, and a variety of others, but it has been understood in later cases as based on the Due Process Clause of the 14th Amendment, which says that no person shall be denied due process—shall be denied liberty without due process of law. And that's my understanding of it.

And the issue that was involved in *Griswold*, the possession of contraceptives by married people, is not an issue that is likely to come before the courts again. It's not likely to come before the Third Circuit, it's not likely to come before the Supreme Court, so I feel an ability to comment, a greater ability to comment on that than I do on an issue that is involved in litigation.

And what I have said about *Roe* is that if the issue were to come before me if I am confirmed, and I'm on the Supreme Court, and the issue comes up, the first step in the analysis for me would be the issue of *stare decisis*, and that would be very important. The things that I said in the 1985 memo were a true expression of my views at the time from my vantage point as an attorney in the Solicitor General's Office, but that was 20 years ago, and a great deal has happened in the case law since then. *Thornburgh* was decided, and then *Webster* and then *Casey* and a number of other decisions. So the *stare decisis* analysis would have to take account of that entire line of case law.

And then if I got beyond that, I would approach the question—and of course in *Casey*, that was the beginning and the ending point of the analysis in the joint opinion. If I were to get beyond that, I would approach that question the way I approach every legal issue that I approach as a judge, and that is to approach it with an open mind, and to go through the whole judicial process which is designed—and I believe strongly in it—to achieve good results, to achieve good decisionmaking.

Senator DURBIN. This is what troubles me, that you do not see *Roe* as a natural extension of *Griswold*, that you do not see the privacy rights of *Griswold* ended by the decision in *Roe,* that you decided to create categories of cases that have been decided by the Court that you will concede have constitutional protection, but you have left in question the future of *Roe* v. *Wade*.

Yesterday, Senator Specter asked you, as he asked John Roberts before you, a series of questions about whether or not you accept the concept that this is somehow a precedent that we can rely on, that is embedded in our experience, that if it were changed it would call into question the legitimacy of the Court, and time and time again he brought you to the edge, hoping that you would agree, and rarely if ever did you acknowledge that you would agree. You made the most general statement that you believe reliance was part of *stare decisis*.

But let me just ask you this. John Roberts said that *Roe* v. *Wade* is the settled law of the land. Do you believe it is the settled law of the land?

Judge ALITO. *Roe* v. *Wade* is an important precedent of the Supreme Court. It was decided in 1973, so it has been on the books for a long time. It has been challenged on a number of occasions, and I discussed those yesterday, and the Supreme Court has reaffirmed the decision, sometimes on the merits, sometimes in *Casey*

based on *stare decisis*, and I think that when a decision is challenged and it is reaffirmed that strengthens its value as *stare decisis* for at least two reasons. First of all, the more often a decision is reaffirmed, the more people tend to rely on it, and second, I think *stare decisis* reflects the view that there is wisdom embedded in decisions that have been made by prior Justices who take the same oath and are scholars and are conscientious, and when they examine a question and they reach a conclusion, I think that's entitled to considerable respect, and of course, the more times that happens, the more respect the decision is entitled to, and that's my view of that. So it is a very important precedent that—

Senator DURBIN. Is it the settled law of the land?

Judge ALITO. It is a—if settled means that it can't be re-examined, then that's one thing. If settled means that it is a precedent that is entitled to respect as *stare decisis*, and all of the factors that I've mentioned come into play, including the reaffirmation and all of that, then it is a precedent that is protected, entitled to respect under the doctrine of *stare decisis* in that way.

Senator DURBIN. How do you see it?

Judge ALITO. I have explained, Senator, as best I can how I see it. It is a precedent that has now been on the books for several decades. It has been challenged. It has been reaffirmed, but it is an issue that is involved in litigation now at all levels. There is an abortion case before the Supreme Court this term. There are abortion cases in the lower courts. I've sat on three of them on the Court of Appeals for the Third Circuit. I'm sure there are others in other courts of appeals, or working their way toward the courts of appeals right now, so it's an issue that is involved in a considerable amount of litigation that is going on.

Senator DURBIN. I would say, Judge Alito, this is a painful issue for most of us. It is a difficult issue for most of us. The act of abortion itself is many times a hard decision, a sad decision, a tragic decision. I believe that for 30 years we have tried to strike a balance in this country to say it is a legal procedure, but it should be discouraged. It should be legal but rare, and we should try to find ways to reduce the incidence of abortion. But as I listen to the way that you have answered this question this morning and yesterday, and the fact that you have refused to refute that statement in the 1985 job application, I am concerned. I am concerned that many people will leave this hearing with a question as to whether or not you could be the deciding vote that would eliminate the legality of abortion, that would make it illegal in this country, would criminalize the conduct of women who are seeking to terminate pregnancies for fear of their lives and the conduct of doctors who help them. That is very troubling, particularly because you have stated that you are committed to this right of privacy.

If I could move to another issue that came up yesterday, I did not understand your answer to one question and I want to clarify it. This so-called Concerned Alumni of Princeton. You noted in your application for a job with the Department of Justice you belonged to two organizations, the Federalist Society and the Concerned Alumni of Princeton. I will not get into Federalist Society, because every time I say those words they go into a rage that I am some-

how guilty of McCarthy-like tactics, asking who are these people in the Federalist Society? I will not touch it.

Let me just go to the Concerned Alumni of Princeton. I did not understand your answer. Your answer said something about ROTC being discontinued at Princeton University. I know you were involved in ROTC. I am told that by the time you filled out this application, ROTC had been restored. I do not believe you were suggesting that bringing more women and minorities to Princeton would somehow jeopardize the future of ROTC. I do not know that that is the case.

But there is a woman named Diane Weeks, who was a colleague of yours in the New Jersey U.S. Attorney's Office, and she said that she was troubled by your membership in this group. She said you had a first-rate legal mind, but here is what she went on to say. "When I saw Concerned Alumni of Princeton on that 1985 job application, I was flabbergasted," she said. "I was totally stunned. I couldn't believe it. CAP made it clear to women like me that we were not wanted on campus, and he is touting his membership in this group in 1985, 13 years after he graduated? He's not a young man by this point," she said, "and I don't buy for a second that he was doing it just to get a job. Membership in CAP gives a good sense of what someone's personal beliefs are. I'm very troubled by this, and if I were in the Senate, I would want some answers."

I don't think explaining discontinuing ROTC at Princeton is an answer. What is your answer? Why did you include this controversial organization as one of your qualifications for being part of the Reagan administration? As you said, with your background, with your immigrant background and the fact that Princeton had just started allowing people of your background as students, how could you identify with a group that would discriminate against women and minorities?

Judge ALITO. Well, Diane Weeks was an Assistant U.S. Attorney in the U.S. Attorney's Office in New Jersey, and somebody that I hired, and one of many women whom I hired when I was U.S. Attorney, and I think that illustrates my attitude toward equality for women.

I've said what I can say about what I can recall about this group, Senator, which is virtually nothing. I put it down on the '85 form as a group in which I was a member. I didn't say I was anything more than a member. And since I put it down, I'm sure that I was a member at the time, but I'm also sure—and I have racked my memory on this—that if I had participated in the group in any active way, if I had attended meetings or done anything else substantial in connection with this group, I would remember it, and if I had renewed my membership, for example, over a period of years, I'm sure I would remember that. So that's the best I can reconstruct as to what happened with this group.

I mentioned, in wracking my memory about this, I said, what would it have been, what could it have been about the administration of Princeton that would have caused me to sign up to be a member of this group around the time of this application? And I don't have a specific recollection, but I do know that the issue of ROTC has bothered me for a long period of time. The expulsion of

the units at the time when I was a student there, struck me as a very bad thing for Princeton to do.

Senator DURBIN. Do women and minorities have anything to do with that?

Judge ALITO. No, and I did not join this group, I'm quite confident, because of any attitude toward women or minorities. What has bothered me about—what bothered me about the Princeton administration over a period of time was the treatment of ROTC, and after the unit was brought back, I know there's been a continuing controversy over a period of years about whether it would be kept on campus, whether in any way this was demeaning to the university to have an ROTC unit on campus, whether students who were enrolled in ROTC could receive credit for the courses, whether the members of—whether the ROTC instructors could be considered in any way a part of the faculty. All of this bothered me, and it is my recollection that it continued over a period of time.

Senator DURBIN. Let me ask you, if I might, to reflect on a couple other things. You are a Bruce Springsteen fan?

Judge ALITO. I am to some degree, yes.

Senator DURBIN. I guess most people in New Jersey would be, they should be.

Judge ALITO. There was the movement sometime ago—we don't have an official State song, and there was a movement to make "Born to Run" our official State song, but it didn't quite make it.

Senator DURBIN. We will stick with Lincoln in Illinois, but I can understand your commitment to Bruce Springsteen. They once asked him, "How do you come up with the songs that you write and the characters that are in them?" And he said, "I have a familiarity with the crushing hand of fate." It is a great line.

I want to ask you about the crushing hand of fate in several of your decisions. *Riley* v. *Taylor*. This cas involved the murder conviction of an African-American defendant, and the question was raised as to whether he had a fair trial, and the people who argued in his defense said that when we take a look at the various people who were involved in these jury pools in the murder cases here, we find that the local prosecutors had eliminated all the African-Americans in four murder trials that had taken place during the year that led up to his trial. And they raised the question in his case whether there had been a conscious effort to eliminate African-American jurors in this case involving an African-American defendant.

And you dismissed the statistical evidence of these all-white juries, and you made a statement that said the significance of an all-white jury was as relevant as the fact that five of the past six Presidents of the United States have been left-handed.

That is a troubling analogy, and I am not the only one troubled. Your colleagues on the Third Circuit were troubled as well. Here is what they said: "The dissent"—your dissent—"has overlooked the obvious fact that there is no provision in the Constitution that protects persons from discrimination based on whether they are right-handed or left-handed. To suggest any comparability to striking of jurors based on their race is to minimize the history of discrimination against prospective black jurors and black defendants."

Why did you use that analogy that apparently is so inappropriate?

Judge ALITO. Well, the analogy went to the issue of statistics and the use and misuse of statistics and the fact that statistics can be quite misleading. Statistics are very powerful, but statistics can also be very misleading, and that's what that was referring to. There's a whole—I mean, statistics is a branch of mathematics, and there are ways to analyze statistics so that you draw sound conclusions from them and avoid erroneous conclusions from them. Sometimes when you see a pattern, it's the result of a cause, and sometimes when you see something that looks like it might be a pattern, it's the result of chance.

Riley was a very, very difficult case, and I can tell you I struggled over that case because the issue of racial discrimination in the criminal justice system is an issue of enormous importance. Obviously, it's very important for the defendant. It's important for the society so that everybody knows that everyone in this country is treated equally regardless of race. And it's important for law enforcement, because I know from years as a prosecutor that nothing is a greater poison for law enforcement than even the slightest hint of unfairness.

The issue of racial discrimination in the jury had to be viewed by our court and by me under the habeas corpus statute that Congress passed, and that gave us an important role to play, but a very limited role. The Pennsylvania—and what the habeas corpus statute is that if the State courts have decided a question on the merits and they've applied the correct legal standard, the correct constitutional standard, we can't authorize a granting of a writ of habeas corpus unless they were unreasonable. It's not enough for us to say, "We don't agree with it." We have to say, "You were unreasonable."

Now, I think seven members of the Pennsylvania judiciary—well, I think there were more. There was the judge who heard the State habeas case and the Pennsylvania Supreme Court, and the Pennsylvania Supreme Court, as I recall, was unanimous on the issue that there hadn't been racial discrimination in the selection of the jury in the case.

Then the case came up to us, and the issue was whether the State courts were unreasonable in finding that the particular peremptory challenges at issue in this case were not based on race. And it was a tough question, but I didn't see how we could overturn what they had done under the habeas standard. Now—

Senator DURBIN. I would just say, Judge, in many of these tough questions as I read through your cases, you end up ruling in favor of established institutions and against individuals. Let me tell you another one, *Pirolli* v. *World Flavors*. Remember this case? A mentally retarded individual, Kenneth Pirolli, physically harassed at his workplace, subjected to a hostile, abusive work environment, and sexually assaulted by his coworkers. According to his deposition testimony, he said they attempted to rape him.

I could read to you what is in that record here, but it is so graphic and it tells in such detail the sexual assault that he was subjected to that I am not going to read it into the record. But I bet you remember it.

And when it came to whether or not he should have a trial, as to whether he was entitled to bring his case before a jury, you said no, stand by the summary judgment, don't take this to a jury. You dissented from the majority position here. And the reason you dissented was, I think, significant. It wasn't about Kenneth Pirolli or the merits of his case. It was about the conduct and efforts of his lawyer.

You noted the fact that his lawyer had not adequately provided citations in his brief to places in the record describing the harassment. So you held Kenneth Pirolli responsible for the fact that his lawyer didn't do a good job—at least in your view—and denied him his day in court. How do you explain that crushing hand of fate on this man who was a victim of sexual harassment?

Judge ALITO. Well, Senator, the district court thought that the defendant in that case was entitled to summary—was entitled to summary judgment, and so I think that says something about the facts of the case and whether it was a particularly strong case.

There's a very important principle involved in the appellate practice, and I think it goes with the idea of judicial self-restraint. It is that certain things are to be decided at certain levels in the court system, and that requires that parties raise issues in the trial court; and that if they do not raise the issue in the trial court, then absent some extraordinary circumstances, they shouldn't be able to raise the issue on appeal. And that was the principle there.

Now, this was not a criminal case. In a criminal case, there's a constitutional right to counsel, and so a person can claim ineffective assistance of counsel. And we treat that issue differently in criminal cases than we do in civil cases.

Senator DURBIN. I would just say that you are arguing on the merits of the district court decision. Your statement in dissent criticized his lawyer for the brief that they presented to your court. That seems to me to be an unfair treatment of a man who I think deserved a day in court.

Let me ask you about another group looking for a day in court, the *RNS Services* v. *Secretary of Labor* case that I referred to in my opening statement. It is a timely case. It is about mine safety. You know what happened in West Virginia a few days ago and yesterday in the State of Kentucky where there are serious questions being raised about whether there is adequate mine safety. And in this case, there was a question as to whether or not the Federal and State mine safety provisions applied to a company in a certain activity. And you concluded they did not apply. You concluded that you would narrowly construe the statute passed by Congress, and in construing it in that way, that the requirements of inspecting this mine location would not be subject to Federal law.

Again, you dissented and you ruled on the side of the company, on the side of the established institution, against the coal miners and against the workers in this circumstance. It is a recurring pattern. The crushing hand of fate here seems to always come down against the workers and the consumers and in favor of these established institutions and corporations.

How would you explain the fact that you would so narrowly construe a statute when you knew that the lives and safety of coal miners were at stake?

Judge ALITO. The facility that was involved in that case was not a mine as a lay person would think of a mine. It wasn't an underground facility. It wasn't like the facility in West Virginia where the terrible accident occurred a few days ago. It was basically a pile of coal that was being loaded onto trucks to be transported to another place. The definition of a mine under the Federal law is very broad, and it's not limited to what ordinary people would think of as a mine. And there was an argument that this facility, which, as I said, as I recall, was basically a big pile of coal on top of the ground and coal was being hauled away to a cogeneration facility. Is that a mine? An ordinary person would look at that and say that's not a mine, that's a pile of coal.

But the issue in the case was the kind of technical issue of interpretation that we get all the time, and the question was is this a mine in the sense of the law, and I thought it was not a mine in the sense of the law.

Now, that conclusion, I don't believe, would mean that this facility would be spared safety regulation at either the Federal or local level. It's been a long time since I worked on that case, but I would imagine that if the facility is not governed by the Federal mining laws, it would be covered by OSHA, by the Occupational Safety and Health Administration, and perhaps by State law. So the issue would not be whether this facility would be allowed, which was not a mine in the ordinary sense, would be allowed to operate in an unsafe fashion. It was which body of laws and regulations would govern the facility.

Senator DURBIN. Judge, I would say that your opinion did not prevail. The two other judges, both Reagan appointees, who saw this case on the side of the workers, understood that the wording of the law is as follows: "Congress declares that the first priority and concern of all in the coal or other mining industry must be the safety and health of its most precious resource—the miner." And instead of taking the obvious interpretation that these were people working in the mining industry, even if they were outside of the underground mine and the danger that it presents, you drew this statute as narrowly as you could—construed it as narrowly as you could to take the company position here that the Federal Mine Safety and Health Administration did not have jurisdiction.

I find this as a recurring pattern, and it raises a question in my mind whether the average person, the dispossessed person, the poor person who finally had their day in court and may make it all the way through the process to the Supreme Court, are going to be subject to the crushing hand of fate when it comes to your decisions. They have been many times at the Third Circuit, and that is a concern which I will continue when we have further questions in the next round.

Thank you, Mr. Chairman.

Chairman SPECTER. Do you care to respond, Judge Alito?

Judge ALITO. Yes, could I just say a couple of words? That case was a case of statutory interpretation and applying the statute, and that's how I thought it came out. There have been many other cases that I have worked on on the court of appeals where I have come out in favor of the small person who was challenging a big institution, and I could mention a number of them.

Let me just mention *Shore* v. *Regional High School* because I think it has some relation to the *Pirolli* case, which you mentioned. This was a case in which a high school student had been bullied unmercifully by other students in his school because of their perception of his sexual orientation. He had been bullied to the point of attempting to commit suicide, and his parents wanted to enroll him at an adjacent public high school, and the school board said, no, you can't do that. And I wrote an opinion upholding their right to have him placed in a safe school in an adjacent municipality.

That is just one example, but all of these cases involve what judges are supposed to do, which is to take the law and apply it to the particular facts of the case that is before them.

Chairman SPECTER. Thank you very much, Judge Alito.

Senator Brownback?

Senator BROWNBACK. Thank you very much, Mr. Chairman.

Good morning, Judge Alito, Mrs. Alito, family members. Good to have you here.

I have got a number of areas I would like to ask you questions about, and I am hopeful we can get through them and maybe reduce the need of time in a second round, which would probably be pleasing to your ears.

I want to first go at this area, because it seems to keep coming up, that I think is really not applicable and not reflective of your record that you always take the side of the big institution and against the little guy, as you just stated. But then I want to get into a number of areas of constitutional law, some of which you have written on, religious freedom type cases, takings cases. I would like to get into some of these areas.

But I want to enter into the record, Mr. Chairman, a letter from a former law clerk of yours, David Walk, dated January 6, 2006. David worked with you in the New Jersey U.S. Attorney's Office. I don't know if you remember David or not.

Judge ALITO. I do. He was a fine—

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

Senator BROWNBACK. Thank you.

He is a lifelong Democrat, former member of the ACLU, and talks about how fair you were to everybody's rights. But then he cites the case of Franklin Igbonwa. This was a Nigerian set to be deported for drug dealing who had testified against other Nigerian drug dealers and was fearful of being deported, that he would be killed once back in Nigeria. The other two judges said his case—he shouldn't be believed on the face of it, and you said he should and that the trial court should have given more deference to this Nigerian to be deported. This was somebody that David Walk represented. Talk about a little guy in a case, and that is one that is cited in this particular record and letter that I would hope my colleague from Illinois could take a chance at, because it is a legitimate point of view. And saying, well, it looks like you always take one side or the other, here is where another side was taken.

And then here is a letter from another individual who worked with you, Cathy Fleming, lifelong Democrat, president-elect, National Women's Bar Association, gives an unqualified endorsement of you. She says, "By providing my credentials as an outspoken

women's rights advocate and liberal-minded criminal defense attorney, I hope you will appreciate the significance of my unqualified and enthusiastic recommendation of Sam Alito for the Supreme Court."

I think one can kind of look in the past and try to say, well, OK, there is this problem, there is that, but then when people that know you well put their names to letters saying differently, I think that's also something we should consider, and I would ask that that letter be put into the record as well.

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

Senator BROWNBACK. Thank you.

Judge Alito, the Supreme Court has gotten a number of things wrong at times, too. That would be correct, and the answer when the Court gets things wrong is to overturn the case. That is the way it works. Isn't that correct?

Judge ALITO. Well, when the Court gets something wrong and there's a prior precedent, then you have to analyze the doctrine of *stare decisis*. It is an important doctrine, and I have said a lot about it, but—

Senator BROWNBACK. Wait, let me just ask you, was *Plessy* wrong, *Plessy* v. *Ferguson*?

Judge ALITO. *Plessy* was certainly wrong.

Senator BROWNBACK. OK, and you have gone through this. *Brown* v. *Board of Education*, which is in my hometown of Topeka, Kansas. I was there last year at the dedication of the schoolhouse. Fifty years ago, that overturned *Plessy*. *Plessy* had stood on the books since 1896. I don't know if you knew the number. And I have got a chart up here. It was depended upon by a number of people for a long period of time. You have got it sitting on the books for 60 years, twice the length of time of *Roe* v. *Wade*. You have got these number of cases that considered *Plessy* and upheld *Plessy* to the dependency. And yet *Brown* comes along, 1950s case, poor little girl has to walk by the all-white school to go to the black school in Topeka, Kansas. And the Court looks at this and they say unanimously that is just not right.

Now, *stare decisis* would say in the *Brown* case you should uphold Plessy. Is that correct?

Judge ALITO. It certainly would be a factor that you would consider in determining whether to overrule it.

Senator BROWNBACK. But obviously—

Judge ALITO. A doctrine that you would consider.

Senator BROWNBACK. Obviously, *Brown* over turned it, and thank goodness it did. Correct?

Judge ALITO. Certainly.

Senator BROWNBACK. It overturned all these super duper precedents that had been depended upon in this case because the Court got it wrong in *Plessy*. Is that correct?

Judge ALITO. The Court certainly got it wrong in *Plessy*, and it got it spectacularly wrong in *Plessy*, and it took a long time for that erroneous decision to be overruled.

One of things I think that people should have understood is that separate facilities, even if they were absolutely equal in every re-

spect, even if they were identical, could never give people equal treatment under the law.

Senator BROWNBACK. They don't.

Judge ALITO. I think they should have recognized that. But one of the things that was illustrated in those cases—and *Sweatt* v. *Painter*, the last one on the list brought that out—was that, in fact, the facilities, the supposedly equal facilities were never equal, and the continuing series of litigation that was brought by the NAACP to challenge racial discrimination illustrated—if the illustration was needed, the litigation illustrated that, in fact, the facilities that were supposedly equal were not equal. And that was an important factor, I think, in leading to the decision in *Brown* v. *Board of Education*

Senator BROWNBACK. I want to give you another number, and that is, in over 200 other cases, the Court has revisited and revised earlier judgments. In other words, in some portion or in all of the cases, the Court got it wrong in some 200 cases. And thank goodness the Court is willing to review various cases.

I want to give you an example of a couple, though, that the Court hasn't reviewed yet that I think are spectacularly wrong. The 1927 case of *Buck* v. *Bell*, I don't know if you are familiar with that case. The Court examined a Virginia statute that permitted the sterilization of the mentally impaired. Carrie Buck, a patient at the so-called Virginia State Colony for Epileptics and Feeble Minded, was scheduled to be sterilized after doctors alleged she was a genetic threat to the population due to her diminished mental capacity. Buck's guardian challenged the decision to have Carrie sterilized all the way to the Supreme Court, but in an 8–1 decision, the Court found that it was in the State's interest to have her sterilized.

The majority opinion written by Justice Oliver Wendell Holmes said, "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence."

Clearly, some precedents are undeserving of respect because they are repugnant to the Constitution. Isn't *Plessy* repugnant to the Constitution?

Judge ALITO. It certainly was repugnant to the Equal Protection Clause.

Senator BROWNBACK. And the vision of human dignity, isn't *Buck* and those sort of statements by Oliver Wendell Holmes repugnant to the Constitution?

Judge ALITO. I think they are repugnant to the traditions of our country. I don't think there is any question about that.

Senator BROWNBACK. I will give you another case, the *Korematsu* v. *United States* case, a 1944 case. World War II broke out following Japanese attacks on Pearl Harbor. Feelings spread that Japanese-Americans, both naturalized and those born in the United States, might not be loyal to the United States and should be removed from the West Coast. So great was the fear that even the esteemed writer Walter Lippmann stated that, "Nobody's constitutional rights include the right to reside and do business on a

battlefield. There is plenty of room elsewhere for him to exercise his rights."

President Roosevelt signed an Executive order removing them. *Korematsu* contested the constitutionality, Fred Korematsu did, of his internment. In *Korematsu* v. *the United States*, the Supreme Court held that military necessity justified the internment program and that Fred Korematsu had no protection against relocation under the Constitution.

Of course, that was later overturned—excuse me, that was never overturned. In 1948, Congress enacted the Japanese American Evacuation Claims Act to provide some monetary compensation. In 1980, Congress again revisited the case. In 1988, Congress passed legislation apologizing for the internment and awarded each survivor $20,000. In 1999, Fred Korematsu was awarded the Presidential Medal of Freedom, the highest civilian honor that anyone can receive. Justice has not been done because *Korematsu* remains on the books. It is still on the books.

Roe v. *Wade*. You have had every question on that, but I want to point out its difficulty. My colleagues on the other side look at this as completely settled law, but let's see what the legal experts say about how settled it is.

Laurence Tribe, who will be here to testify, I believe, probably against you in a little bit. Let's see what he says, a professor of law at Harvard: "One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found." Settled law? Super duper precedents? Laurence Tribe has some questions about it.

Justice Ruth Bader Ginsburg: "*Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Provoked, not resolved, conflict—one of your potential colleagues says.

Edward Lazarus, former clerk to Chief Justice Harry Blackmun, who wrote *Roe*: "As a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible. I say this as someone utterly committed to the right to choose, as someone who believes such a right was grounded elsewhere in the Constitution, instead of where *Roe* placed it, and as someone who loved *Roe's* author like a grandfather." Settled law? Edward Lazarus has some questions about it being settled.

Let's look at John Hart Ely, former Dean of Stanford Law School, excellent law school in the country, one of the top law schools in the country: *Roe* v. *Wade* "is not constitutional law and gives almost no sense of an obligation to try to be. What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the Framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the Nation's governmental structure." John Hart Ely. Do you think he thinks *Roe* is settled law? Not constitutional and gives no sense of an obligation to try to be.

Alan Dershowitz, professor of law, Harvard Law School, one of the top law schools in the country. It is not Princeton, but... *Roe* v. *Wade* and *Bush* v. *Gore* "represent opposite sides of the same

currency of judicial activism in areas more appropriately left to the political process. Judges have no special competency, qualifications, or mandate to decide between equally compelling moral claims, as in the abortion controversy. Clear governing constitutional principles are not present in either case." Settled law? Super duper precedents?

I think there are places where the Court gets it wrong, and hopefully they will continue to be willing to revisit it.

Now I want to look at a couple of areas of law in addition to this. Your view of the Constitution—and yesterday you hit at this, I thought, on some of the edges, but I just want to get your thoughts of how you view the Constitution, how you would review it. There are these different schools of thought on this of strict constructionist, living document, originalist, and there are several others that float around out there. How do you generally look at the Constitution? And I am aware yesterday you were saying that some provisions are very clear and some are not, and you seem to apply a different set of viewpoints on those of the Constitution. Could you articulate your view of how you look and interpret the Constitution?

Judge ALITO. First of all, Senator, I think the Constitution means something, and I don't think it means whatever I might want it to mean or whatever any other member of the judiciary might want it to mean. It has its own meaning, and it is the job of a judge, the job of a Supreme Court Justice, to interpret the Constitution, not distort the Constitution, not add to the Constitution or subtract from the Constitution.

In interpreting the Constitution, I think we should proceed in the way we proceed in interpreting other important legal authorities. In interpreting statutes, for example, I think we should look to the text of the Constitution and we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption. But I think we have to recognize that the Constitution is very different from statutes in some important respects. Statutes are often very detailed, and they generally don't exist without revision for very long periods of time. The Constitution was adopted to endure throughout the history of our country, and considering how long our country has existed, it's been amended relatively few times. And the magic of that, I think, is that it sets out a basic structure for our Government and protects fundamental rights. But on a number of very important issues, I think the Framers recognized that times would change, new questions would come up, and so they didn't purport to adopt a detailed code, for example, governing searches and seizures. That was the example I gave yesterday, and I will come back to it. They could have set out a detailed code of search and seizure. They didn't do that. They said that the people are protected against unreasonable searches and seizures, and they left it for the courts—and, of course, the legislative body can supplement this—to apply that principle to the new situations that come up.

Now, when that is done, that doesn't amount to an amendment of the Constitution or a changing of the Constitution. It amounts to—it involves the application of a constitutional principle to the situation at hand.

Senator BROWNBACK. Let me go to a specific area you have written quite a bit about, and that is on religious liberties and free exercise. And I have looked at these cases, and this is going to be an active area of law in front of the Supreme Court. It has been for the last 40 years.

You wrote the case of *ACLU* v. *Schundler*, a Third Circuit case, considered—it is an ACLU challenge to religious displays erected by Jersey City on the Plaza of City Hall. Jersey City for decades had had holiday displays of a menorah and Christmas tree. Litigation resulted in permanent pulling of this. The city came back and said, OK, if that is not good enough, we will put a nativity scene, a menorah, a Christmas tree, Frosty the Snowman, Santa Claus, Kwanzaa symbols, and signs explaining the display. So, OK, if two is not enough, we will add more into it, and they were again challenged by the ACLU. The district court found no constitutional violation.

A panel of the Third Circuit, not including you, reversed that decision. The panel found no basis for the demystification approach, as they put it, and expressed skepticism as to constitutional display.

On remand, the district court held that there was a constitutional violation. The city appealed. You sat on the panel that heard that appeal. In a 2–1 decision, you upheld the constitutionality of the modified display.

In your decision, you specifically cited Justice O'Connor and two particular issues regarding excessive entanglement with religious institutions and Government endorsement or disapproval of religion. Because Justice O'Connor used these factors to uphold similar displays in prior cases, you applied them to your upholding in that case. That is a correct interpretation. Is that correct, Judge Alito?

Judge ALITO. Yes, it is, Senator.

Senator BROWNBACK. Because these are coming up so much in front of the Court, are these types of displays, you feel, generally constitutionally permissible?

Judge ALITO. Well, this is an area in which the Supreme Court has handed down several decisions, and like a lot of the—like a number of the issues that the Court has addressed under the Establishment Clause, it has drawn some fairly fine lines. The first case involving a display of this nature was the Pawtucket, Rhode Island, display that was involved in *Lynch* v. *Donnelly*, and it was a display that was similar to the display in Jersey City. It included both religious and secular symbols. And they found that that was not a violation.

Senator BROWNBACK. I want to jump in here because I have got several ways I want to. When I read your opinions, what I hear you to write is you would rather have a robust public square than a naked public square, that you think there is room for these sorts of displays in the public square.

Judge ALITO. Well, that was exactly what Jersey City had decided in that case, and Jersey City said: We are one of the most religiously diverse, ethnically diverse, racially diverse communities you will find anywhere in the country. This is right across the New York harbor from the Statue of Liberty and from Ellis Island, and it is still an entry point for a lot of people coming into the country.

And so they had—over the course of the year, at the appropriate time, they had a Christmas display, they had a display of a menorah—on that particular year, Hanukkah was early in the month of December, so the display, the menorah was up at a different point. They had a display—they had celebrations for Muslim festivals, for Hindu festivals, for Buddhist festivals, for Latino festivals, for festivals concerning the many ethnic groups in the community. And their view was that this is the way we should show that all of these groups are valuable parts of our community and express our embracing of them. And this display, they said, reflected that philosophy and applying the precedents that the Supreme Court had provided in this area, the Pawtucket case and a later case involving a display in Pittsburgh, Judge Rendell and I, who were the judges in the majority on that case, said this is constitutional, this is consistent with the Establishment Clause.

Senator BROWNBACK. Well, and that is what—as we have had this 40 years of cases, I really hope we can have a public square that celebrates and not that it has got to be completely naked to views, and I appreciate that.

You wrote in a free exercise case, *C.H.* v. *Olivia*, a case in which a child sued through his parents for violation of his free speech and free exercise rights, when his school removed and repositioned a poster he had made of a religious figure that was important to him. It was a picture of Jesus. The poster was part of an assignment which students were instructed to show something for which they were thankful. The district court granted judgment on the pleadings in favor of the defendant, the school district. The Third Circuit affirmed. You dissented in that opinion. Can you elaborate on your reasoning in that particular opinion? Do you remember the case?

Judge ALITO. Yes, Senator, I do. Justice O'Connor pointed out something that's very critical in this area. She said there is a big difference between Government speech endorsing religion and private religious speech, and this case—and private religious speech can't be discriminated against. It has to be treated equally with secular speech. And in this case, this involved a student who—and there were two incidents. One involved reading. The students in the class were told that if they could read at a certain level, they would have—their reward would be to be able to read their favorite story to the class. And this student satisfied those requirements, and the student wanted to read a very simplified version of the story of Jacob and Esau to the class. And the teacher said, "No, you can't read that to the class. You can read that privately to me off in a corner."

And then Thanksgiving was coming along, and the students were told, "Draw a picture of something that you're thankful for," and I guess the teacher expected they were going to draw pictures of football games and turkeys and things like that. But this student drew a picture of Jesus and said, "That's what I'm thankful for." And the teacher put all the other pictures up in the hall, but would not put this student's picture up in the hall because of its religious content.

And that, we found, was a violation of this principle that you have to treat religious speech equally with secular speech. If you ask a student to say something about a topic, what are you thank-

ful for, and the student says something that fits within the topic that the student was asked to talk about, then you can't discriminate against one kind of speech or another.

Senator BROWNBACK. I thought it was a very interesting stance, and I think appropriate, that you took, and I wanted to—obviously very active areas of the law that we have.

I want to look at the issue of checks and balances on the Federal court. It is a very active area here in Congress as a lot of people across the country and certainly Members of Congress have grown the feeling that we can rule however—we can do whatever we want to here, but wait until the Court decides, that it is the Court that have moved beyond judicial restraint. I asked this of John Roberts, and I asked what is—the checks and balances on Congress are obvious, the President can veto a bill, a court can declare something unconstitutional, checks and balances executive branch are clear, they can be challenged, their actions, in the court, the court can say the President can't do that, we cannot appropriate the money from here. We have got checks and balances, and people are well known. Any high school government student would know that.

Checks and balances on the Court. When I talked with John Roberts about this, he said basically the only check and balance is judicial restraint. It is what the Court restrains itself in. And yet you have within the Constitution a provision that is there that I asked him about that I want to ask you about. Article III, Section 2 goes, "In all cases"—excuse me. "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact," and then it goes on with this interesting Exceptions Clause, "with such exceptions, and under such regulations as the Congress shall make." The last phrase known as the Exceptions Clause.

What do you believe is Congress's power to define the jurisdiction of the Supreme Court under the Exceptions Clause?

Judge ALITO. Well, the Exceptions Clause obviously gives Congress the authority to define the appellate jurisdiction of the Supreme Court, and it can provide for various avenues by which cases get to the Supreme Court, and that has changed over the years.

There's been a controversy, never resolved, about the exact scope of the authority. It came up in *Ex Parte McCardle* in the post-Civil War era, and it has been raised by—it has been discussed by scholars in subsequent years, and there are several schools of thought in the question about whether it would be consistent with the Constitution for Congress to eliminate jurisdiction in the Supreme Court over a particular type of case, that's an unresolved issue that the scholars have addressed, and some argue that that falls within the Exceptions Clause, and some argue that it would be inconsistent with other provisions of the Constitution.

Senator BROWNBACK. What I see taking place in this country, as the Court gets more and more involved in tough political issues, is you are going to be pressing other bodies then to say, "Look, we believe these decisions should be here. We believe the issues on the competing interests of an abortion, the mother and the child, should be decided by legislative bodies," but the Court said no. Issue of marriage is coming through the court system right now. As the Court keeps getting involved in these areas, I think you are

going to see these sorts of constitutional issues being explored more and more.

Marriage case I want the take you to because that is making its way through the Federal Court. Forty-five of our 50 States have deemed marriage being between the union of a man and a woman. The State of Nebraska passes a State constitutional amendment, 70 percent of the people voting for it, saying that marriage is the union of a man and a woman. Yet a Federal judge in that case threw out the State constitutional amendment on novel constitutional grounds, and it is now making its way up through the system. The Congress has passed the Defense of Marriage Act, DOMA, passed overwhelmingly, signed into law by President Clinton, basically did two things. First establishes for purposes of Federal law marriage would be defined as the union of a man and a woman, and second, it would provide that no State would be forced to recognize a marriage entered into in another State. A number of legal scholars believe that this second part violates the Full Faith and Credit Clause of the Constitution.

Judge Alito, this case is coming forward, and will probably be resolved in the Federal courts if it is not resolved by the Congress through constitutional amendment. What is your understanding of the meaning of the Full Faith and Credit Clause, and does this apply to the institution of marriage which has been traditionally an issue and an area left up to the States?

Judge ALITO. Well, several constitutional doctrines seem to be implicated by the matters that you discussed. The Full Faith and Credit Clause in general means that one State must honor judgments that are issued by a court of another State, and it's an important part of the process. It is an important part of the Federal system, so that we don't have worrying decisions in different States. It is not my—I have not had cases involving this, but there are—the doctrine has a certain, has certain boundaries to it. There are exceptions, and it covers certain areas and doesn't cover other areas, and a challenge to the Defense of Marriage Act under the Full Faith and Credit Clause would call into question the precise scope of the doctrine.

And I believe that scholars have expressed differing views about how it would apply in that situation, and that's an issue that may well come up within the Federal courts, almost certain to do so.

Senator BROWNBACK. Yes. And I know you cannot express on it. One last thing I would like to get into just very briefly is the Takings Clause in the *Kelo* case that was in a neighboring circuit to yours, *Kelo* v. *City of New London*, where private property was taken by a private—another private group—private property was taken by a public group and given to another private group. Judge O'Connor wrote eloquently in her dissent, "Nothing is to prevent the State from replacing any Motel 6 with the Ritz Carlton, or any home with a shopping mall, or any farm with a factory now."

I just conclude by putting that in front of you, saying that this is one that people have relied upon for a long time, that you could not take private property to another private individual for public use, and I hope that is one that the Court will end up reviewing at some point in time.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Brownback.

Senator Coburn?

Senator COBURN. Thank you, Mr. Chairman. Good morning, long day.

I would like to put a few things into the record if I may. One is just a list of cases where Judge Alito ruled for the little guy. There has been a lot made, and here is a list of nine cases with specifics where he in fact—one of these I think he mentioned, but not the others. And I would like unanimous consent to—

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

Senator COBURN. Actually, there are 15 cases.

I also want to go back and quote from somebody who was a member of CAP, and this is a Judge Napolitano. He is a commentator on one of the news shows. I would like his statements put into the record from yesterday, where he clarified what CAP was about, and clarified the interest of ROTC at Princeton, and the fact that that was one of the leading reasons that that organization was formed, so I would like for those to be admitted as well.

As you know, I am not an attorney. Sometimes it is very disadvantageous on this panel, but at times it is advantageous. I have this little thing that I have to depend on, and I kind of read it for what it says. As you talk about *stare decisis*—is that mentioned anywhere in here?

Judge ALITO. It is not expressly mentioned in the Constitution.

Senator COBURN. It is actually a procedure of common English law, correct?

Judge ALITO. That's its origin, yes.

Senator COBURN. That is its origin, and we use that as a tool for working with the Constitution. Can you recall the number of times that precedents have been reversed by the Supreme Court?

Judge ALITO. I don't know the exact figure, Senator.

Senator COBURN. I think it is around 170 some times, affecting some 225 cases, I believe. That is close. That may not be exactly accurate. So, in fact, it is a tool used to help us with the law, but our Founders did not say you have to use *stare decisis* in this, did they?

Judge ALITO. No, they didn't. They conferred the judicial power on the judiciary, and I think that contemplated that the Federal judiciary would be permitted to proceed with—in accordance with fundamental judicial procedures as they had been known—

Senator COBURN. At the time.

Judge ALITO. At the time.

Senator COBURN. And Article III, section 2 really delineates the scope for the courts in this country, and what it says is, "All cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made under their authority." So that really gives us the scope under Article III, section 2. I was interested when Senator Kyl asked you yesterday about foreign law. That is something extremely disturbing to a lot of Americans, that many on the Supreme Court today will reference or pick and choose the foreign law that they want to use to help them make a decision to interpret our Constitution, where in fact, the oath of office mentions no foreign law. Matter of fact it

says the obligation is to use the United States law, the Constitution and the treaties, and that is exactly what Article III, section 2 says. So there is no reference at all to foreign law in terms of your obligations or your responsibility, and matter of fact, the absence of it would say that maybe this ought to be what we use, and the codified law of the Congress and the treaties rather than foreign law.

The question I have for you—and I could not get Judge Roberts to answer it because of the conflict that might occur afterwards, but I have the feeling that the vast majority of Americans do not think it is proper for the Supreme Court to use foreign law. I personally believe that that is an indication of not good behavior by a Justice, whether it be a Justice at a appellate division, or a magistrate, or a Supreme Court Justice. I just wondered if you had any comments on that comment.

Judge ALITO. Well, I don't think that we should look to foreign law to interpret our own Constitution. I agree with you that the laws of the United States consist of the Constitution and treaties and laws, and I would add regulations that are promulgated in accordance with law. And I don't think that it's appropriate or useful to look to foreign law in interpreting the provisions of our Constitution. I think the Framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world. The purpose of the Bill of Rights was to give Americans rights that were recognized practically nowhere else in the world at the time. The Framers did not want Americans to have the rights of people in France or the rights of people in Russia, or any of the other countries on the continent of Europe at the time. They wanted them to have the rights of Americans, and I think we should interpret our Constitution—we should interpret our Constitution. I don't think it's appropriate to look to foreign law.

I also don't think that it's—I think that it presents a host of practical problems that have been pointed out. You have to decide which countries you are going to survey, and then it is often difficult to understand exactly what you are to make of foreign court decisions. All countries don't set up their court systems the same way. Foreign courts may have greater authority than the courts of the United States. They may be given a policymaking role, and therefore, it would be more appropriate for them to weigh in on policy issues. When our Constitution was being debated, there was a serious proposal to have members of the judiciary sit on a council of revision, where they would have a policymaking role before legislation was passed, and other countries can set up their judiciary in that way. So you'd have to understand the jurisdiction and the authority of the foreign courts.

And then sometimes it's misleading to look to just one narrow provision of foreign law without considering the larger body of law in which it's located. That can be—if you focus too narrowly on that, you may distort the big picture, so for those reasons, I just don't think that's a useful thing to do.

Senator COBURN. It actually undermines democracy because you get a pick and choose, and the people of this country do not get a pick and choose that law, as people from a different country. So it actually is a violation of the Constitution, and to me, I very strong-

ly and adamantly feel that it violates the good behavior, which is mentioned as part of the qualifications and the maintenance of that position.

I am sorry Senator Durbin left. I wanted to razz him a little bit. You have taken quite a bit of criticism on what things that you have written and said in 1985, but I want to put forward, for 45 years Senator Durbin was adamantly pro-life, and he wrote multiple, multiple letters expressing that up until 1989. He is a very strong advocate for the abortion stance and a free right to choose, but I think it is important that the American people—if he has the ability to change his mind on something, something he wrote in 1989, certainly you have the ability to say something was ineptly put. This is just Senator Durbin, I am teasing him a little bit, but I think it is important that people recognize people can change their mind. I continue to believe the Supreme Court's decision in *Roe* v. *Wade* should be reversed. There are other Members that are adamantly pro-abortion, pro the destruction of human life today that have changed their mind, changed their position. So it is hard to be critical of you and on something you had written in 1985, when many of us have backtracked on things that we have said through the years. So I think it puts a little bit of perspective into where we are going.

I want to spend just a minute, if I can, yesterday during Senator Feinstein's questioning there was some discussion about the Health Exception to any regulations pertaining to abortion. And on January 22nd, when *Roe* was decided, the Court also decided *Doe* v. *Bolton*, and in that case the Court ruled that a woman's right to abortion cannot be limited by the State if abortion was sought for reasons of maternal health. As a practicing physician, I agree with that. I have actually performed abortions on women who were going to die if they did not have an abortion, so the choice was somebody alive versus losing both.

The Court defined health as all factors, physical, emotional, psychological, familial, and a woman's age relevant to the well-being of the patient. This exception effectively expanded the right to abortion for any reason through all the entire pregnancy. Since that time, States have been trying to find ways to effectively regulate abortion without intruding on this health exception, but it has proven nearly impossible. The absence of knowledge is something that *Roe* v. *Wade*, which I believe was wrongly decided, has hurt us immensely in this country, and the absence of informed consent on abortion has hurt us immensely.

Mr. Chairman, I would like to enter into the record a study published, a 35-year longitudinal study, which was just released this January from New Zealand, that followed women, 600 women for 35 years from the time of the abortion, that studied the ill health effects of—

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

Senator COBURN. I would also like to enter into the record a Breast Cancer Institute study and analysis of a Lancet 3/25/04 article, and also the testimony of Dr. Elizabeth Shadigian, University of Michigan, Clinical Associate Professor, Department of Obstetrics and Gynecology, as to the complications.

Chairman SPECTER. All of those documents, without objection, will be made a part of the record.

Senator COBURN. It is amazing what we do not know, and as I explained in my opening statement, once we go down a path, the complications associated—the rulings that you make have major impact. I understand the questions that you cannot answer on things that are going to come before us, and I cannot pretend to know what is in your heart about those issues. But what I do know is you were pretty aggressively approached on positions in terms of Justice O'Connor and Executive power. There seemed to be a blinding contradiction during some of your questions that were presented by my colleagues yesterday that raised concerns that you are too close to the Executive and too supportive of Executive power. They wanted to be sure that you respect the role of the judiciary and are free from the influences of the political branches. However, they then argue that you should have the same ideology of Justice O'Connor to maintain the balance on the Court. I have trouble figuring out how they can have it both ways. That is an inherently political desire.

Is there anything in the Constitution, this little document, that says what the ideology ought to be of one Supreme Court Justice replacing another one?

Judge ALITO. The Supreme Court simply gives the President the authority to nominate Justices of the Supreme Court and other Federal judges, and gives Congress the advice and consent responsibility, and doesn't go further than that.

Senator COBURN. And the President, by being elected, the only person in this country who is elected by the whole country, is given that honor and that privilege as well as that responsibility, and then we have the responsibility to advise and consent to that; is that correct?

Judge ALITO. That's correct.

Senator COBURN. But nowhere in the Constitution, nor by precedent—matter of fact, the precedents are just exactly the opposite of that—is it stated that somebody has to have the same philosophy as somebody that is coming off the Court.

Judge ALITO. I think that every Supreme Court Justice is an individual, and I think every nominee is an individual, and no nominee can ever be a duplicate of someone who retires, and particularly when someone retires after such a distinguished career and such a historic career as Justice O'Connor. Nobody can be expected as a nominee to fit that mold.

Senator COBURN. So the fact that you have to fit the Sandra Day O'Connor mold is really a misapplication of—there is no precedent that would say that.

Judge ALITO. The only—if I'm confirmed, I'll be myself. I'll be the same person that I was on the Court of Appeals. That's the only thing that I can say in answer to that.

Senator COBURN. Let me repeat some facts that one of my colleagues mentioned yesterday. Of the 109 Justices to sit on the Supreme Court, nearly half have replaced Justices appointed by another political party. President Clinton replaced Justice White, who dissented on *Roe* v. *Wade*, with Justice Ginsburg, who argued for a right to abortion. Justice Ginsburg was, I think, three votes

against her in the Senate when she was approached, and she took it completely opposite, but she was well qualified. She had integrity, and she was voted onto the Court even though many people knew that her philosophy was very different from theirs; is that true?

Judge ALITO. She was—the vote was 90 something to a small number. I know that, yes.

Senator COBURN. A lot of times in these hearings, you do not get a chance to say, why would you want to be a Justice of the Supreme Court of the United States? Why would you want that responsibility? Why do you want to go through this process to be able to achieve that position? Can you tell the American people why?

Judge ALITO. I think it's a chance to make a contribution. I think it's a chance to use whatever talent I have in the most productive way that I can think of. There are a lot of things that I can't do and a lot of things that I couldn't do very well if I was given the assignment of doing them, but I've spent most of my career as an appellate attorney. Well, I spent most of my career before becoming a judge as an appellate attorney and now I've spent 15 years as an appellate judge and I think this is what I do best. I think this gives me an opportunity to make a contribution to the country and to the society, because the Supreme Court has a very important role to play and it's important that it do the things that it's supposed to do well and I would do my very best to further that.

And it is also important for the Supreme Court, and for that matter, all of the Federal courts, to exercise restraint. As you were referring to earlier, that has turned out to be the principal check on the way the judiciary does its work on a day-to-day basis. The judiciary is not checked in its day-to-day work in the same way as the Congress and the President. The Congress can pass a law or pass a bill and the President can veto it. One House can pass a bill, the other House may not go along. The President has to propose legislation to Congress if the President wants legislation. Congress can pass laws that the President doesn't like. There are checks and balances that are worked out in the ordinary processes of government.

But when it comes to the judiciary in deciding constitutional cases, the judiciary is checked on a daily basis primarily by its own discipline, its own self-restraint. And so it's important for—the judiciary has these twin responsibilities that are in intention at times, doing what it is supposed to do and doing those things well and vigorously and courageously, if it comes to that, but at the same time, constantly monitoring its own activities and asking, are we doing what we are supposed to be doing as judges? Are we functioning as judges, or are we stepping over the line? Are we turning ourselves into legislators? Are we turning ourselves into members of the executive branch or administrators? And the judiciary has to maintain its independence. That's of critical importance, and that's an important part of the role and that also has to be informed by this sense of self-restraint.

Senator COBURN. Thank you. During Judge Roberts's hearing, Senator Feinstein tried to get him to talk and speak out of his heart and I thought it was a great question so that the American people can see your heart. This booklet is designed to protect the

weak, to give equality to those who might not be able to do it themselves, to protect the frail, to make sure that there is equal justice under the law. You know, I think at times during these hearings you have been unfairly criticized or characterized as that you don't care about the less fortunate. You don't care about the little guy. You don't care about the weak or the innocent. Can you comment just about Sam Alito and what he cares about and let us see a little bit of your heart and what is important to you and why?

Judge ALITO. Senator, I tried to—in my opening statement, I tried to provide a little picture of who I am as a human being and how my background and my experiences have shaped me and brought me to this point. I don't come from an affluent background or a privileged background. My parents were both quite poor when they were growing up. I know about their experiences, and I didn't experience those things. I don't take credit for anything that they did or anything that they overcame, but I think that children learn a lot from their parents and they learn from what the parents say, but I think they learn a lot more from what the parents do and from what they take from the stories of their parents' lives.

And that's why I went into that in my opening statement, because when a case comes before me involving, let's say, someone who is an immigrant, and we get an awful lot of immigration cases and naturalization cases, I can't help but think of my own ancestors because it wasn't that long ago when they were in that position. And so it's my job to apply the law. It's not my job to change the law or to bend the law to achieve any results, but I have to, when I look at those cases, I have to say to myself, and I do say to myself, this could be your grandfather. This could be your grandmother. They were not citizens at one time and they were people who came to this country.

When I have cases involving children, I can't help but think of my own children and think about my children being treated in the way the children may be treated in the case that's before me. And that goes down the line. When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account. When I have a case involving someone who's been subjected to discrimination because of disability, I have to think of people who I've known and admired very greatly who had disabilities and I've watched them struggle to overcome the barriers that society puts up, often just because it doesn't think of what it's doing, the barriers that it puts up to them.

So those are some of the experiences that have shaped me as a person.

Senator COBURN. Thank you. Mr. Chairman, I think I will yield back the balance of my time at this time and if I have additional questions, I will get them in the next round.

Chairman SPECTER. Thank you very much, Senator Coburn.

We will now proceed to the second round of questioning, with each Senator having 20 minutes, and we will take 20 minutes more and then we will take a break.

Is it appropriate for the Court to declare Acts of Congress unconstitutional because of our, quote, "method of reasoning"? Does the

Court have some superior insights on a method of reasoning? Is it appropriate for the Court to declare Acts of Congress unconstitutional, functioning as a taskmaster to make sure that Congress does its homework? There have been a series of decisions which have seriously undercut congressional power where, in my opinion, the Court has usurped the authority of Congress, and this moves into the often-criticized range of congressional legislation—judicial legislation and derogation of the congressional power.

We are seeking, Judge Alito, to have an appropriate equilibrium in our system and the beauty of the American system is that no one has too much power. We call it separation of power. Although not specifically mentioned in the Constitution, we call it checks and balances. We have looked into the issue of tremendous importance. Regrettably, we haven't plumbed it, only scratched the surface, but our time is limited on the authority of the President under War Powers Article II contrasted with Congress's authority to legislate for privacy under the Foreign Intelligence Surveillance Act, and I want to move into two other analogous areas, Congress versus the Court and the Court versus Congress, as Congress has taken away the jurisdiction of the Court, notably very recently by stripping habeas corpus jurisdiction on detainees.

When the Congress legislated to protect women against violence, the Congress did so with a very expansive record. It wasn't like *Lopez*, which was a revolution where the Court upset 60 years of congressional power under the Commerce Act, but in the case of *U.S.* v. *Morrison* involving the legislation to protect women against violence, there was a record which included gender bias from task forces in 21 States, five separate reports. Notwithstanding a, quote, "mountain of evidence," as noted by four dissenters, the Court declared the Act unconstitutional because of our method of reasoning.

Now, you are a judge. You may be a Supreme Court Justice. Is there something we are missing? Do you judges have some method of reasoning which is superior to the method of reasoning of the Congress?

Judge ALITO. I think the branches of government are equal and everybody, all the officers in all the branches of government take an oath to the same Constitution—

Chairman SPECTER. Equality on method of reasoning?

Judge ALITO. I would never suggest that judges have superior reasoning power than does Congress. I think what the Court was getting at when it made that statement in *Morrison*, and yesterday, I looked at something that I had written and said that was not well phrased, I think that what the Court was getting at there in *Morrison* was that it was applying a certain standard, a certain legal standard as to whether something substantially affected commerce, and I think that is what they were getting at, but—

Chairman SPECTER. It is hard to figure out what they were getting at. We do know what they said. They said our method of reasoning was defective. But I take it from your statement you wouldn't subscribe to overturning congressional Acts because of our method of reasoning?

Judge ALITO. I think that Congress's ability to reason is fully equal to that of the judiciary and I think Congress—

Chairman SPECTER. And you think that even after appearing here for a day and a half?

[Laughter.]

Judge ALITO. I have always thought that and nothing has changed my mind about that.

Senator HATCH. I am starting to worry about you.

[Laughter.]

Chairman SPECTER. That is on Senator Hatch's time.

[Laughter.]

Chairman SPECTER. Let me take up the Americans with Disabilities Act on two decisions within a couple of years of each other, one where the Supreme Court declared unconstitutional the Americans with Disabilities Act because it applied to employment, upholding the Act as it applied to access to facilities. Justice Scalia had a ringing dissent when the Court imposed the standard of congruence and proportionality, a very difficult standard which you wrestled with in the family leave case.

The congruent and proportional standard came to the Court in the *Boerne* case in 1997, so it is very recent origin and it has all the earmarks of having been pulled out of the thin air. Justice Scalia said that it was a thinly veiled invitation to judicial arbitrariness and policy-driven decisionmaking. Justice Scalia criticized the majority opinion for functioning as a taskmaster to see to it that Congress had done its homework. Here again, there was a voluminous record, 13 congressional hearings. Thirty-thousand people were surveyed.

Do you think, Judge Alito, that a test like congruence and proportionality is fair notice to the Congress on what we can do by way of legislation? Here, we are dealing—and it is maybe worth just a little explanation. When Congress legislates on constitutional issues under Article V of the 14th Amendment, the Court then makes a comparison to State immunity under the 11th Amendment. But do you think that is a fair test as to what we are to try to figure out what the Supreme Court is later going to say is congruent and proportionate?

Judge ALITO. Well, like many tests in the law, it is not a mathematical or a scientific formula that can produce a particular result with certainty as it is applied to particular situations. It addresses—

Chairman SPECTER. How about just fair notice? Never mind mathematical certainty.

Judge ALITO. It addresses a difficult problem the Court has grappled with over the years and that is the scope of Congress's authority under Section V of the 15th Amendment—of the 14th Amendment to pass legislation enforcing the provisions of the 14th Amendment, and one argument that has been made which would represent a very narrow interpretation of congressional power, and this is basically the argument that Justice Scalia—the position that Justice Scalia took in the dissent that you mentioned, is that Congress' authority doesn't extend any further than remedying actual violations of the 14th Amendment, that there is no—Congress doesn't have additional authority to enact prophylactic measures outside of the area of race, which Justice Scalia would treat dif-

ferently and recognize broader authority because of the historical origin of the 14th Amendment.

Chairman SPECTER. Judge Alito, what is wrong with the test of *Maryland* v. *Wirtz* and *Gonzales* v. *Raich*, because you take a look at power under the Commerce Clause and to be applicable to our legislation under the Americans with Disabilities Act? That test is where the Court has gone into some length to say what you have gone into repeatedly, that judges have no expertise. It is up to the Congress to have hearings. It is up to the Congress to find facts. It is up to the Congress to find out what goes on in the real world.

In *Wirtz* in 1968 and reaffirmed recently in *Gonzales* v. *Raich* after *Morrison*, after *Lopez*, quote, "where we find the legislators have a rational basis for finding a chosen regulatory scheme necessary for the protection of commerce," could apply as well to disability, "our investigation is at an end." What is wrong with that? Would you subscribe to that test over the proportionate and congruence test?

Judge ALITO. There are a number of tests that have been used and proposed over the years in this area and this is the subject, I think, of continuing litigation in the Supreme Court. There is the *Maryland* v. *Wirtz* approach and then the *City of Boerne* approach, and you mentioned that the *City of Boerne* is a relatively recent decision and it's been followed by a number of subsequent decisions—

Chairman SPECTER. Where did it come from? Where did the *Boerne* test on proportionate and congruence come from if not thin air?

Judge ALITO. Well, I think it was an effort by the majority in that case to identify a standard that would not strictly limit congressional power to remedying established violations of the 14th Amendment without going—while still, in their view, retaining the necessary remedial connection to Section V of the 14th Amendment. It is an approach that they have used in a number of cases and the cases have not come out—sometimes the results in the cases have not been predictable.

You mentioned the contrast between the two decisions under the Americans with Disabilities Act. I think *Nevada* v. *Hibbs* was a decision that some people—that surprised some people based on the Court's prior precedents. So there is, I think, still some ferment in this area and I am sure it is a question that's going to be—that will come up in future cases.

Chairman SPECTER. Well, we are speaking not only to you, Judge Alito, but to the Court. The Court watches these proceedings and I think they ought to know what the Congress thinks about making us schoolchildren per challenging our method of reasoning. We are considering legislation which would give Congress standing to go into the Supreme Court to uphold our cases. Right now, the Solicitor General does that, but he is in the executive branch. We don't want to derogate the Solicitor General in your presence, Judge Alito, but the thinking that we have had was to speak about the decisions, the Court's decisions on the floor in the Senate, nobody pays attention to that. Maybe we would try to come in as amicus. Why do that? We have the power to grant standing. We can grant standing to ourselves and come into Court and fight to uphold constitutionality.

Let me move at this point to the recent legislation which takes away the jurisdiction of the Federal bench to hear habeas corpus decisions. It is in the context of the detainees.

Justice O'Connor in *Hamdi* laid out the law in flat terms. All agree that absent suspension, the Writ of Habeas Corpus remains available to every individual detained within the United States, every individual, not just citizens. And then she spells out the way you suspend the writ, and you do it only by rebellion or invasion. Then this recent legislation says the District Columbia Court of Appeals shall have the exclusive jurisdiction to determine the validity of any final decision by the Combatant Status Review Tribunal. If it means what it says, and judges like to look to the statute as opposed to going to congressional intent, if it means what it says, that there is exclusive jurisdiction, there is no jurisdiction of the Supreme Court.

This may come before the Court, but what factors would you consider to be relevant in making the analysis as to again maintaining equilibrium between the Court and the Congress of our authority to take away Federal court jurisdiction on this important item?

Judge ALITO. In the area of habeas corpus, there are a number of important principles that have to be considered in reviewing any legislation that is argued to—that someone contends has altered habeas jurisdiction. The first is that the Court said in a case called *INS* v. *Cyr* that if there is an attempt to—that habeas jurisdiction can't be taken away unless it's clear in the statute that that's what was intended. Habeas jurisdiction is not to be repealed by implication. That's one important principle.

And then in *Felker* v. *Turpin*, which involved the Anti-Terrorism and Effective Death Penalty Act of 1996, Congress—I'm sorry, the Supreme Court considered arguments about whether provisions of that legislation which restructured Federal habeas review violated the Constitution and they found that there wasn't a violation because the essentials of the writ were preserved. And so if other legislation is challenged, it would have to be reviewed under standards like that.

Chairman SPECTER. Judge Alito, I want to move now to a subject on efforts to have television in the Supreme Court of the United States, a subject very near and dear to my heart. I have been pushing it for a long time. I am personally convinced that it is going to come some day. I am not sure whether it will come during my tenure in the Senate, more likely to come during the tenure of Chief Justice Roberts in the Supreme Court, or your tenure, if confirmed.

The Supreme Court said in the *Richmond Television* case that, quote, "the rights of a public trial belong not just to the accused, but to the public and the press, as well. Such openness has long been recognized as an indispensable attribute in the Anglo-Saxon trial." There are many other lines of authority, but only a few moments left to set the stage here, but the Supreme Court has the final word.

We can talk about the President's war power under Article II and the congressional authority under the Foreign Intelligence Surveillance Act, but the Court makes the decision. We can talk about taking away habeas corpus jurisdiction, but the Court decides

whether we can do it or not. We can talk about the insult of declaring Acts of Congress unconstitutional because of our method of reasoning, but the Court can do that. And the Court has made these decisions on all the important subjects. The Court decided who would be President of the United States in *Bush* v. *Gore*. The Court decides who lives on a woman's right to choose, who dies on the right to die, on the death penalty, on every critical decision.

The Congress has the authority to do many things on the administrative level, such as we set the starting date for the Court, the first Monday in October. We set what is a quorum for the Court, six members. Congress sets the size of the Court, the effort made by President Roosevelt to increase the number from nine to 15. We put provisions in on speedy trial, time limits on habeas corpus matters.

In recent times, some of those who have objected to televising the Court have been on television quite a bit themselves. When Justice Scalia and Justice Breyer come on TV, it is a pretty good show. There is not much surfing when that happens, like surfing when my turn comes to question.

[Laughter.]

Chairman SPECTER. But this proceeding on confirmation of Supreme Court Justices has attracted a lot of attention. As I said to you yesterday, I am tired of picking up the front page everywhere and seeing your picture on it. Fred Hume was on Fox News talking about going to a Redskins game in 1991 when Justice Thomas was being confirmed and how he had his earsets on to listen to the proceedings. I think Senator Leahy was questioning Professor Hill at that particular time.

But how about it? Why shouldn't the Supreme Court be open to the public with television?

Judge ALITO. Well, I had the opportunity to deal with this issue actually in relation to my own court a number of years ago. All the courts of appeals were given the authority to allow their oral arguments to be televised if they wanted and we had a debate within our court about whether we would, or whether we should allow television cameras in our courtroom and I argued that we should do it. I thought that it would be a useful—

Chairman SPECTER. You have taken a position on this issue?

Judge ALITO. Well, I did, and this is one of the matters on which I ended up in dissent in my court.

[Laughter.]

Judge ALITO. I think the majority was fearful that our Nielsen numbers would be in the negatives.

Chairman SPECTER. Could you promise the same result?

[Laughter.]

Chairman SPECTER. Could you promise the same result, if confirmed, to be a dissenter for the Court to allow TV?

Senator GRASSLEY. Be careful how you answer.

Chairman SPECTER. Be careful how you answer everything, as you have been.

Judge ALITO. The issue is a little bit different on the Supreme Court and it would be presumptuous for me to talk about it right now, particularly since I think at least one of the Justices has said that a television camera would make its way into the Supreme

Court courtroom over his dead body, so I wouldn't want to comment on it.

Chairman SPECTER. Justice Souter. But quite a few of his colleagues have been on television.

Let me ask you this, Judge Alito. I know what the answer will be, with 7 seconds left. Will you keep an open mind?

Judge ALITO. I will keep an open mind despite the position I took on the Third Circuit.

[Laughter.]

Chairman SPECTER. Thank you, Judge Alito.

We will now take a 15-minute break and we will reconvene at 11:35.

[Recess 11:18 a.m. to 11:35 a.m.]

Chairman SPECTER. The hearing will resume. Turning to the distinguished ranking member, Senator Leahy, for 20 minutes.

Senator LEAHY. Thank you, Mr. Chairman.

Judge Alito, welcome back. If the past is any prologue, you probably do not have more than another day or so of this to go through. I am concerned. I want to just state this right out, concerned that you may be retreating from part of your record. I think that some of the answers that—I have expressed this concern, mentioned to the Chairman I am concerned that some of your answers were inconsistent with past statements. All of us want to know your legal and constitutional philosophy.

So let's go back to the questions that I was asking yesterday about checking Presidential power, and we spoke about Justice Jackson's opinion in *Youngstown*. Justice Jackson, as you know, is a hero of mine, and I point often to the *Youngstown* case. But when Congress acts to strain the President's power, as we did with the anti-torture statutes and the Foreign Intelligence Surveillance Act, I believe the President's power then is at its lowest ebb. You seemed to be saying yesterday that fell into the second category of Jackson, the twilight zone. Actually, I believe you were mistaken on that. Justice Jackson spoke of the twilight zone area, or as he said, zone of twilight, where Congress had not acted.

So let us go to the landmark decision in *Hamdi*, and Justice O'Connor's decision. The issue there was whether due process required that a U.S. citizen, should have a meaningful chance to challenge the factual basis for his detention by the Government.

Now, Justice O'Connor wrote that the President does not have a blank check even in time of war. Yesterday you told Senator Specter that you agreed with Justice O'Connor's general statement. A very different view was in the dissent. Justice Thomas would have upheld the extreme claims with the all powerful and essentially unchecked President. He argued the Government's powers could not be balanced away by the Court, and there is no occasion to balance a competing interest. Which one is right, Justice O'Connor or Justice Thomas? They are quite a bit different.

Judge ALITO. Justice O'Connor wrote the opinion of the Court. The first question that she addressed in *Hamdi* was whether it was lawful to detain Hamdi, and it was a statutory question, and it was a question whether—it was whether he was being detained in violation of what is often referred to as the anti-detention statute, which was passed to prevent a repetition of the Japanese intern-

ment that occurred during World War II, and she concluded that the authorization for the use of military force constituted authorization for detention. And then she went on to the issue of the constitutional procedures that would have to be followed before someone could be detained, and she looked to standard procedural due process law in this area, and identified some of the requirements that would have to be followed before someone could be detained.

And now issues have arisen about the identity of the tribunal that is to make a determination about detaining people who are taken into custody during the war on terrorism, and that's one of the issues that's working its way through the court system.

Senator LEAHY. No, I am not talking about things working their way through, but just on *Hamdi,* which has already been decided. Would you say that Justice O'Connor basically applied the Jackson test, not the twilight zone test, but the test of where the President's power is at its lowest ebb?

Judge ALITO. In addressing the statutory question I don't think she had any need to get into Justice Jackson's framework as well.

Senator LEAHY. Would you say it would be consistent with what Justice Jackson said?

Judge ALITO. I think it certainly is consistent with what Justice Jackson said.

Senator LEAHY. Which decision do you personally agree with, hers or the dissent by Justice Thomas?

Judge ALITO. I think that the war powers are divided between the executive branch and Congress. I think that's a starting point to look at in this area. The President is the Commander in Chief, and he has authority in the area of foreign affairs, and is recognized in Supreme Court decisions as the sole organ of the country in conducting foreign affairs.

Senator LEAHY. But you are not going to say which of the two decisions you agree with.

Judge ALITO. Well, I'm trying to explain my understanding of the division of authority in this area, and I think that it's divided between the executive and the Congress. I certainly don't think that the President has a blank check in time of war. He does have the responsibility as the Commander in Chief, which is an awesome responsibility.

Senator LEAHY. And we all understand that and appreciate that. I understood, listening to Chief Justice Roberts, when he was here sitting where you are, that he felt that Justice O'Connor's decision most clearly tracked the Jackson standards in *Youngstown*.

But I want to get more into this unitary Executive theory because I really had questions listening to you yesterday. You have said as recently as five years ago, that you believe the unitary Executive theory best captures the constitutional role of Presidential power. You were a sitting judge when you said that. And do you still adhere to that constitutional view that you were expressing 5 years ago?

Judge ALITO. I think that the considerations that inform the theory of the unitary Executive are still important in determining, in deciding separation of powers issues that arise in this area. Of course, when questions come up involving the power of removal, which was the particular power that I was talking about in the

talk that you're referring to, those are now governed by a line of precedents from *Myers* going through *Humphrey's Executor* and *Wiener* and *Morrison*, where the Court held 8–1 that the removal restrictions that were placed on an independent counsel under the Independent Counsel Act did not violate separation of powers principles. So those would be applied. Those would be the governing precedents on the question of removal, but my point in the talk was that the considerations that underlie this theory are relevant, should inform decisionmaking in the area going beyond the narrow question of removal.

Senator LEAHY. But in the past you criticized *Morrison*. Are you saying now that you are comfortable with *Morrison*, that you accept it?

Judge ALITO. *Morrison* is a settled—is a precedent of the Court. It was an 8–1 decision. It's entitled to respect under *stare decisis*. It concerns the Independent Counsel Act, which no longer is in force.

Senator LEAHY. So do you hold today that the Independent Counsel statute was beyond the congressional authority to authorize—to enact?

Judge ALITO. No. I don't think that was ever my position.

Senator LEAHY. All right. Under the theory of unitary Executive that you have espoused, what weight and relevance should the Supreme Court give to a Presidential signing statement? I ask that because these are real issues. I mean we passed the McCain-Warner, et al. statute against torture, when the President did a separate signing statement. After he signed it into law, he did not veto it. He had the right and, of course, the ability to veto it. He did not veto it. He signed it into law, and then he wrote a sidebar, a signing statement basically saying that it will not apply to him or those acting under his order if he does not want it to.

Under the unitary Executive theory, one could argue that he has an absolute right to ignore a law that Congress has written. What kind of weight do you think should be given to signing statements?

Judge ALITO. I don't see any connection between the concept of a unitary Executive and the weight that should be given to signing statements in interpreting statutes. I view those as entirely separate questions. The question of the unitary Executive, as I was explaining yesterday, does not concern the scope of Executive powers. It concerns who controls whatever power the Executive has. You could have an Executive with very narrow powers and still have a unitary Executive. So those are entirely different questions.

The scope of Executive power gets into the question of inherent Executive power.

Senator LEAHY. Let's go into that a little bit because back in the days when I was a prosecutor, I mean I was very shocked what happened in the Saturday Night Massacre. A President orders certain things to be done. The Attorney General says, no, I won't do it. Fires him. The Deputy Attorney General, said, "OK, you do it," and Deputy Attorney General would not, saying it violated the law. Fires him. They keep on going down to finally find one person, a person you have praised, Robert Bork, who says, "Fine, I'll fire him. I'll do what the President says."

You have criticized Congress for allowing these independent agencies to refine and apply policies passed by Congress. You said that insofar as the President is the Chief Executive, he should follow their policies, not Congress.

So let's take one, for example, the Federal Election Commission, independent agency. They make policies. Suppose the President, whoever was the President, did not like the fact they were investigating somebody who had contributed to him. Could he order them to stop that investigation?

Judge ALITO. Senator, I don't think I have ever said that—I don't think I've ever challenged the constitutionality of independent agencies. My understanding—

Senator LEAHY. No, but you have said—my understanding is that you chastised Congress for giving so much power to them when the power should be in the President or in the Executive.

Judge ALITO. Senator, I don't think I've ever said that either. I said that I thought that there was merit to the theory of the unitary Executive, and I tried to explain how I thought that should play out in the post-*Morrison* world, accepting *Morrison* as the Supreme Court's latest decision in a resounding 8–1 decision on the issue of removal. How should the issue of—how should the concept of the unitary Executive play out in the post-*Morrison* world?

On the issue of removal, my understanding of where the law stands now is that *Myers* established that there are certain officers of the executive branch whom the President has the authority to remove as he sees fit. There are—and there are those—

Senator LEAHY. Of course, he could fire his whole cabinet today if he wanted to. We all accept that.

Judge ALITO. Well, that was the issue that was presented by the Tenure in Office Act that led to the impeachment of the first President Johnson, and in *Myers*, Chief Justice Taft, although the Act of that controversy was long past, Chief Justice Taft opined that the Tenure in Office Act had been unconstitutional.

Senator LEAHY. But let us not go off the subject of these independent agencies that we have set up. Use as an example the FEC, the Federal Election Commission. Could the President, if he did not like somebody they were investigating, a contributor or something, could he order them to stop?

Judge ALITO. What *Morrison* says is that Congress can place restrictions on the removal of inferior officers, provided that those removal restrictions don't interfere with the President's exercise of Executive authority. So they adopted a functional approach, and that was the Court's latest word on this question. They looked back to *Humphrey's Executor*, and *Wiener*, which had talked about categories, and they—categories of quasi-judicial and quasi-legislative officers, and they reformulated this as a functional approach, and that's the approach that would now be applied.

Senator LEAHY. Do you believe the President has the power to curtail investigations, for example, by the Department of Justice?

Judge ALITO. I don't think—

Senator LEAHY. The Department of Justice is under him.

Judge ALITO. I don't think the President is above the law, and the President is the head of the executive branch, and I've ex-

plained my understanding of the removal restrictions that can and cannot be placed on officers of the executive branch.

Senator LEAHY. But could he order them to stop an investigation?

Judge ALITO. Well, you'd have to look at the facts of the case and the particular officer that we're talking about.

Senator LEAHY. Could he order the FBI to conduct surveillance in a way not authorized by statute?

Judge ALITO. The President is subject to constitutional restrictions, and he cannot lawfully direct the FBI or anybody in the Justice Department or anybody else in the executive branch to do anything that violates the Constitution.

Senator LEAHY. Could he—I am speaking now of statute—could he order our intelligence agencies to do something that was specifically prohibited by statute?

Judge ALITO. My answer to that is the same thing. He has to follow the Constitution and the laws of the United States. He has to take care that the laws are faithfully executed. If a statute is unconstitutional, then the President—then the Constitution would trump the statute. But if a statute is not unconstitutional then the statute is binding on the President and everyone else.

Senator LEAHY. Does the President have unlimited power just to declare a statute, especially if it is a statute that he had signed into law, to then declare it unconstitutional or say he is not going to follow it?

Judge ALITO. If the matter is later challenged in court, of course, the President isn't going to have the last word on that question, that's for sure. And the courts would exercise absolutely independent judgment on that question. It's emphatically the duty of the courts to say what the law is when constitutional questions are raised in cases that come before the courts.

Senator LEAHY. That is an answer I agree with. Thank you. In other areas, SEC, can he order them to stop an investigation if it is somebody he does not want investigated?

Judge ALITO. Well, the independent agencies are governed by *Humphrey's Executor* and cases that follow that, and there have been restrictions placed on the removal of commissioners of the independent agencies, and they have been sustained by the Supreme Court. That's where the Supreme Court precedent on the issue stands.

Senator LEAHY. Is that settled law?

Judge ALITO. It is a line of precedent that culminated, I would say—there have been a few additional cases relating to this, the *Edmond* case and the *Freitag* case, but I would look to *Morrison*, which was an 8–1 decision involving a subject of considerable public controversy, the removal of an independent counsel, removal of restrictions on that independent counsel.

Senator LEAHY. I am still having some difficulty with statements you have made about the unitary Executive and how you would apply it. You said yesterday, in answer to a question I asked, that when people's rights are violated, they should have their day in court. The courts are there to protect the rights of individuals. I do not think anybody in this room would disagree with that. It is the practice we look at in *PIRG* v. *Magnesium Electron*. You concluded

the Congress did not have the constitutional authority to authorize citizens to bring a suit against polluters under the Clean Water Act, whether the people had justiciable claims or not, there were a number of people downstream from *Magnesium Electron*. They said the water had been polluted. They brought a suit. You threw it out. Judge Lewis dissented, said it should have gone back to the lower court on the question of facts.

I will give you a two-part question. One, why did you send that case back to the lower court? And do you accept *Laidlaw* as being settled law?

Judge ALITO. Well, *Magnesium Electron* presented the question of whether we had a case or controversy under Article III, and that's the fundamental limit on our jurisdiction. The Supreme Court has said that we do not have a case or controversy before us if we do not have a party that has constitutional standing which requires injury in fact. And the issue was whether the plaintiffs in that case had established injury in fact. There was a plant that was discharging certain things into a creek, which eventually emptied into the Delaware River, and the plaintiffs in the case alleged that they enjoyed the Delaware River in a variety of ways. They ate fish from the river. They drank water from the river. They walked along the river.

But there was no—there was nothing in the evidence—and Judge Lewis agreed on this. Judge Roth wrote the opinion and I agreed with Judge Roth, and Judge Lewis agreed with us on this point, there was nothing in the record.

Senator LEAHY. But didn't Judge Lewis agree with you on the legal point, but he suggested sending it back to the lower court to determine whether there were facts to give standing? I mean, we all agree you can't be in a case if you don't have standing, but didn't Judge Lewis say, send it back to the lower court so they can determine on the facts whether there might be standing?

Judge ALITO. The evidence that was before us did not show that there was any standing on the part of the plaintiffs. There was no evidence of harm to the Delaware River in any way from the discharges and that was the basis of Judge Roth's opinion which with I agreed. As I recall, Judge Lewis's point was that the case should go back to the district court so that the plaintiffs could have an opportunity to present additional evidence. But as I recall, they were not even arguing before us that they had additional evidence. They were not arguing before us, as I recall, that we have additional evidence and we'd like the opportunity to go back to the district court to present it. That's my recollection of the matter.

Senator LEAHY. And the other part of my question is *Laidlaw*, is it settled law?

Judge ALITO. Well, Laidlaw is a precedent on the Supreme Court and my answer to the question there is the same. It's entitled to the respect of *stare decisis*.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Hatch?

Senator HATCH. Judge Alito, I just want to clarify a few matters. In his questioning this morning, Senator Durbin from Illinois I think apparently misstated what Chief Justice Roberts said during his confirmation hearing. Senator Durbin claimed that now the

Chief Justice said that *Roe* was the settled law of the land. In fact, that exchange that Senator Durbin referred to was made during the confirmation process for Judge Roberts to the Circuit Court of Appeals for the District of Columbia, where he would have to admit that that would be settled law for him in that court. It is beyond question that for a circuit court nominee, the Supreme Court's pronouncements on specific questions are binding precedents and will be the settled law of the land.

Moreover, contrary to the distinguished Senator from Illinois's suggestion, then-Judge Roberts's testimony in his recent confirmation hearing, and Judge, your testimony today and yesterday, you have both been entirely consistent in this particular matter. I just wanted to clarify that because there is a difference between a nominee for the circuit court of appeals saying that something is settled law that he or she has to be bound by than by somebody who is a nominee for the Supreme Court, and that is just a matter of clarification that I would like to make at this time.

Now, yesterday, you were asked, I think, some 340 questions by 15 Senators and you are getting a bunch today. I am told that you felt that you had to decline to answer only about 5 percent of them. That is even lower than previous Supreme Court nominees, by far in most cases. This hearing has hopefully provided an opportunity for you to address our concerns and answer some of the criticisms from members of this Committee. But, of course, there is always a battle waged outside of this Committee room by the special interest groups, who are also making charges and launching really unfair attacks on you. Now, these attacks typically go directly across the airwaves or the Internet with hardly a chance to even catch them, let alone address them or rebut them or correct them. So I want to give you a chance to respond to some of these attacks by some of these left-wing groups, many of which are certainly less than responsible and, in my view, pretty reprehensible in what they do in these matters.

One group says in a press release that in the *Chittister* case and at other times in your career on the bench, you go out of your way to rule against workers. This group claims what it calls your views and biases are strong evidence that you would, in their words, quote, "rarely rule in favor of those seeking justice in the courts." I think that is a good example of how misleading some of these groups can actually be, where they are looking only for results in certain cases rather than upholding of the law itself in those particular cases. In that particular case, they are apparently willing to ignore two things about the cases they discuss. The ignore the facts, they ignore the law, and that is all, just the facts and the law. But they also ignore what you have written and they ignore what you have said here today.

How about that criticism, Judge? In *Chittister*, did you go out of your way to rule against workers? What were the facts and the law in the case and why did you think that they required the result that you finally upheld in that case?

Judge ALITO. I felt the result was dictated by Supreme Court precedent, and I wasn't the only one who thought that. That was a unanimous decision of our panel. Judge McKee and, I believe, Judge Fulham from the District Court in Philadelphia were on that

panel. They all agreed, and it is my recollection that seven other courts of appeals have decided the case the same way. More than 20 court of appeals—that issue the same way. More than 20 court of appeals judges, including judges appointed by all recent Presidents, have reached that decision.

I think when you look at the law and the facts of the case, it becomes clear why there is so much unanimity on the question. Whether one likes the test or not, the test that we in the lower courts have to apply in this area is the congruence and proportionality test from *City of Boerne*, and therefore, what we had to do was to see whether there was a record of discrimination relating to the particular provision that was at issue in *Chittister*, which had to do with leave for personal illness. So there would have to be some evidence that State employers had given more leave for personal illness to men than women, or more leave for personal illness to women than men, and there was no evidence whatsoever on this issue. That's why all of these courts of appeals reached the conclusion that they did in *Chittister*.

Senator HATCH. When somebody takes an unfair crack at me, I can come back at them as a Member of the U.S. Senate. But because you are a judge and not a politician, you really don't have the opportunity, really, to address fully these misrepresentations of your views, and there have been plenty of them in this process that you have had to undergo. So I wanted to give you some opportunity here.

For example, one liberal group sent an e-mail around just yesterday that claimed you were not responsive to a question about whether the President can immunize executive branch officials who directly violate the law. Now, is it an accurate representation of your views to suggest that you argued that executive branch officials should be fully immunized for their violations of the law?

Judge ALITO. No, it is not a correct expression of my views. The President, like everybody else, has to follow the Constitution and the laws. He has to follow the Constitution at all times and he has to follow all the laws that are enacted consistent with the Constitution. That's clear.

Now, on the *Mitchell* v. *Forsythe* case, which they may be referring to, that was simply—I was simply saying that a certain argument relating to immunity from civil damages was an argument that had been made before and it was an argument that was being requested by our client in the case who was being sued in his individual capacity, and I recommended that we not make the argument, but I said, I don't dispute this argument, and that's all that was involved there.

Senator HATCH. Let me just say this. I want to allow you to respond to a tactic that has been used by several of our colleagues here in these hearings. They observed results in some past cases and then they expressed concerns that entire groups or categories of litigants might not be able to get a fair shake by you in the court. One of them yesterday wondered whether the average citizen, quote, "can get a fair shake from you when the government is a party." Another did the same thing this morning. It is one thing to express disagreement with your decisions, and, of course, as I said before, to look only at results and ignore the facts and

the law is fundamentally misguided and it is a misleading way of evaluating judicial decisions.

But let us be clear what is being floated around here with this type of tactic. Those who say, because you ruled this way in the past, litigants cannot get a fair shake in the future, are saying, Judge, that you are biased, that you prejudge these cases, that you are less than fair and impartial, something that virtually everybody who knows you, including all of the people who testified before the American Bar Association, say is false, that you prejudge these cases, you are less than fair and impartial. That is a very serious charge, even if it is cloaked in suggestions and innuendo.

Judge, you previously mentioned you oath of office, an oath before God to do equal justice to everyone without regard to who the parties are. How do you react to this suggestion that the way you have ruled in the past shows or even suggests that you are biased and that entire categories of litigants may not get a fair shake before you?

Judge ALITO. Well, I reject that. I believe very strongly in treating everybody who comes before me absolutely equal. I take that oath very seriously and I have tried to do my very best to abide by that during my 15 years on the bench.

Now, I don't think a judge should be keeping a scorecard about how many times the judge votes for one category of litigant versus another in particular types of cases. That would be wrong. We are supposed to do justice on an individual basis in the cases that come before us. But I think that if anybody looks at the categories of—looks at the cases that I have voted on in any of the categories of cases that have been cited, they will see that there are decisions on both sides. In every type of employment discrimination case, for example, there are decisions on both sides.

Senator HATCH. Most employment discrimination cases really are decided at the lower level.

Judge ALITO. Most of them are, yes.

Senator HATCH. And when they get up to your level, it is generally decided on technical or procedural bases. Am I wrong in that?

Judge ALITO. No, that is correct, Senator.

Senator HATCH. And sometimes you have to uphold the law, even though you may be uncomfortable with the law yourself.

Judge ALITO. We have to decide the cases on the facts that are in the record and the law that applies.

Senator HATCH. That is right. Let me just ask you about a few of your cases, because it is easy to cherry-pick these cases and find a sentence here you don't like and a sentence there you don't like and criticize you in the process as though you are not being fair when, in fact, everybody who knows you knows your impeccable reputation for fairness, dignity, decency, honor, and capacity, and that is why you got the highest rating from the American Bar Association and deserve it, and you twice got that, and I know how tough they can be.

But let me just give you a couple of illustrations. *Zubi* v. *AT&T*. You were the lone dissenter in that case. What did you dissent from?

Judge ALITO. I dissented from a majority decision that held that Mr. Zubi, who was claiming racial discrimination, would not have his day in court because of the statutory—

Senator HATCH. You would have given him his day in court, right—

Judge ALITO. I would have, yes—

Senator HATCH [continuing]. If it had been up to you?

Judge ALITO. Yes.

Senator HATCH. All right. How about *U.S.* v. *Kithcart*? I don't expect you to remember all these cases, and if you don't, just raise your hand and I will try and recite them, but this was a Fourth Amendment case. You held that the Fourth Amendment does not allow police to target drivers because of the color of their skin, is that right?

Judge ALITO. That is right. That was essentially a case of racial profiling and I wrote an opinion holding that that was a violation of the Fourth Amendment.

Senator HATCH. And that was even after a police officer received a report that two black men in a black sportscar had committed three robberies, and she pulled over the first black man in a black sportscar, or the first black sportscar she saw. But you ruled for the defendant and against racial profiling in that case.

Judge ALITO. That's correct, Senator.

Senator HATCH. OK. In *Thomas* v. *Commissioner of Social Security*, just to mention a few of these cases to show that you are going to do what is right, regardless. Sometimes in these employment cases and even other cases, when they get up on appeal, they are fairly technical in nature and you have got to do what is right under the law. But in *Thomas* v. *Commissioner of Social Security*—do you recall that case?

Judge ALITO. I do, yes.

Senator HATCH. What did you do there?

Judge ALITO. Well, that was a case where I think that the Supreme Court thought that my opinion had gone too far in favor of the little guy who was involved there. That was a—

Senator HATCH. This was a woman with disabilities, right?

Judge ALITO. That's right, a woman who was trying to get—

Senator HATCH. And she sought Social Security benefits.

Judge ALITO.—Social Security disability benefits, and in order to be eligible for those, she had to be unable to perform any job that existed in substantial numbers in the national economy.

Senator HATCH. She had a job as an elevator operator, if I recall.

Judge ALITO. That's right. As the case was presented to us, the only job that she could perform was her past job, which was as an elevator operator, and what I said was that you can't deny somebody Social Security benefits because the person is able to do a job that no longer exists in any substantial numbers in the national economy. You can't deny benefits based on a hypothetical job. It has to be based on a real job. And the Supreme Court didn't see it that way, but it seems to me that the way we ruled was consistent with what I thought—

Senator HATCH. So in other words, you stood up for the person seeking rights here. The Supreme Court overruled you.

Judge ALITO. That's right.

Senator HATCH. Oh my goodness. In the landmark case of, how do you pronounce it, *Fatin* v. *INS*?

Judge ALITO. "Fatten," I think.

Senator HATCH. This involved an Iranian woman—Iranian women who refused to conform to their government's gender-specific laws and social norms, whether or not they should be granted asylum in America. How did you rule in that case?

Judge ALITO. I think that was one of the first cases in the Federal courts to hold that requiring a woman to be returned to a country where she would have to wear a veil and conform to other practices like that would amount to persecution if that was deeply offensive to her and that subjecting a woman to persecution in Iran or any other country to which she would be returned based on feminism would be persecution on the basis of political opinion.

Senator HATCH. I have got another nine or ten cases and perhaps even more than I could go through, but the point is that whenever they deserve to win, they win, regardless of whether they are rich or poor, whether they are powerful or not. You basically upheld the law in these cases, is that correct?

Judge ALITO. That is what I've tried to do.

Senator HATCH. And where you have been in dissent, you have tried to do it to the best of your ability.

Judge ALITO. That's right, Senator.

Senator HATCH. OK. Let me just mention one other thing. This business of *Vanguard*, when you signed that back in 1990, 12 years before the matter for which you are being criticized, not by anybody who has any ethical, professorial, or other knowledge, not by the American Bar Association, not by the vast majority of lawyers who look at these matters, that particular statement said, will you during your, quote, "initial service." It seems to me those are important words. You haven't tried to hide behind that. You have just honestly explained that, basically, you made a mistake, which really wasn't a mistake according to all the ethics people and according to the American Bar Association. And now, instead of the original accusation and the original implication, you are being accused of not being forthcoming because of that original statement on your application form, to the Committee questionnaire.

But the fact of the matter is that, quote, "initial service" doesn't mean 12 years away, does it, when there is no chance in the world that you had ever received any monetary benefit from *Vanguard*?

Judge ALITO. Well, I don't think initial service means 12 years away—

Senator HATCH. Neither do I and neither does anybody who cares about justice and about what is right in this matter. So to blow that out of proportion like your adversaries have done is really pretty offensive. I could go on and on and be stronger on that, but the fact of the matter is, I just wanted to make that statement. "Initial service," unquote, is pretty clear.

Let me just say that, sometimes, I just can't make sense out of what some of your critics are saying. On the one hand, they want to portray you as some sort of a robotic patsy for big government who does not think for himself. Yesterday, one of my Democratic colleagues even suggested that the Bush administration was trying to manipulate you to give responses favorable to them in this hear-

ing. Now, you quite rightly said, and I think you were fairly restrained about saying it, that you have been a judge for 15 years and are quite capable of thinking for yourself.

On the other hand, then your critics then turn it around and attack you for supposedly dissenting too much, as if you should actually stop doing all that thinking for yourself and just fall in line with the majority in all of your cases.

Now, Judge, I know that appeals court judges—that the appeals courts themselves are collegial bodies, but how do you view dissenting from your colleagues? How do you decide when to do it? How do you know how often you dissent in your court, or do you know how often you dissent in your court and whether it is out of step with your colleagues? Could you give us some answers there?

Judge ALITO. Yes. I think that it is important for a multi-member court to issue a judgment and to speak clearly to the lower courts and the parties. And so when I've been in a position where taking an independent position would result in the absence of a judgment. I had gone out of my way to make sure that there was a judgment, that there was a majority opinion. An example of that is the *Rappa* case where we were really divided three ways, and my position was close to Judge Becker's opinion, and Judge Becker had the opinion-writing assignment, and I issued an opinion saying, "I don't completely agree with the way Judge Becker analyzed this issue. I would analyze it differently. But I'm joining his opinion so that there is a majority opinion, so that there is a clear statement of the law for the guidance of the parties." I think that's the first principle.

Second is that judges should be respectful of each other's views, and I don't have any—I have tried never to write a dissenting opinion or respond in a majority opinion to a dissenting opinion in a way that was not completely respectful of the views of the other members of the court.

It's useful to dissent if there's a chance that the case may go en banc, and that's happened in a number of cases where I've dissented. It's useful to dissent if there is a chance that the case may go to the Supreme Court and so that the Supreme Court will have the benefit of a different expression of views, and there have been cases—

Senator HATCH. Well, would it surprise you to know that you have dissented only 79 times in nearly 5,000 cases in which you have participated? That comes to about 1.6 percent, which is considerably lower than most others who have been on the appellate courts. And I would observe that the Washington Post concluded in an editorial that your dissenting opinions "are the work of a serious and scholarly judge whose arguments deserve respect." I certainly agree wholeheartedly with that assessment.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman.

Judge Alito, I hadn't planned to get into *Vanguard* on this particular round, but I chaired those hearings when you were promoted to the circuit court, and I was also the one that filed those questions which you responded to. And you responded under oath

when you promised the Committee that you would recuse yourself on Vanguard issues.

Now I am just hearing from you that you believe that that pledge was somehow conditioned. Unlike my friend—and he is my friend—from Iowa that says, well, a pledge is just a pledge, it is like any political pledge around here. It is a political promise and doesn't carry much weight.

That is not my opinion, and I don't think it is the opinion of most of the Members of this body. You made a pledge to the Senate, effectively to the American people, that you were going to recuse yourself. Now you say, well, it was just for an initial time, and I think 12 years is more than I really had in mind, or you just qualified your answer.

How long, when you made that pledge and that promise to the Committee, how long did you intend to keep it?

Judge ALITO. Well, Senator—

Senator KENNEDY. And when that time was up, did you ever imagine that you might get back to the Committee and say, "I believe my time is up on Vanguard"?

Judge ALITO. Well, Senator, the statement that I—the nature of the question that I was responding to did not figure in the way the *Monga* case was handled, and I thought I made that clear yesterday. I was following throughout my time on the bench the practice of going beyond the code, and had I focused on this issue when the matter came before me, I would have recused myself at that time, as I later did.

But in answer to Senator Hatch's question, looking at that question today and looking at the answer, the question was: What do you intend to do during your initial period of service? And I think that that's what the answer has to be read as responding to. But just to be clear, that was not—I'm not saying that that's why this played out the way it did. I'm just saying that's how I think the question and the answer—that's how I think the question and any response to the answer by any nominee needs to be interpreted.

Senator KENNEDY. Well, if there is someone that can just understand what you just told us, I would be interested in it, because I don't.

Senator HATCH. Well, I will be glad to explain it.

Senator KENNEDY. Well, if—Mr. Chairman.

[Laughter.]

Senator KENNEDY. You in response to Senator Hatch did not believe you were bound by the promise because you said in your mind you felt that it was just for the initial period of it. That is another issue, because initially it was meant to include the investments that you had at that particular time. You might have those investments and then discard an investment and, therefore, no longer have a conflict. That is what—as the asker of the question had intended. But you have added another wrinkle to it. You have just indicated that when you made a pledge to the Committee that you were going to recuse yourself, that you thought that at some time you were going to be released. And I would just like to know how long that was going to be. Was that going to be 2 years? Was it going to be 3 years? Was it going to be 5 years? When did you feel that you were going to be released if that—

Judge ALITO. Well, Senator, I—

Senator KENNEDY [continuing]. If we followed your interpretation?

Judge ALITO. Senator, I did not rely on that time limitation in relation to what I did in the *Monga* case, and I hope I have made that clear. If I didn't in my previous answer, I do want to make it clear. I did not rely on that in my handling of the *Monga* case.

Looking at the question now, where it says "initial period of service," I would say that 12 years late is not the initial period of service. But that was not—

Senator KENNEDY. When did it stop, then? When did you think that your pledge to the Committee halted, after how many years? Six months?

Judge ALITO. Well, Senator, I don't—

Senator KENNEDY. What did you intend at the time that you made the pledge? What was in your mind at that time? I am not interested in what is in your mind at this time, but what was in your mind at that time.

Judge ALITO. I can't specifically recall what was in my mind at that time, but I'll tell you what I'm pretty sure I had in mind. I was not a judge, and I was being considered for a judicial position. And what I was trying to express was basically the policy that I followed during all my years on the bench, which is to bend over backwards to make sure that I didn't do anything that came close to violating the code of conduct or give anybody the impression that I was doing anything that was improper.

Senator KENNEDY. The last question on this is: How long, then, when you made the promise under oath to the Committee that you were going to recuse yourself—and you understand that now to be—in your own interpretation just to be the initial time—how long did you think that that pledge and promise lasted?

Judge ALITO. Senator, as I said—

Senator KENNEDY. That is my question.

Judge ALITO. And, Senator, as I said, I can't tell you 15 years later exactly what I thought when I read that question. It refers to the initial period of service, and looking at it now, it doesn't seem to me that 12 years later is the initial period of service.

Senator KENNEDY. Well, my question to you, which I guess I'm not going to get an answer to, is: When did it? Is 10 years—how about 3 years, is that—

Judge ALITO. Well, I don't know exactly what the time limitation would be, but 12 years does seem to me not to be the initial period.

Senator KENNEDY. We will come back. I just want to mention, in fairness to my friend and colleague—both my friends, Senator Hatch and Senator Durbin, in Senator Hatch's quoting of Senator Durbin that you responded on the question of the *Roe* v. *Wade* in the—when you were in the circuit court, I have here the record that said—of the hearings of Roberts, and the question was asked by Senator Specter to Judge Roberts during the time of his consideration for the Supreme Court. So I want that to be—Senator Durbin can clarify the record, but I wanted that to be clarified so that there wasn't a confusion about it.

Now, in the time that I have, Judge Alito, I listened carefully to responses that you gave to Senator Leahy about the CAP organiza-

tion at Princeton. And I listened to other responses that you gave to our colleagues, and again to Senator Durbin earlier today. But I have just some questions on this to at least try to finalize, at least in my mind, and it might be useful in the Committee's mind as well.

You had indicated in your 1985 job application that you were a member of the Federalist Society for Law and Public Policy and a regular participant at its luncheon and a member of the Concerned Alumni of Princeton University, a conservative alumni group. And you said yesterday that you racked your memory about the issue and really had no specific recollection of the organization. Is that correct?

Judge ALITO. I have no specific recollection of joining the organization.

Senator KENNEDY. And you also said yesterday and today to Senator Durbin that you very likely joined CAP because of your concern over the ROTC program being kicked off campus. Is that correct?

Judge ALITO. Well, what I said specifically was that I racked my memory as to why I might have joined, and the issue that had bothered me for a period of time as an undergraduate and in the 1980s, around the time of this—when I made this statement, was the issue of ROTC. This was the issue about the administration of Princeton that bothered me. I had a high regard for Princeton in many respects in general and had participated in a lot of their activities. But this issue bothered me a great deal at various times. That's what I said.

Senator KENNEDY. And, finally, you said yesterday that you very likely joined CAP around 1985 just before you were applying to the high-level job in the Justice Department under President Ronald Reagan. I think that is correct.

Judge ALITO. Senator, what I specifically said, as I recall, is that if I had done anything substantial in relation to this group, including renewing my membership, I would remember that. And I do not remember that.

Senator KENNEDY. So I want to ask a few things that I hope can clear this up. You have no memory of being a member. You graduated from Princeton in 1972, the same year CAP was founded. You call CAP a conservative alumni group.

It also published a publication called Prospect, which includes articles by CAP members about the policies that the organization promoted. You are familiar with that?

Judge ALITO. I don't recall seeing the magazine. I might—

Senator KENNEDY. But you know that they had a magazine?

Judge ALITO. I have been—I have learned of that in recent weeks.

Senator KENNEDY. So a 1983 Prospect essay titled "In Defense of Elitism" stated, "People nowadays just don't seem to know their place. Everywhere one turns, blacks and Hispanics are demanding jobs simply because they're black and Hispanic. The physically handicapped are trying to gain equal representation in professional sports, and homosexuals are demanding that Government vouchsafe them the right to bear children."

Did you read that, that article?

Senator FEINSTEIN. Finish the last line.
Senator KENNEDY. Finish the last line. "And homosexuals are"—
Senator FEINSTEIN. "And now here come women."
Senator KENNEDY. If the Senator would let me just—
Senator FEINSTEIN. Yes, I—
[Laughter.]
Senator KENNEDY. Can I get 2 more minutes from my friend? Just to continue along—I apologize, Judge. Did you read this article?
Judge ALITO. I feel confident that I didn't. If that—I am not familiar with the article, and I don't have a context in which those things were said. But they are antithetical to—
Senator KENNEDY. Well, could you think of any context that they could be—
Judge ALITO. It's hard to imagine. If that's what anybody was endorsing, I disagree with all of that. I would never endorse it. I never have endorsed it. Had I thought that that's what this organization stood for, I would never associate myself with it in any way.
Senator KENNEDY. The June 1984 edition of Prospect magazine contains a short article on AIDS. I know that we have come a long way since then in our understanding of the disease, but even for that time, the insensitivity of statements in this article are breathtaking. It announces that a team of doctors has found that the AIDS virus in Rhesus monkeys was similar to the virus occurring in human beings. And the article then goes on with this terrible statement: "Now the scientist must find humans—or, rather, homosexuals to submit themselves to experimental treatment. Perhaps Princeton's Gay Alliance may want to hold an election."
You didn't read that article?
Judge ALITO. I feel confident that I didn't, Senator, because I would not have anything to do with statements of that nature.
Senator KENNEDY. In 1973, a year after you graduated, and during your first year at Yale Law School, former Senator Bill Bradley very publicly disassociated himself with CAP because of its right-wing views and unsupported allegations about the university. His letter of resignation was published in the Prospect, garnered much attention on campus and among the alumni.
Were you aware at the time of that, at the time that you listed the organization in your application?
Judge ALITO. I don't think I was aware of that until recent weeks when I was informed of it.
Senator KENNEDY. And in 1974, an alumni panel including now-Senator Frist unanimously concluded that CAP had presented a distorted, narrow, hostile view of the university. Were you aware of that at the time of the job application?
Judge ALITO. I was not aware of it until very recently.
Senator KENNEDY. In 1980, the New York Times article about the coeducation of Princeton, CAP is described as an organization against the admittance of women. In 1980, you were working as an Assistant U.S. Attorney in Trenton, New Jersey. Did you read the New York Times? Did you see this article?
Judge ALITO. I don't believe that I saw the article.
Senator KENNEDY. And did you read a letter from CAP mailed in 1984—this is the year before you put CAP on your application—

to every living alumni—to every living alumni, so I assume you received it—which declared Princeton is no longer the university you knew it to be. As evidence, among other reasons, it cited the fact that admission rates for African-Americans and Hispanics were on the rise while those of alumni children were falling, and Princeton's president, at the time, had urged the then-all-male eating clubs to admit females.

And in December 1984, President William Bowen responded by sending his own letter. This is the president of Princeton—he responded by sending his own letter to all of the alumni in which he called CAP's letter callous and outrageous. This letter was the subject of a January 1985 Wall Street Journal editorial, congratulating President Bowen for engaging his critics in a free and open debate. This would be right about the time that you told Senator Kyl you probably joined the organization. Did you receive the Bowen letter or did you read the Wall Street Journal, which was pretty familiar reading for certainly a lot of people that were in the Reagan administration?

Judge ALITO. Senator, I testified to everything that I can recall relating to this and I do not recall knowing any of these things about the organization, and many of the things that you've mentioned are things that I have always stood against. In your description of the letter that prompted President Bowen's letter, there is talk about returning the Princeton that used to be. There is talk about eating clubs, about all-male eating clubs. There is talk about the admission of alumni children. There is opposition to opening up the admissions process.

None of that is something that I would identify with. I was not the son of an alumnus. I was not a member of an eating club. I was not a member of an eating facility that was selective. I was not a member of an all-male eating facility and I would not have identified with any of that. If I had received any information at any point regarding any of the matters that you have referred to in relation to this organization, I would never have had anything to do with it.

Senator KENNEDY. Do you think that these are conservative views?

Judge ALITO. Senator, whatever I knew about this organization in 1985, I identified as conservative. I don't identify those views as conservative. What I do recall as an issue that bothered me in relation to the Princeton administration as an undergraduate and continuing into the 1980s was their treatment of the ROTC unit and their general attitude toward the military, which they did not treat with the respect that I thought was deserving. The idea that it was beneath Princeton to have an ROTC unit on campus was an offensive idea to me.

Senator KENNEDY. Just moving on, you mentioned—and I only have a few minutes left—you joined CAP because of your concern about keeping ROTC on campus. Now, ROTC was a fairly contentious issue on Princeton's campus in the early 1970s. The program was slated to be terminated in 1970, when you were an undergraduate. By 1973, 1 year after you graduated, ROTC had returned to campus and was no longer a source of debate. And from what I can tell, by 1985, it was basically a dead issue. In fact, my staff

reviewed the editions of Prospect from 1983 to 1985 and could find only one mention of ROTC, and it appears in a 1985 issue released for homecoming that year that says, "ROTC is Popular Once Again." Here is the Prospect, 1985, "ROTC is Popular Once Again." This is just about the time that you were submitting this organization in your job application.

Judge ALITO. Senator—I'm sorry.

Senator KENNEDY. Briefly, please.

Judge ALITO. It's my recollection that this was a continuing source of controversy. There were people on the campus, members of the faculty, as I recall, who wanted the unit removed from the campus. There was certainly controversy about whether students could get credit for courses, which I believe was a military requirement for the maintenance of the unit. There was controversy, as I recall, about the status of the instructors, whether they could be given any kind of a status in relation to the faculty. I don't know the exact dates, but it's my recollection that this was a continuing source of controversy.

Senator KENNEDY. Mr. Chairman, my time is running out. I had wanted to just wind up on a few more brief questions on this. But I have to say that Judge Alito, that his explanations about his membership in this sort of radical group and why you listed it on your job application are extremely troubling. In fact, I don't think that they add up.

Last month, I sent a letter to Senator Specter asking a number of questions about your membership in CAP and I asked Senator Specter to make a formal Committee request for the documents in the possession of the Library of Congress as part of the William Rusher papers. Mr. Rusher was the publisher of the National Review, was an active founder and leader of CAP. Do you have any hesitation or reason for us not to look at those documents?

Judge ALITO. They're not my documents, Senator, and I have no—

Senator KENNEDY. Do you think they would be helpful to us?

Judge ALITO [continuing]. Opinion about it whatsoever.

Senator KENNEDY. Do you think they would be helpful?

Judge ALITO. Senator, I don't believe I had any active involvement with this group.

Senator KENNEDY. Well—

Judge ALITO. I have racked my memory and I can't recall anything, and if I had been involved actively in any way in the group, I'm sure that I would remember that.

Senator KENNEDY. Mr. Chairman, if I could have your attention, I think we ought to vote on issuing a subpoena to the custodian of those CAP records. I want to do that at an appropriate time. I move that the Committee go into executive session for the purpose of voting on the issuance of the subpoena of those records.

Chairman SPECTER. We will consider that, Senator Kennedy. There are many, many requests which are coming to me from many quarters. Quite candidly, I view the request, if it is really a matter of importance, you and I see each other all the time. You have never mentioned it to me. I do not ascribe a great deal of weight. We actually didn't get a letter, but—

Senator KENNEDY. You did get a letter, are you saying?

Chairman SPECTER. Well, now wait a minute. You don't know what I got. I am about to—

Senator KENNEDY. Of course, I do, Senator, since I sent it.

Chairman SPECTER. Well, the sender—

Senator KENNEDY. I have got it right here.

Chairman SPECTER [continuing]. Doesn't necessarily know what the recipient gets, Senator Kennedy.

Senator KENNEDY. I have got it right here.

Chairman SPECTER. You are not in the position to say what I received. If you will bear with me for just one minute—

Senator KENNEDY. But I am in a position to say what I sent to you on December 22, so I renew my—

Chairman SPECTER. You are in a position to tell me what you sent.

Senator KENNEDY. I renew my request, Senator, and if I am going to be denied, then I would appeal the decision of the Chair. I think we are entitled to this information. It deals with the fundamental issues of equality and discrimination. This nominee has indicated he has no objection to us seeing these issues. We have gone over the questions and we are entitled to get that kind of information. And if you are going to rule it out of order, I want to have a vote on that here on our Committee.

Chairman SPECTER. Well, don't be premature, Senator Kennedy. I am not about to make a ruling on this state of the record. I hope you won't mind if I consider it, and I hope you won't mind if I give you the specifics that there was no letter which I received. I take umbrage at your telling me what I received. I don't mind your telling me what you mailed. But there is a big difference between what is mailed and what is received and you know that.

We are going to move on now. Senator Grassley?

Senator KENNEDY. Mr. Chairman, I would appeal the ruling of the Chair on this. I want—

Chairman SPECTER. There has been no ruling of the Chair, Senator Kennedy.

Senator KENNEDY. But my request is that we go into executive session for the sole purpose of voting on a subpoena for these records that are held over at the Library of Congress, for that purpose and that purpose only, and if I am going to be denied that, I would want to give notice to the Chair that you are going to have it again and again and again and we are going to have votes of this Committee again and again and again until we have a resolution. I think that—

Chairman SPECTER. Well, Senator Kennedy, I am not concerned about your threats to have votes again, again, and again, and I am the Chairman of this Committee and I have heard your request and I will consider it, and I am not going to have you run this Committee and decide when we are going to go into executive session.

We are in the middle of a round of hearings. This is the first time you have personally called it to my attention and this is the first time that I have focused on it and I will consider it in due course.

Now, we will move to Senator Grassley for 20 minutes.

Senator GRASSLEY. We have gone over this same ground many times. I suppose, maybe to some extent, both sides are guilty of that. We have an old saying in the Midwest about if a horse is dead, quit beating it, and I think several horses have been beaten to death, particularly on the other side, and you have been very consistent in your answers and I thank you. I think that that speaks to the intellectual honesty of your positions.

It is kind of like we are in the fourth quarter of a football game and you are the quarterback and your team is way ahead here in the fourth quarter. Opponents are very desperate, trying to sack you, and aren't doing a very good job of it. They haven't hit you all day now for 2 days. You are going to keep getting these last-minute "Hail Marys" thrown at you, so just bear with us.

I want to compliment you, first of all, before I ask some questions, and I just did to some extent about the consistency of your testimony, but I think it has been good. I think under very difficult circumstances, you have handled yourself very well, being responsive, forthright, thoughtful. I sense in you a person that is very sincere, and obviously, I don't know you except this appearance here and the small period of time we spent in my office. It seems like you have modesty. That is a breath of fresh air, demonstrating a command of and very much a respect for the law and the Constitution, of course.

This is all stuff that we ought to be looking for in the tradition of Alexander Hamilton saying the role of the Senate is to make sure that only competent people get on the Court and that political hacks don't get on the Court. You are surely no political hack and you are very competent, and that has been demonstrated with your fair and open-minded approach to your being a judicial person.

It is too bad that we are getting this misconstruing of your record or the answers, the claim that you have not written a single opinion on the merits in favor of a person of color alleging race discrimination on the job in your 15 years on the bench. I have looked at a lot of opinions you have given and it is just not true. Your record shows that you ruled in favor of minorities making allegations of racial discrimination in employment, not once but in a number of cases.

The claim that you acted unethically in the *Vanguard* case just is not true. You did nothing improper and actually went beyond the rule to ensure compliance. The claim that you would support an unchecked Executive is just not true. Your record shows that you have repeatedly ruled against the government and that you have told us no one, including the President, is above the law.

The claim that you have ruled the vast majority of the time against the claims of individual citizens in favor of the government and large corporations is just not true. The reality, as I see it, is that you have found in favor of the little guy in numerous cases, but because of who was right and who was wrong, not just because you have got a bias one way or the other. Your critics are, I think, grasping at any straw to tarnish your record, and that is unfortunate.

Judge Alito, in your opening statement, you said, and I hope I quote you accurately, no person in this country, no matter how high or powerful, is above the law, and no person in this country

is beneath the law. You didn't go into detail about what you meant. I think it is quite clear, above the law, but give us that diverse opinion, above the law versus beneath the law.

Judge ALITO. Every person has equal rights under the law in this country, and that involves people who have no money—that includes people who have no money. That includes people who do not hold any higher or prestigious position. It includes people who are citizens and people who are not citizens. Everybody is entitled to be treated equally under the law, and I think that's one of the greatest things about our country and about our legal system.

Senator GRASSLEY. You have been criticized for being hostile to voting rights based upon a statement that you wrote 20 years ago when you were applying for a job with the Justice Department during the Reagan years. In fact, yesterday, some of my colleagues repeated that assertion, but it is apparent to me that it is off the mark.

Specifically, in your 1985 statement, you wrote that you became interested in constitutional law and went to law school in part because you had some disagreements over Warren Court decisions, including some regarding reapportionment. Of course, that is understandable because the Warren Court had handed down very many decisions on reapportionment and they had been criticized as unworkable and that, in fact, the Supreme Court backed away from some. So there was disagreement, there was debate over those issues at that time, probably a lot less today but still recently there is going to be a case going to the Court.

Some have questioned your 1985 statement regarding electoral reapportionment, that is how districts are drawn. They have suggested that you are hostile to the principle of one person/one vote. Clarify for me. Nowhere in your 1985 statement did I find that you wrote that you ever disagreed with the principle of one person/one vote, did you?

Judge ALITO. I never disagreed with that principle, Senator. What I disagreed with when I was in college was the application of the principle in some of the—the elaboration of the principle in some of the late Warren Court decisions, and this grew out of my father's work with the New Jersey legislature. He had been the Secretary to the State Constitutional Convention in 1966, which redrew the provisions of the State Constitution relating to the composition of the legislature in an effort to bring it into compliance with the one person/one vote standard.

These provisions, however, because they tried to respect county and municipal lines, as I recall, resulted in population deviations of under 10 percent, but those deviations were much higher than the ones that the Supreme Court said in the late decisions that I'm talking about would be tolerated regarding congressional districts. There was a belief that that principle would be applied across the board, both to congressional districts and to legislative districts, and that would have wiped out the plan that had been adopted. And I was quite familiar with all of this, and it seemed to me an instance of taking a good principle, which is one person/one vote, and taking it to extremes, requiring that districts be exactly equal in population, which did not seem to me to be a sensible idea.

Senator GRASSLEY. Isn't it true that the words "one person/one vote" weren't even in your statement?

Judge ALITO. Those words are not in my statement.

Senator GRASSLEY. Just to make—go ahead.

Judge ALITO. Just to add, Senator, that this issue of how nearly exact the districts had to be was an issue that was working its way to the Supreme Court or maybe it had actually been there—I've forgotten the exact chronology—at the time of the 1985 statement in *Karcher* v. *Daggett*, which involved the New Jersey Congressional districting plan.

Senator GRASSLEY. Well, just to make sure that there is no lingering confusion then, let me ask you straight out: Do you believe in the principle of one person/one vote?

Judge ALITO. I do. I think it's a fundamental part of our constitutional law.

Senator GRASSLEY. I find it curious that the same people who are questioning your integrity are either asserting or implying that you took a position against the principle of one man or one person/one vote when it is demonstrably false that you ever did.

Further, on another point, some have suggested that you are hostile to women and minorities. Obviously, I don't think that is the case. I think you have demonstrated that sincerity in just very recent statements today.

Now, in the Washington Post article, Alberto Rivas, a criminal defense lawyer and a Democrat, said you "took steps to diversify an office"—this is when you were U.S. Attorney. You "took steps to diversify an office that had a reputation as something of a white boys' club." Rivas said that when you hired him at the U.S. Attorney's Office in New Jersey, he was the only Latino lawyer in the office, and by the time you left that office, Rivas said there were four Latino lawyers as well as African-American lawyers. Your commitment also included advancing women attorneys and promoting them into senior positions during your tenure as U.S. Attorney. And I understand that when you started in that office, only two of the 15 divisional leadership attorneys, chiefs or deputy chiefs, or attorneys in charge were women, and 2 years later you had more than doubled that number, and 5 of the 17 divisional leadership attorneys were women.

Now, on the Federal bench, you have hired many women and minorities to serve as law clerks, and you had a discussion with Senator Brownback earlier mentioning some very complimentary things that Cathy Fleming, your former deputy chief and acting chief of the Special Prosecutions Unit in the New Jersey office, and David Walk, a former lawyer in that office, had to say about you and your treatment of women and minorities. They both, being lifelong Democrats, vouched in those statements for your qualities as a judge and your respect for individual rights.

And, Mr. Chairman, if these letters—and they may have already been put in the record, but if they aren't in the record, I would like to have those put in the record.

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

Senator GRASSLEY. Several of your dissents have been referred to today, or in the last 2 days, and so I wanted to comment on this

suggestion that you are way out of the mainstream because you have written a lot of dissenting opinions. I don't find that you have written so many as a percentage of your total thing, but whatever reason you did it, you did it with good reason.

But judges disagree all the time, and that is to be expected, and obviously there is nothing wrong with that. And, in fact, the Supreme Court has agreed with your dissents on several occasions, I recall from reading a synopsis of your opinions, and the reality is, as I see it, you don't disagree with majority opinions more frequently than most Federal appeals judges do in similar cases. And of more than 4,800 cases—and that we got from the Washington Post. But of more than 4,800 cases that you decided during your tenure on the Third Circuit, you dissented only in 79 cases, which would be only 1.6 percent of all those cases.

So, you know, I don't think that there is anything very extraordinary about the number of dissents or the dissents, and particularly when the Supreme Court has agreed with your opinion in reversing the Third Circuit.

I would like to go to the issue of some historical basis for our constitutional law. The role of historical precedent in constitutional laws I find very interesting. For example, qui tam lawsuits have been a feature of Anglo-American law since the Middle Ages and have been a common feature of Federal statutory law even since the 1st Congress. Yet their constitutionality has never been clearly adjudicated by the Supreme Court.

What role does longstanding, historical practice play in assessing the constitutionality of a Government act or practice?

Judge ALITO. Well, it can be very relevant in many instances. One place where this has come up is when a statute was passed by the 1st Congress—and this has happened on a number of occasions. The 1st Congress, which was responsible for the Bill of Rights, passed a number of statutes relating to provisions of the Bill of Rights, and the Supreme Court has often looked to those and said this is the same Congress that proposed the Bill of Rights, and they did this in enacting a statute, so that gives us a good indication of what they had in mind. And when there has been a legal practice that has existed for—that predated the Constitution, then that certainly is relevant in considering its constitutionality.

Senator GRASSLEY. I would like to have you think about legislative history and how you might use it or how often you might use it, or even how often—maybe if you got a rough quantifiable answer, how often you might use it. The Supreme Court, I think, has quite often stated legislative history of a particular bill would be critical in their interpretation of it. What is your position with respect to legislative history? How important is it to you? And how have you utilized history in interpreting statutes?

Judge ALITO. I have often looked to legislative history in the cases that I've written concerning statutory interpretation. And I think if anybody looks at those opinions, they will see that.

When I interpret a statute, I do begin with the text of the statute. I think that certainly is the clearest indication of what Congress as a whole had in mind in passing the statute. And sometimes the language of the statute is dispositive and it is really—

the decision can be made based on the language of the statute itself.

But when there is an ambiguity in the statute, I think it is entirely legitimate to look to legislative history, and as I said, I have often done that. I think it needs to be done with caution. Just because one Member of Congress said something on the floor, obviously that doesn't necessarily reflect the view of the majority who voted for the legislation. So it has to be done carefully and I think with a realistic evaluation of the legislative process, but I'm not one of the judges who thinks that you should never look to legislative history. I think it has its place.

Senator GRASSLEY. Are you familiar with the legal arguments that some opponents of the False Claims Act have made to the effect that its qui tam provisions are unconstitutional under Articles II and III? And if you are, do you have any opinion on those arguments that are used without prejudicing any review of it you might give?

Judge ALITO. Well, the issue hasn't come up before me. I have a little bit of familiarity with the arguments. And I don't think I—I think that all I can say on the question is that the qui tam statute is of historical origin, as you pointed out, and we have seen what it has produced in terms of tangible results in the cases that have been brought under the statute in recent years. And should an issue relating to its constitutionality come before me, either on the Third Circuit or the Supreme Court, then I would have to follow that whole judicial process that I've described and evaluate the arguments and certainly study the question much more thoroughly than I have done up to this point.

Senator GRASSLEY. You may have just answered this question, but I would like to get it explicitly on the record. Have you ever written or spoken publicly about the issue of the constitutionality of qui tam or any other provision of the False Claims Act, and if so, the circumstances and the context?

Judge ALITO. I'm quite sure I've never written or spoken about its constitutionality.

Senator GRASSLEY. Do you feel that you have any bias against the False Claims Act or Whistle-Blower Protection Act that would impact the ability of you to fairly decide cases involving those issues?

Judge ALITO. I certainly don't, Senator.

Senator GRASSLEY. I would like to ask you about the opinion you authored in *Mystic*. As author of the legislation that we call the False Claims Act, it has returned billions of dollars to the Federal Government and has become a very effective tool in combating fraud against the American taxpayers. So I follow court cases on this as much as I can.

The False Claims Act contains a provision that jurisdictionally bars lawsuits based on public disclosure, including such things as administrative reports and investigations. The purpose of this provision is to prevent an individual who has read about a description of a fraud in a newspaper report, public document, or Government report from simply taking that material and using it as a basis for a case.

In *Mystic*, the qui tam relater had made a FOIA request and utilized some of the documents he received in response to FOIA in filing that qui tam case. In your opinion, you determined that the qui tam relater had based his False Claims Act lawsuit on public disclosure made in an administrative report or investigation. To come to that conclusion, you had to equate that the qui tam relater, who was acting on behalf of the Government, as the public. But I think it is clear that Congress did not equate such qui tam relaters with the public when it wrote the public disclosure bar provision. That is because if Congress had done so, then everything qui tam relaters know is known to the public, which doesn't make any sense.

So because my time has run out, I don't want to go on with a question, but do you see what I am getting at? Could you react to that?

Judge ALITO. I do, and I understand that's a very strong argument. I remember that I found that a very difficult issue to deal with, and I spent a lot of time on it, and my view of the matter elicited a strong and a very persuasive, I think, dissent by one of my colleagues. So it is a tough issue, and if that were to come up again, I would have to really reconsider it.

Senator GRASSLEY. Just in your last sentence, you gave pretty much the same answer that Judge Roberts did. He had dissented in a case, too, and it kind of worries me when we get two of you on the Court that may be unfamiliar with congressional intent on false claims.

Thank you very much.

Chairman SPECTER. Thank you, Senator Grassley.

That will be all. We will recess until 2 o'clock.

Senator KENNEDY. Mr. Chairman?

Chairman SPECTER. Yes, Senator Kennedy?

Senator KENNEDY. Just as a quick matter of personal privilege, I would like to include in the record the response from your staff to this letter that I wrote to you on the 22nd and also my staff response to your staff's response to the letter, include them in the record.

Chairman SPECTER. Like all requests, unanimous consent for the record, they are granted.

Senator DURBIN. Mr. Chairman? Mr. Chairman?

Chairman SPECTER. Senator Durbin?

Senator DURBIN. Mr. Chairman, I—

Chairman SPECTER. I just want it known that we are now into the lunch hour, but go ahead, Senator Durbin.

Senator DURBIN. Mr. Chairman, I sent you a note and you were kind enough to come and speak to me about it. I would just ask for 2 minutes time to respond to comments made by members of the Committee mentioning my name after I asked questions this morning. You have asked if I would wait until Senator Coburn returned to the Committee, and in deference to the respect to my colleague, I will do that.

Senator LEAHY. Could I also, Mr. Chairman, on this—

Chairman SPECTER. Well, I appreciate it very much, waiting for Senator Coburn. I think it is a good practice, when comments are made about other members, to do it while they are here or to ask their joinder. And that is why if you have something to say to Sen-

ator Coburn, I want him here; otherwise, he will have something to say and you are not here.

Senator LEAHY. In fact—

Senator DURBIN. He did already, Mr. Chairman.

Chairman SPECTER. Now Senator Leahy is recognized into the lunch hour.

Senator LEAHY. Into the lunch hour. Mr. Chairman, if I might, I came very close to objecting when Senator Coburn was speaking and referring to Senator Durbin. Senator Coburn is a new—he is a valued member of the Committee, of course but new, and I wanted to say that I have been here for 30 years. I have always made it a point, if I am going to raise something, to get word to the other party. I think it is a good way of doing it, and you have been totally fair in that.

I would urge Senators, if they are going to start quoting each other, that maybe we have "quote time" or something like that. Senator Durbin is absolutely right in wanting to be able to respond to what was said.

Chairman SPECTER. Well, I think that we might agree on best practice, but when you deal with Senators, my view is to give Senators great latitude as to what they want to undertake to do. And if Senator Coburn wants to make a comment without Senator Durbin here, I think that is going to be his call, although my preference would be to the contrary. But when Senator Durbin wants time to respond, I immediately sent word to him he would have the time that he requested. And then I sent for Senator Coburn. And Senator Coburn is in a meeting that he couldn't leave, but we will get the two of you together fairly promptly.

Senator DURBIN. Thank you.

Chairman SPECTER. Lunchtime.

[Whereupon, at 1:05 p.m., the Committee was adjourned, to reconvene at 2 p.m., this same day.]

[AFTERNOON SESSION]

Chairman SPECTER. The Committee will resume, and it is now Senator Biden's turn for his second round for 20 minutes.

Senator Biden?

Senator BIDEN. Thank you very much, Mr. Chairman.

Judge, good to see you. As I said to you—we happened to run into each other in the hallway coming in—what I would like to do, if I may, is go back and revisit two areas that you were questioned on yesterday, and a little bit maybe today. I do not recall actually. I think it was yesterday. One is the *Casey* case and I want to make sure I understand because I am still a little bit puzzled by your reasoning, but let me start off and make it clear.

From my perspective, the abortion is a different—I am trying to figure out how you arrived at interpreting a Supreme Court Justice's standard that was being applied, and how it came out differently than others. Yesterday you said when I think it was Senator Kohl asked you, that you agreed with Justice O'Connor, "that you look at the group that's affected, not the group that's unaffected." But when you wrote your dissent, you said, and I quote, "It seems safe to assume that some percentage, despite an initial inclination not to tell their husbands, would notify their husbands

without suffering substantial ill effects, acknowledging some would suffer substantial ill effects."

Can you rationalize yesterday's statement and your dissent for me? Explain it to me.

Judge ALITO. Well, I think what you look at is the group that is required to notify. You don't look at the group that's not required to notify, so unmarried women are not examined here because the notification requirement obviously does not apply to them.

Then my understanding of Justice O'Connor's standard, which was the "more than some woman" standard, let me put it that way, although she didn't put it quite that strongly. She said that it is insufficient that some women are inhibited from having an abortion as a result of the requirement. So you look at the people who are affected by—who are within the scope of the provision, and then you would see how many of the people within the scope of the provision would be inhibited from having an abortion as a result of what was involved. You don't look at people who aren't regulated at all, and you don't just look at the people who would be inhibited because both of those would not be the right thing to look at.

So in the case of—let's take the case of the informed consent requirement. You'd look at everybody who was required to receive the information that was within the informed consent provision, and then you would ask how many of the people, how many of the women who were regulated by this, would be inhibited from having an abortion as a result of the requirement. That was my understanding and that is my understanding of what she was talking about.

Senator BIDEN. You referenced in your dissent in *Casey* the *Thornburgh* case. What was the issue in *Thornburgh*?

Judge ALITO. *Thornburgh* concerned—

Senator BIDEN. Excuse me. That prompted her to come up with the statement that you referenced, which was that it does not have to affect everyone?

Judge ALITO. Well, she was setting our her understanding of what the standard was, of the Undue Burden Standard. Now, in *Thornburgh* there were several provisions of a previous version of the Pennsylvania statute at issue. There was an informed consent provision, as I recall. There was a provision relating to health insurance. There was a provision relating to notification of a minor's parents. There were a number of provisions involved. And my recollection is that when she made the statement, she was talking about the Undue Burden Standard itself. It was an explanation of what she meant by the Undue Burden Standard.

Senator BIDEN. As I went back and read it, my understanding was—and I will not, in the interest of time, read her entire two paragraphs here—but the part of *Casey* which she found to be a particular problem as being declared unconstitutional by her colleagues was where a doctor, an obstetrician would have to read to a woman certain verbiage that would explain the pros and cons about an abortion, or at least downsides of an abortion. And she said the State has an interest in promoting life, and so even though some women might be offended by that, it was still OK, it was still constitutional.

That language is the language that the discussion about even though some women would be affected, you transposed, in good conscience, to a case where notification to a husband was required. And one of the things that I had some difficulty with is whether or not there really were comparable issues here. In one case it was about whether or not a woman would fear for her life, for example, an exception was given, if she informed her husband. Another case, it was not about that that O'Connor was referring to, she was referring to about whether or not it put an undue burden on a woman to be told, "By the way, this can happen when you have an abortion, and this is the state the fetus is, et cetera." And that is the part that kind of disturbs me, or that perplexes me anyway, about the real world here.

Senator Specter references the Violence Against Women Act. We did a lot of work on that. There is overwhelming evidence that there are women who would be fearful of going home and telling their husbands they are going to have an abortion, not fearful physically, fearful that the husband had all the economic power and said, "I am divorcing you and I am taking the kids and having a custody battle, and you don't have the money to hire a lawyer."

Are they comparable ill effects? That is, that kind of ill effect on a woman that if she tells her husband, he is going to sue for divorce and seek custody of the children, knowing that he has all the economic horsepower and she has no ability to go out and hire a significant lawyer? Is that comparable to the doctor saying, "By the way, if you have an abortion, here is what happens?"

Judge ALITO. No. The informed consent provision presented an easier—easier isn't even the right word—a less difficult question than the spousal notification provision. I don't think there's any question about that. They both involved the same standard, which was the Undue Burden Standard. And therefore, I thought—and I still think that's what's said in reference to one provision is relevant in determining what the standard was.

The big issue, when this case was before us, was whether the standard was undue burden or not. It's funny how cases look different after they've progressed through the Supreme Court than they do when they're first presented to the court of appeals. That was the most hotly contested argument before us. Had there been any change in the Supreme Court's case law—and the plaintiffs argued strenuously that there had not—but our panel, after some effort, determined under the *Marks* standard for determining what the holding of a case is when there's no majority opinion, that the standard was the Undue Burden Standard. And there just wasn't a lot to go on. I think I said that yesterday. I looked for whatever guidance I could find.

Senator BIDEN. Again, I am not questioning the sincerity of your search. Again, it gets down to the thing that keeps coming up with me, is not that you do not care about the little guy and all of that, that your reading of statutory language, Supreme Court precedent, the Constitution, seems to me to not reflect some of the genuine real-life differences that exist. The idea that you acknowledged that some women would suffer ill effects, substantial ill effects from informing their husbands, but because it was only a small percentage

that met the Undue Burden test, that did not meet the Undue Burden test, it seems to me—

Anyway, the majority disagreed with you, and I happen to disagree with you because I guess maybe it is because we have been so exposed to how so many women are within their relationships can suffer significant consequences for challenging a position that their husband does not want to accept, whether it has to do with abortion or what school their child goes to, and it is pretty consequential. But that is my problem with how you arrived at your reasoning—or your reasoning how you arrived at your conclusion.

Let me move on to another area in the interest of time here. Yesterday there was discussion about the Family and Medical Leave Act, and you correctly stated there were two distinct parts of the Act, and the *Hibbs* case dealt with one, and *Chittister* dealt with another. Can you explain that again for me?

Judge ALITO. Yes. *Hibbs* concerned a provision that required employers to give employees leave to be out of work to take care of a family member. And there was a record that employers, State employers had given more leave for this purpose to women than they had to men, and that was based on the stereotype that when somebody in the family gets sick and somebody has to leave work to take care of the family member, it's the woman and not the man, and it reinforced the stereotype, of course, because having such a policy would encourage, would put pressure on women to leave for this purpose, as opposed to the man. If there was a woman and a man in the family, and somebody had to leave work to take care of a sick family member, and you have a plan like this, this is going to pressure the woman to do that. So the *Hibbs* court found that that was a sufficient record of gender discrimination to justify the passage of legislation under Section 5 of the 14th Amendment.

Chittister concerned a provision that related to leave for personal illness, and there's no reason to think that men or women get sick more often one than the other, or what was to the point, that State employers had given men more sick time than women, or women more sick time than men. And so with that record, it was the conclusion of my court, and I believe seven other circuits, that this was a different issue. These cases were decided before and after *Hibbs* and that could not be justified if you accept the Congruence and Proportionality Standard.

Senator BIDEN. On the Congruence and Proportionality Standard, we in the Congress thought we were speaking to that because were you aware or your colleagues—speak for yourself, actually, you cannot speak for them—that one in four people taking sick leave under the Act are women for pregnancy-related disabilities? That we, when we wrote the law, we said explicitly that working women, we wanted the bill to protect working women from the dangers that pregnancy-based distinctions could be extended to limit their employment opportunities. I mean the practical world is that a fair number of women who are pregnant are told in the last—and I yield to my doctor at the end of the dais on the other side—but it is not unusual for a woman to be told that she needs to, the last month of pregnancy or 2 months of pregnancy, have bed rest. And if that counts against her 12 weeks, employers—we did establish there is a record where employers say, "Hey, look, man, we are

going to give men and women the same leave, notwithstanding the fact that women in fact in many circumstances—and one in four of them are pregnancy-related—need more time because of the pregnancy." I mean was that discussed by you guys or women?

Judge ALITO. I'm quite certain it never was. I would have made a reference to it in the opinion if that had been mentioned. I am not aware of that coming up in the other circuit opinions on the issue. We are, to a degree—we can't know everything about the real world, and we're dependent on the arguments that are presented to us to a degree. I don't believe that argument was ever presented.

Senator BIDEN. Congress expressly stated that the purpose of the Act was, quote, "to minimize the potential for employment discrimination by ensuring generally that leave is available for eligible medical reasons, including maternity-related disability." That is why the decision confuses me. I think all you probably have to do is turn to your wife and say, "Hey, the real world, when you are pregnant does that sometime inhibit the amount of time you are required to be away from your job?" Fortunately, most women, like my wife and my daughter-in-law, work up to the time, but a lot cannot.

Let me suggest also, as I said to you in the hallway, I want to kind of set the record straight on Princeton. One of the reasons why I am perplexed and many of us are perplexed by your answers regarding the CAP, the organization, is that it does not fit with your background. As we both said in the hallway, I read your opening statement again, where you said that "a generation earlier I think that somebody from my background probably would not have felt fully comfortable at a college like Princeton." And I pointed out to you I am about 10 years older than you, that is how I felt. That was what I was referencing yesterday about my, you know, Irish-Catholic kid from Claymont.

And the thing that surprises, or at least puzzles, me is that it was kind of, I thought, it was a pretty widely known debate that in the Ivies, the one sort of last holdout, fighting to not admit as many women and fighting not to admit as many minorities, was Princeton. There was a whole battle over it, as you heard referenced in terms of the Wall Street Journal and mailings to alumni.

And I noticed someone in the press. I want to be able to wear the hat given to me by pointing out that the reason I can wear this hat proudly today after being on campus as much as I have at Princeton is today, 28.7 percent of Princeton's undergraduate population is minority, and today, the class of 2005, 47 percent—47 percent—are women. So that is what that battle was all about, a lot of us thought. I would be proud if my daughter were at Princeton Graduate School instead of Penn now, although I am very proud she is at Penn, but that is what this debate was about, Judge, and that is why it still confuses me.

I am going to ask you a straightforward question and I hope it doesn't offend you. Did, when you listed CAP, was part of your rationale for listing it in an application you thought that would appeal to the outfit you were applying to, the people looking at your resume?

Judge ALITO. Well, Senator, as I said, I don't have a recollection of having anything to do with CAP, so all I can say is that I put it down on the '85 form and therefore I must have been a member at around that time, and that's—I can't—

Senator BIDEN. I am not even suggesting about whether you were or were not remembering. Was part of the reason—I am looking for a reason. I am looking to be able to say—because you don't impress me as someone, especially from your background, that would want to keep Princeton as—I won't go back and read the quotes—keep Princeton as, you know, imagine my father's 50th reunion, having 40 percent women, isn't that awful. You don't impress me as belonging to that club.

Judge ALITO. Well, I wasn't.

Senator BIDEN. So the only explanation I can think of—and you are not. You are a very informed guy. I mean, you are sitting up there in North Jersey as a U.S. Attorney. As I said, it is in the Wall Street Journal. It is a debate going on. You are getting letters. The only thing I could figure is you figured that a relatively conservative Reagan administration Justice Department would say, hey, maybe that is the kind of guy I want. I can't understand why else you would put it down. But if that is not the reason, if you just listed the outfits you belong to, that still perplexes me, but anyway—

Judge ALITO. Well, Senator, I wasn't a member of that club as you refer to it. By the time I entered Princeton, there were many minorities in my class. The practice of not including minorities had ended, and my class was not coeducational when we were admitted, and as I said yesterday, I had never previously attended a noncoeducational school—

Senator BIDEN. You had about 300 women, if I am guessing right, when you got admitted, roughly. When were you admitted?

Judge ALITO. I was admitted in 1968. It was not coeducational. It went coeducational while I was there—

Senator BIDEN. In 1971, 1970–71, there were 300 women. Now, there are 2,100 in that same class.

Anyway, I thank you very much, Judge. I yield the floor.

Chairman SPECTER. Thank you very much, Senator Biden.

We now have both Senator Durbin and Senator Coburn present. Senator Durbin, you have asked for 2 minutes as a matter of personal privilege.

Senator DURBIN. Thank you very much, Mr. Chairman, and I will make it brief.

Chairman SPECTER. You have 2 minutes.

Senator DURBIN. In a courtroom and in a Committee room, it is not unusual to try to rehabilitate a witness. When hard questions are asked, people come back with information. Mr. Gillespie and his team are down there providing information, as are others. It is perfectly acceptable. We would do the same thing if the shoe were on the other foot.

Two personal references to me were made after I left the room, and I apologize for leaving the Committee room. One related to the fact that I had earlier been in the pro-life position in my political life, and it is true. I made reference to this in my opening statement. I have stood for election more than 12 times in the House

and the Senate, general and primary, stating my position as pro-choice, so the voters of Illinois know that.

I had asked Judge Alito whether his position had changed from 1985. That was the nature of my questions to you this morning. I don't consider that to be a shortcoming if you would concede it changed, although at this point, you have not made that concession. Abraham Lincoln was once accused of changing his position on an issue and he said, I would rather be right some of the time than wrong all of the time, and so I don't think changing your mind is necessarily condemnation.

The second point I would like to make specifically is my reference to settled law. *Roe* v. *Wade* is settled law, and I am sorry that Senator Hatch is not here at the moment, but I would like to read into the record exactly what was said on September 13, 2005, before this Committee when Senator Specter said, Judge Roberts—

Chairman SPECTER. Does this involve Senator Hatch, Senator Durbin?

Senator DURBIN. It does. Senator Hatch raised the question that I had said—

[Laughter.]

Senator DURBIN [continuing]. That this position—

Chairman SPECTER. Shouldn't we have Senator Hatch here?

Senator DURBIN. If you want to wait, I will wait.

Chairman SPECTER. Yes, I would like to wait until Senator Hatch arrives. That way, we may be able to conclude this not in 2 minutes, but in less than 2 hours.

I have made inquiries on the Rusher issue over the lunch hour, and I have some things to say about it, but I am not going to say them until Senator Kennedy arrives—

[Laughter.]

Chairman SPECTER. —so I have asked staff to inform Senator Kennedy that I await his arrival.

In the meantime, if it pleases this august body, we will proceed with the hearing. Senator Kyl?

Senator KYL. Thank you, Mr. Chairman. I do want to tie some loose ends up and one of them makes reference to something Senator Kennedy read. Would it be OK if I proceed with that? I think it would be fine. This has to do with this last matter that Senator Biden was also discussing and that is the Princeton alumni group.

Just to make sure that the key facts are understood here, you believe you joined, Judge Alito, around 1985 because of a concerned threat to ROTC at Princeton University, is that correct?

Judge ALITO. Well, Senator, I don't recall joining, but I do remember that that was the issue relating to the administration that was bothering me for a period of time, including that period.

Senator KYL. And just for the record, Mr. Chairman, I would ask unanimous consent to insert a quotation from the Princeton packet. I will just quote it here. Prospect editor Denise DeSouza added that CAP is concerned about the formation of a third-world center, a campaign to eliminate the Army ROTC program, and what it perceives as the decline of Princeton athletics.

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

Senator KYL. Second, on this matter, and I refer to this as the very scurrilous material read by Senator Kennedy, I suspect we would all agree was scurrilous material, had you ever heard of any of that material that he read a while ago before today?

Judge ALITO. No, Senator.

Senator KYL. I believe you said you vehemently disagreed with it, is that correct?

Judge ALITO. I do. I deplore those things.

Senator KYL. And would disavow it?

Judge ALITO. I disavow it. I would never associate myself with those things.

Senator KYL. Did you know that such things had been published by the PAC when you were a member of it, or when you joined it?

Judge ALITO. Absolutely not. I would never be a member of an organization that took those positions.

Senator KYL. OK. And also, Mr. Chairman, unanimous consent for the record to contain the disclaimer which the editors of the Prospect include in the magazine. It reads, "The appearance of an article in Prospect does not necessarily represent an endorsement of the author's beliefs by the Concerned Alumni of Princeton."

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

Senator KYL. OK. Now let us return to your 15 years as a judge and how matters might come before you in the U.S. Supreme Court. I just wanted to also refer to something that I put in the record yesterday. It is a very difficult thing to look at 4,000 cases and conclude that, when you have ruled on both sides of issues depending upon different fact situations, as we have talked about before, that you necessarily favor one side or the other. One of the areas of concern was in the area of discrimination. I just want to read one sentence of what I inserted in the record yesterday regarding employment discrimination and see if you have any other comment on it.

A 2003 study of employment discrimination claims in Federal court found that Federal appeals court judges sided with employment discrimination plaintiffs in only 13 percent of the cases. Judge Alito's record of four out of 18, or 22 percent, is actually more favorable to plaintiffs. Do you know that to be incorrect or do you have any other comment on it?

Judge ALITO. I don't know—I'm not familiar with the statistics. The way the appeals system is set up, the types of—I think that's what results in the statistics that you mentioned, the low rate of success for plaintiffs, because these cases are generally cases in which summary judgment has been granted for the defendant. If the district court denies summary judgment for the defendant, then the case will go to trial and very often is settled, or there's a trial and then there's no appeal after the trial. So the cases that we get, most of the cases that we get are cases that have been looked at by a conscientious district judge and found not to be cases that should go to trial and I think that's what produces those statistics.

Senator KYL. And that's an interesting lesson, I think, for all of us, to be able to explain why certain cases come to courts and why they would be more on one side than the other. It is an important lesson, I think, both for lawyers and non-lawyers to appreciate that

kind of dynamic, because otherwise, if you just look at raw statistics and don't know the background, you could come to different conclusions. So I appreciate that.

In another area, it is apparent to me that you are simply not going to be able to satisfy some of my colleagues because you will not absolutely commit to rule the way that they want to on a couple of key issues, for example, on the issue of abortion. You have repeatedly confirmed the significance in the role of precedent, in this case, *Roe* v. *Wade*. You also noted situations in which, as a Third Circuit Court judge, you adhered to the *Roe* v. *Wade* precedent.

But you have declined to announce your constitutional view of *Roe* today, despite repeated attempts by some of my colleagues to get you to do it in these hearings. Implied in your answer is the point that to do that here would commit you to a particular result, something you cannot ethically do. Are there cases regarding abortion that you believe may come before the U.S. Supreme Court?

Judge ALITO. There certainly are cases that may come before the Supreme Court. There is a case involving abortion before the Court this term, and they come up with some regularity. Many of them involve the application of *Roe*. Most of them involve the application of *Roe* or the application of other precedents that build on *Roe*. But it is entirely possible that a case involving *Roe* itself could come up at some point in the future.

Senator KYL. Now, I said in my opening statement that I would defend your right to decline to say in advance how you would rule on matters that could come before you, but kind of along the same lines that you did a moment ago, perhaps you could tell us the reason for the rule, in other words, to elaborate on the damage that would be done if judges indicate in advance how they might rule on cases. What is the reason for that rule?

Judge ALITO. In my mind, the most important reason is that to do that would undermine the entire judicial decisionmaking process. We have a process for deciding legal issues and it is critically important that we stick to that process, and that means that when an issue comes before us, the briefs are not a formality. The arguments of the attorneys are not a formality. We should read those very carefully and we should study the issue and we should study all the authorities that are cited to us and carefully consider all of the arguments that are presented to us, both in the briefs and in the attorneys' oral presentation, and then go into the conference and discuss the case among the members of the court, and we shouldn't decide legal questions without questions that are going to—not just abstract questions as if we were in a constitutional law seminar, but cases that are going to have an impact on the real world. We shouldn't decide those questions even in our own minds without going through that whole process.

If we announce—if a judge or a judicial nominee announced before even reading the briefs or getting the case or hearing the argument what he or she thought about the ultimate legal issue, all of that would be rendered meaningless and people would lose all their respect for the judicial system, and with justification, because that is not the way in which members of the judiciary are supposed to go about the work of deciding cases.

Senator KYL. I have talked about this image we have of Lady Justice, the blind figure with the scales of justice in her hand, and try to describe why she has the blindfold across her eyes. I just marvel at our judicial system, and having represented clients in court for 20 years myself, how we in America are willing to literally put our lives sometimes, certainly our freedom and our fortune, in the hands of a person, one judge frequently, sometimes a jury, sometimes not, sometimes more than one judge, but frequently a judge. How would people possibly have the trust to put everything they own, or their own freedom, in the hands of a person if we as a country hadn't established over 200 years of adhering to this rule of law, this notion that justice is blind, that the facts of your case and the law will decide whether you win or lose and nothing else?

It is a remarkable phenomenon, if you stop to think about it, and not all countries do that, and even countries that have judicial systems, I don't think one can have near the confidence in that we do here in the United States. So it is a critical, critical principle that plays itself out in courtrooms around this country every day and it is something that I think we have to fight to preserve as much as we possibly can, and I appreciate your explanation of that.

Just a couple of final things and I am going to be able to yield back some of my time. I just can't resist pointing out one little irony here and it has to do with the precedent that I spoke of before, *Roe* v. *Wade*, that is so important to several members of this Committee. It was written by a Justice who himself was, at least in some cases, willing to throw off precedent. Do you remember who wrote the opinion in *Roe* v. *Wade*?

Judge ALITO. It was Justice Blackman.

Senator KYL. Justice Blackman, and in, one might say, an infamous 1994 dissent from a denial of cert in the case of *Collins* v. *Collins*, Justice Blackman wrote that he would refuse to follow all Supreme Court precedent on the death penalty, which has been ruled constitutional by the Court, of course, by saying that he would, and I quote, "no longer tinker with the machinery of death," end of quote. I suspect that is not the way to deal with precedent. If you have a comment on it, fine, but again, I just think it ironic that the decision perhaps most in focus here was authored by a judge who himself was quite willing to throw off precedent, I would argue in a rather cavalier way, in a situation in which he didn't like it.

Let me just close by putting something in the record and making a comment. Mr. Chairman, I ask unanimous consent to insert the following statement in the record, but I would like to read it because it is a statement of the Majority Leader of the Senate, Bill Frist.

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

Senator KYL. And let me briefly read it. "As a Princeton alumnus, I had concerns about CAP, but I have no concerns about Judge Alito's credibility, integrity, and his commitment to protecting the equal rights of all Americans. Judge Alito has condemned discrimination, and his record of more than 15 years demonstrates his commitment to equal rights for women and minorities.

"Old documents of a now-defunct organization will not tell us more than Alito's statements and record already have. Further, the views that the Democrats attribute to Alito through CAP were the views expressed by an individual member in a magazine, who was not speaking for the organization and certainly not for Judge Alito. This is another transparent attempt by Democrats to wage an unfair smear campaign against an exceptionally qualified nominee."

Mr. Chairman, I read that not to attribute the views to any member of this committee, but I think it is important that the reputation of this fine jurist be based upon his actions as a jurist for over 15 years, as I said in my opening statement—longer than any other justice of the U.S. Supreme Court, except for one, 70 years ago, on a circuit court of appeals—with a record of over 4,000 decisions and an ample opportunity to know what kind of a person he is, what kind of a judge he has been, and, I would argue, what kind of a judge that he would make.

I do not believe that his answers to questions have been inconsistent or unforthcoming. I believe that, as a matter of fact, Judge, you have been very forthcoming in your answers to questions, including getting right up to the edge on a lot of matters that arguably could come before the Court. But you did not try to dodge or duck those questions at all. In fact, let me just read for the record two or three statements relating to your performance here at this hearing, if I could, please.

Well, Senator Biden isn't here, so I won't read what he has said. But it is on the chart. And I appreciate what he said, by the way.

Jill Zuckman, who writes for the Chicago Tribune: "Judge Alito has gone farther and I think that has given a lot more substance to these hearings, said Specter—meaning our distinguished chairman, Arlen Specter."

And then, Dana Milbank, writing in the Washington Post: "Unlike John G. Roberts, Jr., who made frequent attempts to soften his views and dodge many of the questions, Alito took almost every question."

I am not going to subscribe to the first part of that last quotation with respect to Judge Roberts, but I think it is true that you have taken the questions, you have answered them to the best of your ability, and you have only stopped short when not to do so would be to commit to a decision in a case that you are not ethically permitted to do and that would do injustice to the rule of law and the parties that might come before the Court.

So I want to commend you for being so forthcoming, for answering our questions, and for testifying in a very thoughtful, and as has been apparent to everybody, without any notes or materials or referring to any other people here, with great knowledge about both the matters on which you have worked and the law generally.

Thank you, Judge.

Judge ALITO. Thank you, Senator.

Chairman SPECTER. Thank you very much, Senator Kyl.

Senator Kohl.

Senator KOHL. Thank you very much, Mr. Chairman.

Judge Alito, after the first day of questions, it seems very clear that you believe there are certain bedrock principles in American constitutional law, principles like the right of one man, one vote in

redistricting, the right of children not to have to go to schools unless they are integrated schools, the right for people to have privacy in making decisions about contraception, and other rights.

Even though these are cases where the principles are raised and their application is debated on the margins or even more fundamentally, I believe you have said and you are willing to say that you will not question the underlying principle involved on these issues. And I commend you for that. We are assured, and I believe, that you clearly do stand by those principles.

And yet, when you are asked about *Roe* v. *Wade* and the following case of *Casey*, cases that say the Government should not place an undue burden on a woman's right to choose, when we ask about principles of that sort, you are unwilling to make the same statement of support.

Now, I understand that there will be cases where plaintiffs argue on the margins about *Roe* and *Casey*, where there are efforts to narrow or broaden these principles, just as there are cases that narrow or broaden the principles of one man, one vote or the issue enunciated in *Brown v. Board of Education or Griswold*. But you are willing to stand by those other legal principles and yet you are not taking the same position with regard to the principles embodied in *Roe* and *Casey*.

Could you explain that, please?

Judge ALITO. Senator, I think it's important to draw a distinction between issues that could realistically come up before the courts and issues that are very much, that are still very much in play—which is to say, the subject of litigation in the courts. And I felt comfortable about commenting on one person, one vote and, of course, *Brown* v. *Board of Education* because those are not issues that are any longer the subject of litigation in our country, not the fundamental principles that are embodied in those decisions. And the *Griswold* case, likewise, concerns an issue that is not realistically likely to come before the courts.

Roe, on the other hand, involves an issue that is involved in a considerable amount of litigation before the courts, and so that's where I feel that I must draw the line, because on issues that could realistically come up, it would be improper for me to express a view and I would not reach a conclusion regarding any issue like that before going through the whole judicial process that I described.

Senator KOHL. I think there is strength to what you say, but I also believe it is not inaccurate to say that these other issues on the margins, just as *Roe* on the margins, are still coming up and may yet come up before the Court. And I still feel that while you are prepared to take a position on these other issues which is almost bottom-line, clearly bottom-line, you are not prepared to take that same position—which you could, if you wished; you could take that position if you wished. And I think what that does suggest is that what you are saying is that it is possible, if a case comes before you, that you would take a look at the principles underlying *Roe* and *Casey* and see them in a way that would overturn *Roe* and *Casey*.

Now, you may say, well, obviously the answer is yes. But I just want to get that clarified for the record.

Judge ALITO. Well, what I would do if a case like that were to come before me, and if I'm confirmed, is to follow the two-step process that I've talked about, which is first to consider the issue of *stare decisis*. And there's been a considerable body of case law now on this issue going back to *Roe* and, in particular over the last 20 years, and in the *Casey* opinion, that was where the joint opinion began and the joint opinion ended. And then only if I got beyond that issue would I consider the underlying issue. And that's what I would do if the issue were to come up. And I don't believe that it would be appropriate and it wouldn't even be realistic for me to go further than that.

Senator KOHL. That is correct. And in your mind, you are not prepared to say that the principle embodied in *Roe* v. *Wade* and the principle embodied in *Casey* is clearly established law that is not subject, to your mind, to review. You are not prepared—I mean, that is not your position, which I think you have said. But I think, at least for me, a clarification of that would be of some importance.

Judge ALITO. Well, in light of the current state of litigation relating to the issue of abortion—and as I said, there's an abortion case before the Supreme Court this term and there are undoubtedly abortion cases before the lower Federal courts; I know there are—I don't believe that it's appropriate for me to go further than that in relation to that issue.

Senator KOHL. All right.

Judge Alito, the President nominated you for the Supreme Court because of your record as a person and as a judge. Groups and individuals, particularly on the right, quickly endorsed you soon after your nomination because they feel comfortable with your record as you have established it over several decades now, where you have come from, and where you are on the issues that are important to them. We also assume that you yourself are very proud of your record, as you should be. As a man of principle and conviction, which we believe you are, you worked on issues throughout your career as a Justice Department attorney that you believed in, that you cared about, that mattered to you. And I am certain you would say that if you didn't believe in these things, you would not have gone to work for that particular Justice Department under that particular administration.

And yet yesterday during the hearing, you seemed to walk away from a lot of your record. For example, when asked about an interview where you supported Judge Bork, calling him "one of the most outstanding nominees of this century," you answered that you were just supporting the administration's position, that that wasn't your position. And even then, you distanced yourself from a number of his views, after having said that he was one of the most outstanding nominees of this century. You are a man of conviction; I am sure you are. And you are not just a mouthpiece for people. You never have been and you never will be—which is to your credit.

When asked about the strong position you took opposing a woman's right to choose in your job application, you said that only reflected how you felt then and did not suggest anything of what you believe now. What you felt then you felt as a full-grown man, and you are saying that is not necessarily how you feel now.

When asked about your membership in a radical organization at Princeton, a group that you cited with pride on your job application, you said that you could not remember anything about the group at all.

When asked about the citation on your job application where you refer to the importance of traditional values, and what you meant by traditional values, then you answered, somewhat incomprehensibly, when you said that you were protecting children from "psychological threats that come from elements in the atmosphere is a traditional value."

I also asked you about your statement on your job application that you disagreed with the Warren Court's rulings on reapportionment, rulings that stand for the basic principle of one person, one vote. Indeed, you said your disagreement was so strong that it contributed to your decision to pursue a legal career. Yesterday you stated that you in fact did not disagree with the principle of one person, one vote—not then, not now.

So, Judge, this is the only time that the people of this country are going to have an opportunity to get a sense of who you are, what you believe in, what you stand for, who you are as a person. I think you would say that the American people have the absolute right to know that, without condition, without any political considerations, that the most important part of this hearing is that the American people get a chance, through our questions and your answers, to know who you really are. I would like to hope that you would say the job isn't worth it if we can't do that and do that well. And I believe you believe that.

So I would like to ask you how you bring into a sense of harmony some of these things that you have done and said throughout your career which have brought you to this situation in which you are now, a person being nominated to serve on the Supreme Court, and some of the positions which you have taken in the last few days which, in effect, distance you from some of the very things that you have done and stood for over a career that bring you to where you are today.

Judge ALITO. Senator, you mentioned a number of things and I've tried to jot them down so that I could cover at least the major things that you mentioned.

You mentioned—and I guess I'll take these in reverse order of chronology—you mentioned the statement in the 1985 statement relating to reapportionment. And I've tried to explain what I had in mind. The statement in the '85 statement talked about what I thought about reapportionment when I was in college. And the reason why I mentioned that—why would I mention what I thought about constitutional law in college before I'd even been to law school?

What I was attempting to do was to explain the development of my thinking about the role of the judiciary and about constitutional law and, in particular my development of my strong belief in judicial self-restraint. And the first place in which I saw a theoretical explanation of that doctrine, which I found persuasive at the time, was Alexander's Bickel's book, "The Supreme Court and the Idea of Progress," which came out during the time when I was in college. I think it was the first book about constitutional theory, so

to speak, that I had read. And he addressed the issue of one person, one vote, and that linked up in my mind with the experiences of my father in working on the reapportionment of the New Jersey legislature.

And at the time when I was in college, there was an issue that was very much a live issue at the time as to what one person, one vote meant. Did it mean that you took this principle of one person, one vote and applied it with blinding literalness so that every district was exactly equal in population, or very close to that, with a population deviation of under 1 percent, or could other factors that people thought were legitimate factors to be considered in drawing districts, such as respecting county lines and municipal lines; was it permissible to take those into account? That's what I know I was thinking about reapportionment back in my college days.

I referred in the statement to traditional values, and I said yesterday at this point in 2006, I can't say for sure exactly what was on my mind in 1985, when I made reference to traditional values. But I tried to describe some of the things that I probably thought were traditional—thought of as traditional values, and I listed a number of them. One—and a lot of them had to do with the ability of people to live and raise a family in the sort of neighborhood where I grew up. And I gave a little description of that earlier.

So it would include things like being able to live in peace and safety. I think that's a traditional value, and that was very much at stake when I was in college in the late '60s and early '70s and in 1985, because these were eras of high crime. And a lot of the work that I had done up to 1985 as an assistant U.S. attorney and working on criminal cases in the Solicitor General's Office seemed to me to be involved with this issue of protecting people from the threat of crime.

I think I mentioned the ability to raise children the way you want, to instill your values, not to have them subject to certain external threats. And these were—you know, I've tried to think of why would these have been at issue in the mid-80s. And they were at issue because of things like some of the things I was referring to earlier today about children being able to, and students being able to express their religious views at school in a nondiscriminatory way, so that religious speech was not discriminated against. And that was very much at issue in the '80s. Congress passed the Equal Access Act at about that time to embody that principle.

So those were some of the things that came to my mind as traditional values.

The 1985 statement in reference to abortion, I have not distanced myself from it. I have said that that was a correct expression of what I thought in 1985 when I wrote it. It was written in 1985, and that was 20 years ago. And there's been a lot of case law in the intervening years. There was *Thornburgh* and there was *Webster* and *Casey*, all of which involved direct challenges to *Roe*, and there were other cases applying *Roe*.

So that's what I had in mind with respect to the matters that you've covered.

Senator KOHL. Last question. When we met privately, I asked you what sort of Supreme Court Justice you would make and your

answer was fair when you said if you want to know what sort of justice I would make, look at the sort of judge that I have been.

Last week, the Washington Post did exactly that in an analysis of your record as a Third Circuit judge for the past 15 years. They analyzed 221 cases that you sat on and in which the court's decision was divided. I recognize that in every case there is a difference and that it must be decided on its facts. Nonetheless, this data reveals patterns and tendencies in your decisions, among other things, as you may have recollected from the Post article.

It was found that in civil rights cases you sided against three out of every four people who claimed to have been victims of discrimination. This was a significantly greater rate than other judges in a national sample of cases. Of 33 criminal cases the newspaper analyzed, you sided with the criminal defendant only three times. This was a very much lower rate than the national sample. In immigration cases, the Post also found that you sided with immigrants who were trying to win asylum or block deportation only in one out of eight cases analyzed. This was much less than most judges in the national sample.

Now, the Washington Post was not the only one to perform an analysis of your record. Noted constitutional law professor Cass Sunstein, for example, found that, "When there is a conflict between institutions and individual rights, Judge Alito's dissenting opinions argue against individual rights 84 percent of the time."

So what can we glean from these analyses of Judge Alito and what might they indicate with respect to your posture on cases should you become a Justice of the Supreme Court?

Judge ALITO. On the discrimination cases, Senator, I think that the statistic that Senator Kyl just cited speaks directly to that, a comparison of the number of times in which people claiming discrimination prevailed in the cases won my vote compared to the average for circuit judges in general. And I think that those statistics—that my statistics and the statistics for circuit judges in general have to be viewed against the background of—have to be viewed with a recognition of the way in which these discrimination cases come up through the court system. Most of them are cases in which the person claiming the violation lost in the district court, and that means that a district court judge—and they are not always right, but most of the time they are right. And they are conscientious people, and they apply the same law that we do. They found that these were not meritorious cases. And so if you start out with a group of cases that have already been found to be not meritorious, it stands to reason that probably not a very high percentage of them will ultimately be found to be meritorious.

On the immigration cases, I take very seriously—and I don't know what the statistics are in this area, but I can tell you this, that I take very seriously the scope of review that I am supposed to perform as an appellate judge. And that is usually dictated by Congress, and in the area of immigration, Congress has spoken clearly. And as to factual decisions that are made by an immigration judge, what Congress has told us is you are not to disturb those unless no reasonable fact finder could have reached the conclusion that the immigration judge did. And I very often see a record where I think it's doubtful. I say to myself, "I might have

decided this differently if I were the immigration judge." But I wasn't there. I didn't see the witnesses testify personally. And Congress has told me what my role is there. My role is not to substitute my judgment for that of the immigration judge. My job is to say, Could a reasonable person have reached the conclusion that the immigration judge did? And if I find that a reasonable person could have reached that conclusion, then it's my job to deny the petition for review. And that's what I do in those instances.

Senator KOHL. I appreciate that. I would just comment again that your siding with immigrants who were trying to win asylum or block deportation, you sided only in one out of eight cases that they analyzed, and this was much less than most judges in a national sample who are about evenly divided in their decisions on these issues. This was what their analysis indicated.

So, you know, for whatever it is worth, you were one out of eight; in the national sample of judges, it was about 50 percent. I only bring that up for your comment.

I thank you very much, Judge Alito, and, Mr. Chairman, I thank you.

Chairman SPECTER. Thank you, Senator Kohl.

We have made some inquiries about the issue which Senator Kennedy has raised about the Concerned Alumni of Princeton. As to the letter, I am advised by my chief of staff, Michael O'Neill, that he first saw a computer letter and that he believes later a letter was delivered to the Judiciary Committee headquarters, apparently near Christmas, perhaps on Christmas Eve, and our custom is to log letters in, and the letter was never logged in. But I repeat and confirm that I have never seen this letter until I saw a computer printout of it about an hour ago.

Mr. O'Neill did talk to me about it over the break between Christmas and New Year's. I traveled to Iraq. That is the first time on the Judiciary Committee schedule I could find a few days to get away, and Mr. O'Neill reminds me that we talked about it on the phone, and I thought the matter was unmeritorious, not worthy of the time of the Committee, based on all that I knew about it. A very brief conversation.

We get so many requests and there are so many items that are largely staff-driven—not that staff-driven matters aren't important, but if something is of significance, you customarily expect a member to tell you about it.

Senator Kennedy and I frequent the gym at the same time and talk all the time, and he never mentioned it to me, nor did he take it to the Ranking Member.

I make it a point that Senator Leahy's calls are the first ones I return, and I have a fair number, but I return all calls from Members very, very promptly. And had this matter been presented to me, I would have given it more attention than I did on that telephone call that I have referred to.

So much for matters which are not quite as relevant as what I am about to come to. The New York Times published a story about this on November 26th, and my chief of staff, William Reynolds, talked to David Kirkpatrick, who said he had gone through all of the records. And as the story in the public domain stated, these are the records that the Library of Congress, the Rusher records, those

records and others at the med. library at Princeton give no indication that Judge Alito was among the group's major donors. He was not an active leader of the group, and two of his classmates who were involved and Mr. Rusher said they did not remember his playing a role.

Well, the obvious thing to do is to call Mr. Rusher, which Mr. O'Neill did over the lunch hour, and Mr. Rusher said he would be glad to have us look at his record, and that he had received a request from Congressional Research Service, but it was from an unnamed requester, and he declined. But he said had he received a request from Senator Kennedy or some member of this Committee, he would have made the records available. So in Senator Kennedy's absence, I asked a staffer to tell him that we had moved ahead, but I didn't want to waste any time, and Mr. O'Neill has contacted Senator Kennedy's staffers, and they are en route or at the Library of Congress to look at these records so that we can confirm what the New York Times' David Kirkpatrick has had to say.

I am just a little puzzled at the issue being raised in this manner. We talk all the time, and I am just a little surprised that Senator Kennedy hadn't talked to Senator Leahy or hadn't talked to me before he made a request for access to the Rusher records, talks about a subpoena, talks about a ruling of the Chair, talks about overruling the Chair. Just a little puzzled. But the substantive matters are being attended to. And I share Senator Kennedy's concern that we have all the facts. All the facts. All the facts. And this is a lifetime appointment. It is a matter of tremendous importance, and I wouldn't want to find on some occasion that something comes to light which would bear on this nomination that we could have found out had we been more vigilant.

Senator Kennedy?

Senator KENNEDY. Thank you, Mr. Chairman. I welcome the fact that we are going to have the access to those records. The fact remains I didn't anticipate—I thought that since this was a major issue on the 1985 application of the nominee for a new job, this membership with the Federalist Society and the CAP organization, I thought as a matter of routine that we would have access to those records. And it was a letter to you, as we would do, and would followup with the staff, which is the usual procedure here. I regret I have not been down in the gym since before Christmas so I have missed you down there.

But the important fact is we are going to get that information. I think that is what is extremely important. And, quite frankly, if we had been able to get what I think were more responsive answers by the nominee during the course of the exchange today, I don't think it would have even been necessary. But I don't think you would be able to look through the transcript on the exchanges that we had with the nominee and not feel that we have an important responsibility to followup.

So I am grateful that we will have that chance to followup, and I look forward to the further considerations and evaluation of the material and further considerations of the hearing.

Chairman SPECTER. Enough said.

Senator Leahy, you have a unanimous consent request?

Senator LEAHY. Yes, Mr. Chairman. As I had understood, we will be going back to another round, so if I have misunderstood, you will correct me. But as I understood Judge Alito, he saw no connection between his unified Executive theory and the use of Presidential signing statements. In fact, the Wall Street Journal reported the President has cited the unitary Executive 103 times in Presidential signing statements. So I would like to put that article and some articles from the Post that are relevant in the record. In fact, in the defense bill, the McCain torture amendment, he specifically employed a signing statement mentioning the unitary Executive, and I would like to make that part of the record.

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

Senator DeWine, 20 minutes.

Senator DEWINE. Thank you, Mr. Chairman.

Judge, yesterday you and I discussed the concerns that I have about the Supreme Court's willingness to strike down law passed by this Congress and by State legislators. This lack of what I consider to be appropriate deference by the Court endangers our ability to protect the rights of our citizens.

One of the groups that I am most concerned about in that context is people with disabilities. Congress has passed a number of laws to assure that people with disabilities have equal access and equal opportunities. I think it is critically important that we make sure that those with disabilities have these opportunities to participate fully in our society in every way possible.

As you know, Judge, the Americans with Disabilities Act was a landmark piece of legislation passed by this Congress in our ongoing efforts to assure that people with disabilities are treated fairly. The 1999 case of *Olmstead* v. *L.C.* was an important Supreme Court case interpreting this law. As you know, *Olmstead* held that Title II of the ADA requires States to serve individuals with disabilities in community settings whenever possible, instead of segregating them while providing them with care.

Olmstead was decided after the case of *Helen L.* v. *DiDario*, a case which, of course, you are familiar with, a Third Circuit case, that reached essentially the same conclusion. Although you were not on the *Helen L.* panel, you along with four other judges voted to rehear the case en banc.

So let me ask you, Judge, if you could, to discuss with us your reasoning behind voting to rehear the *Helen L.* case. I would like to ask you, did that vote to rehear the case mean that you thought that the *Helen L.* case was decided incorrectly or that you opposed the later holding in *Olmstead*? Let me also ask you, now that *Olmstead* has been decided, do your reasons for voting to rehear the *Helen L.* case still apply? And do you have any concerns with the Supreme Court's holding in *Olmstead* that would cause you to question the validity of that particular decision?

Judge ALITO. I certainly don't have any concerns about the decision in *Olmstead*. I would have to look at my own file in the *Helen L.* case—and I doubt that there is any file in the case at this point—to try and see if there's anything in there to indicate specifically why I voted for rehearing in the case. And perhaps if—but I can say this: that I read the decision again, and one important part

of the opinion in the case attempts to distinguish an earlier Third Circuit case that seemed to be somewhat closely related—closely related to the issue that was at hand. And I noted there were five votes for rehearing in the case, and that's quite unusual. It's unusual for there to be that many votes for rehearing.

Most of the time—I would say most of the time when we vote for rehearing, the reason is because we think that there may be an inconsistency in our court case law, and that doesn't necessarily mean that we think that the decision we're voting to rehear was incorrect. Quite often, we think the decision that we are voting to reconsider is correct, but that it is inconsistent with a prior case that needs to be overruled, and we are very scrupulous about following our own precedents, not ignoring them. So if we have a precedent out there and it seems to us to be wrong and the issue comes up in a later case, then our mechanism is to vote to rehear.

That happens very often, and my guess, based on what I can tell just from reading the opinion and looking at the votes for rehearing and the judges who voted for rehearing, is that could have been what was going on.

Senator DEWINE. I appreciate your answer, Judge.

As the Chair of this Committee's Subcommittee on Antitrust, I have seen that it is often very hard to draw the line between anticompetitive conduct and, frankly, just good old-fashioned competition. Let me give you an example that Senator Kohl and I have done a great deal of work on, and, frankly, Senator Kohl has really taken a lead on. Many hospitals buy their supplies through group purchasing organizations, known as GPOs. These organizations purchase products for a large number of hospitals at one time, which decreases prices, but also gives them extraordinary power over which products get used and which ones don't get used. Often, GPOs reach deals with major suppliers to buy items in bundles; in other words, buy a number of different products from those suppliers in order to get discounts on all the products. It saves money, but it also means that smaller companies, which many only offer one of these products, have really a hard time competing with the large discounts being offered. The result is that smaller companies have difficulty getting into the market even if their one specific product may be better or it may even be cheaper.

Judge, you had a case that dealt with bundling like this. It was the *3M* v. *LePage* case. In that case, 3M, which sells Scotch tape, was selling it as part of a bundle with other products. The result was that LePage, which was offering a cheaper competing tape, was having a hard time getting stores to sell its tape because if the stores then did, they would have to give up the chance to save money on all the other 3M products that they carried. The majority ruled against 3M, but you dissented. I wonder if you could please explain your reasoning behind that dissent and explain what type of bundle discounts you think would violate the antitrust laws.

Judge ALITO. Well, let me preface what I'm going to say by saying that I'm not an antitrust expert and so I plod my way through these antitrust issues when they come up. But this was a tough one and it was a monopolization case and it required an examination of all the factors that were relevant to a determination of whether 3M was engaging in monopolization.

3M was selling the product, as I recall, it was selling these products—it was not selling them below its cost. It was selling them above its cost, but 3M was—because of its scale or because it was more efficient, was able to produce its product more cheaply. I remember looking at the authorities that had discussed this and the writing of leading antitrust experts on bundling issues and that factor, taken together with the other factors in the case, persuaded Judge Greenberg and I, and we were the majority on the case at the panel level, that there wasn't sufficient evidence of monopolization here. And then when the case went en banc, the court as a whole came out the other way.

But my understanding of the state of the scholarship on this issue right now and on the way economists view the issue is that I believe that, or many of them who believe that this is—a situation like this is not—does not involve monopolization. This is not a way in which a company like that can engage in a predatory practice over a period of time. But there is uncertainty, really, about how the monopolization standard applies to issues of bundling. So I think it's quite up in the air, and should it come up again, I think it merits reexamination.

Senator DEWINE. Thank you, Judge. Judge, you have heard a lot of discussion and many of us have said that we don't like it when judges legislate from the bench. For judges to properly perform their function, obviously, it is crucial that they attempt to put their own policy preferences aside in the cases before them. But it seems to me that this is a lot easier said than done.

Our Constitution is not a dictionary. It contains a number of very broad, undefined phrases. Let me give you some examples. The Fourth Amendment prohibits unreasonable searches and seizures. The 14th Amendment says that the State shall not deprive any person of liberty without due process of law. The Eighth Amendment prohibits cruel and unusual punishments. I am sure you could supply a lot more examples than I am.

When confronted with such broad phrases, like "unreasonable" or "liberty," "cruel and unusual," how do you know whether you are making policy or merely interpreting the Constitution itself? What tools will you use as a Supreme Court Justice to ensure that your personal views do not play a role in your decisionmaking?

Judge ALITO. In all the areas that you mentioned, there is now a considerable body of case law, and that is a real limitation on the exercise of judicial power. That is one of the important reasons for the doctrine of *stare decisis*. In the 78th Federalist Paper, when Alexander Hamilton was responding to the people who were worried about this power of judicial review, who thought that it would give the judiciary too much power, he specifically cited the fact that members of the judiciary would be bound up by precedent and this would restrain them. This would keep them from injecting their own views into the decisionmaking process.

Under the Fourth Amendment, there is an enormous body of case law now and there are many types of searches that are—it's established in case law that a warrant is required. There are types of searches where it's established now that the activity can be conducted with reasonable suspicion, a *Terry* stop, for example, other types of searches require probable cause. And there are many spe-

cialized types of searches, administrative searches, roadblocks constructed for certain purposes, border searches, and so forth.

Under the Due Process Clause of the Fifth Amendment and the 14th Amendment, there is a great body of case law on procedural due process and most of the due process issues involve procedural due process, what sort of process is required. There is a standard for cases involving the substantive component of that.

Under the Eighth Amendment, since the Supreme Court in *Gregg* v. *Georgia* ruled that the death penalty is permissible under certain circumstances, there is a very large body and a complex body of case law within which a judge would work in deciding cases in that field.

Senator DEWINE. Judge, let me turn to an area that I talked with Judge Roberts about, and that is free speech in the public square. To me, there is perhaps no right in our Constitution that is really as important as freedom of speech. The heart of the First Amendment is the idea that people have a right to speak their mind but also be heard on matters of public concern. Traditionally, our citizens have expressed their opinion on public issues by turning to the public square. They do it in parks, streets, sidewalks, anywhere that people gather. It is as old as the country—older than our country.

Lately, however, I believe that we are seeing a disturbing trend. In many cases, governments have sought to restrict speech in the public arena, sometimes with success, sometimes without. Let me give you some examples. In one recent case, a Wisconsin woman was kicked off a city bus when she tried to distribute a book containing Bible stories to individuals sitting next to her. In many towns and cities across the country, individuals are prohibited from placing political signs on their own property. They are told what size they can put out. They are told the times they can put it out, the dates they can put it out, et cetera. In many public places, individuals have been forced to hold up signs of protest and been confined to "free speech zones," far away from the event that they wish to protest. These individuals are doing nothing more, many times, than just standing their with their sign.

These sorts of restrictions concern me because they limit the ability of individuals not only to speak, but also to be heard in public places, people who want to talk about politics, religion, or any other matter of public concern. I think we need to be careful as a society before we limit what people can say and where they can say it.

Let me ask you, how do you approach challenges to government restrictions on the ability of individuals to speak and be heard in public places, and what, Judge, factors do you consider when deciding which restrictions on speech in the public square are proper under the First Amendment and which ones are not?

Judge ALITO. I think that freedom of speech and freedom of the press and all the freedoms set out in the First Amendment are matters of the utmost importance. Freedom of speech is not only important for its own said, but it is vital to the preservation of our form of government, and I think that if anybody reviews that opinions that I've written in the area of freedom of expression and other First Amendment—

Senator DEWINE. I have looked at some of them, at least—

Judge ALITO. —they will see that I strongly support those rights.

The issue of speech in particular places is a daunting issue. The Supreme Court has addressed it by developing the forum doctrine, and they have identified what they call a public forum, which would be something like a public street, where people's ability to speak is at the maximum. At the other extreme, there is a private forum. My chambers would be a private forum. A Senator's office would be a private forum. Someone would not have a right to come in from the street and speak in a place like that. And then there are what they call limited public forums or dedicated public forums or fora, places where people can speak freely, but only at particular times on particular subjects, a place that is dedicated to free speech but only on a particular subject, for example. That is the way they analyze it.

Now, some people would say that there are developments in society that have resulted in the shrinking of public fora that make it more difficult for people to express themselves. I know that I'm not up to date on New Jersey case law under the New Jersey Constitution, but it's my belief that our State has read this—has a different forum doctrine in things like shopping centers. Malls that are privately owned are considered to be public fora under a New Jersey State law. I think some other States view it that way and that's a competing way of looking at this problem.

An important principle where I have dealt with this in my cases, as I can recall, is the issue of freedom of speech in a limited public forum, and even in a limited public forum, what government cannot do is engage in viewpoint discrimination. If the government opens up a particular forum for discussion of a particular subject, it can't say, but we're not going to allow—we're only going to allow people who express this viewpoint and not another viewpoint. Viewpoint discrimination really goes to the heart of what the First Amendment is intended to prohibit, so that even in a limited public forum where people are restricted with respect to what—the subject that they can talk about, government can't impose a viewpoint discrimination.

Senator DEWINE. It just seems to me, Judge, that we could talk about this issue all day, and we're not going to, obviously, but that there is a shrinking public forum and the opportunities many times are going away. I guess you could make the other argument that because of modern technology, there are other opportunities with the Internet, et cetera, that they are opening up for people to communicate and to make their point well known. But a lot of the places that people historically have talked and made their point well known are shrinking. You talked about the malls, which certainly in most States are totally off limits to any kind of display of that kind of debate.

Let me turn to commercial speech, if I could. Under current law, commercial speech is protected by the First Amendment, but it has never had the same level of protection as other forms of speech, such as political speech. The difference in treatment has puzzled a number of commentators and judges. In reviewing your cases, I noted that you are certainly familiar with the issue of commercial speech. In the *Pitt News* case, for instance, you struck down a

Pennsylvania statute that barred paid alcohol advertisements in newspapers affiliated with colleges and universities.

Let me ask you, Judge, based on your experience with this and other cases, what is your view about the distinction between commercial speech and noncommercial speech and is there a common sense difference between these two types of speeches and have you found that case law supports any distinction? How, if confirmed, will you approach the so-called commercial speech claims under the First Amendment?

Judge ALITO. Well, there's a debate about how much protection commercial speech should have. There are those who argue that the distinction between commercial speech and noncommercial speech should be eliminated. The Supreme Court views commercial speech differently, and while it is strict about any limitation regarding accurate information about prices, it limits—it permits greater restriction of commercial speech under current case law than it does with respect to other types of speech. The theory, as I understand it, is that commercial speech is more durable. At least, that's part of the theory. In other words, there's such a great incentive for people who are selling things to engage in advertising and other forms of commercial speech that it's less likely to be driven out than speech on other issues where the financing may not be as extensive.

In the *Pitt News* case, what I had to apply was the question of whether there was sufficient tailoring. There was a compelling interest for what was done there, which was to restrict advertising about alcohol in a publication that was affiliated with an educational institution. But based on the facts there, it just did not seem to be tailored at all. This was a newspaper that I think 75 percent of the people who received it, and it's connected with the University of Pittsburgh, were people over the drinking age, and maybe even more to the point, this publication was distributed free on campus in newspaper boxes next to a number of others that contained commercial publications and they both advertised establishments and events in the area of the university and the others were full of information about alcoholic beverages and those were free, too.

So while the problem of underage drinking and abusive drinking on college campuses is a very serious issue, and the Pennsylvania legislature recognized that and we certainly didn't question that, I mean, it is an issue of critical importance, it seemed quite unrealistic to think that this regulation, which only applied to the *Pitt News* and not to these other publications, was tailored sufficiently.

Senator DEWINE. I thank you, Judge. That is an interesting set of facts. I thank you, sir.

Chairman SPECTER. Thank you, Senator DeWine.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

I want to try one more time. First of all, let me just say this. Senator Durbin said that Justice Roberts retired the trophy on performance. If that is true, you have retired it on equanimity. I really think you are to be congratulated.

This is in this morning's Washington Post, "Alito Says He Will Keep an Open Mind." But what concerns me, and obviously this is

on *Roe*, is that despite 38 tests, despite 33 years, despite the support of a majority of America, you also said yesterday that precedent is not an inexorable command, and those are the words that Justice Rehnquist used arguing for the overturning of *Roe*.

My question is, did you mean it that way?

Judge ALITO. The statement that precedent is not an inexorable command is a statement that has been in the Supreme Court case law for a long period of time, and sitting here I can't remember what the origin of it is, but I would bet that it's been—it certainly has been used in cases in which the Court has invoked the doctrine of *stare decisis* and refused to go ahead and overrule.

Senator FEINSTEIN. I always believe everything I read in the Washington Post.

[Laughter.]

Judge ALITO. Well, that is an important principle, and I—not the principle of believing everything in the Washington Post, but the principle that *stare decisis* is not an inexorable command, because then we would be stuck with decisions like *Plessy*, and they couldn't be overruled except through a constitutional amendment.

But when an issue is one that could realistically come up, the people who would be making the arguments on both sides of the issue have a right to have a judiciary of people with open minds, and that means people who haven't announced in advance what they think about the issue, and more importantly, people who are not going to reach a conclusion in the—not going to reach a conclusion until they have gone through the judicial process. And it's not a facade, it's a—it's not a meaningless exercise. It's a very important one.

Senator FEINSTEIN. Let me try this. I would like to read a line of questions that Senator Specter asked now Chief Justice Roberts, and then I would like to ask this question: how do you disagree with this? Here is the question.

Specter: Judge Roberts, in your confirmation hearing for the Circuit Court, your testimony read to this effect, and it has been widely quoted. "*Roe* is the settled law of the land." Do you mean settled for you, settled only for your capacity as a circuit judge or settled beyond that?

Roberts: Well, beyond that. It's settled as a precedent of the Court, entitled the respect under principles of *stare decisis*, and those principles applied in the *Casey* case explain when cases should be revisited and when they should not, and it is settled as a precedent of the Court, yes.

Specter: You went on to say then, "It's a little more than settled. It was reaffirmed in the face of a challenge, that it should be overruled in the *Casey* decision, so it has added precedentual value."

Roberts: I think the initial question for the judge confronting an issue in this area, you don't go straight to *Roe* decision. You being with *Casey*, which modified the *Roe* framework and reaffirmed its central holding.

Specter says: And you went on to say accordingly, "It's the settled law of the land," using the term settled again. And then your final statement as to this quotation, "There is nothing in my personal views that would prevent me from fully and faithfully applying the precedent as well as *Casey*."

Where do you differ, since Justice Roberts made that statement in a confirmation hearing. He not only got confirmed, he is the Chief Justice. It seems to me appropriate for you to comment on it and say where you might differ with it.

Judge ALITO. Well, the statement covers a lot of ground, and let me try to remember the major points. I certainly agree with the point—

Senator FEINSTEIN. I can give it to you if you would like? Would that be helpful?

Judge ALITO. Certainly, I would be happy to look at it.

Senator FEINSTEIN. Would someone take it down to him? Show him the place.

[Pause.]

Judge ALITO. Well, Senator, I certainly agree with the point that the Chief Justice made about separating any personal views he has from anything that he would do as a member of the Supreme Court. I emphatically agree with that. That's the essence of what a judge has to do. I certainly agree that *Roe* and *Casey* and all of the other decisions in this line are precedents of the Supreme Court, and they are entitled to respect under the doctrine of *stare decisis* to the extent that some of the earlier decisions have been modified, and obviously, the most recent ones are the relevant provisions of the Supreme Court.

I have agreed, I think, numerous times during these hearings that when a decision is reaffirmed, that strengthens its value as *stare decisis*. I agree that when the Supreme Court entertains a challenge to a prior decision and says, "We're not getting to re-examination of the merits of the issue, we think *stare decisis* counsel against our going to that point," then that is a precedent on precedent. That seems to me to be entirely logical, and we have a long line of precedents now relating to this issue.

I have said I think—I have said that *stare decisis* is a very important legal doctrine, and that there is a general presumption that decisions of the Court will not be overruled. There needs to be a special justification for doing it, but it is not an inexorable command.

Senator FEINSTEIN. But you do not agree that it is well settled in the Court?

Judge ALITO. I think that depends on what one means by the terms "well settled."

Senator FEINSTEIN. I actually agree with you, because others have said that, and then gone out and voted to overthrow it, so it is like saying, "I have no quarrel with that."

Judge ALITO. Let me just say this. As a judge on the court of appeals or if I'm confirmed as a Justice on the Supreme Court, it would be wrong for me to say to anybody who might be bringing any case before my court, "If you bring your case before my court, I'm not even going to listen to you. I've made up my mind on this issue. I'm not going to read your brief. I'm not going to listen to your argument. I'm not going to discuss the issue with my colleagues. Go away, I've made up my mind."

That's the antithesis of what the courts are supposed to do, and if that's what settled means, then I think that's not what judges are supposed to do. We are—

Senator FEINSTEIN. Let me interrupt you for a moment if I may. You were willing to give your view on one man/one vote, and yet there are four cases pending in the court right now on one man/one vote, and that is where I have a hard time. The cases are *Lulac* v. *Perry*, *Travis County* v. *Perry*, *Jackson* v. *Perry*, and *GI Form of Texas* v. *Perry*. That is where I have a hard time. If you are willing to say that you believe one man/one vote is well settled, and you agree with it, I have a hard time understanding how you separate out *Roe*. I understand why. If you say one thing, you upset my friends and colleagues on that side, if you say the other you upset those of us on this side. But the people are entitled to know.

Judge ALITO. I don't think it's appropriate for me to speak about issues that could realistically come up, and my view about *Brown* v. *Board of Education*, for example, which was one of the cases that was cited in connection with this issue about where someone in my position should draw the line, seems to me to embody a principle that is now not subject to challenge, not realistically subject to being challenged, not within the legitimate scope of constitutional debate any longer that there should be segregated racial—facilities that are segregated on the basis of race, and that's where I've tried to draw the line. If an issue involves something that is in litigation, then I think it's not appropriate for me to go further than to say that I would be—I would be very respectful of the doctrine of *stare decisis*, and I would not reach a decision on the underlying issue, if one were to get to it, without going through the whole decision-making process.

Senator FEINSTEIN. OK. I will let you off the hook on that one.

One of the reasons that some of us are so concerned about the Commerce Clause is because we see major law being overturned if the Rehnquist Court continues its march. Let me give you some examples concerning the environment, and these are cases that will be before you, so I do not expect you to comment on the case, but to understand them.

The Clean Water Act was passed in 1972, and it included a provision permitting citizens or citizen groups to bring lawsuits for violation of the Act. In *Public Interest Research Group of New Jersey* v. *Magnesium Electron*, a citizen's environmental group sued a chemical manufacturer under the Clean Water Act for polluting a river used by members of the group. The trial court found that the defendant committed 150 Clean Water Act violations. On appeal, you are the decisive vote in a 2–1 decision, overturning the trial court's decision, even though it was undisputed that the defendant committed the 150 violations of the Clean Water Act.

Your decision, as I understand it, was based upon your conclusion that the environmental group did not have standing to sue under the Clean Water Act, because even though members of the environmental group had stopped using the river due to the pollution, they did not prove any injury to the environment. The decision, if broadly applied, would have gutted the citizen lawsuit provision of the Clean Water Act.

Now, 3 years later in *Friends of the Earth* v. *Laidlaw*, the Supreme Court, in a 7–2 decision, rejected this reasoning, and held that a citizen only needed to show that he or she was harmed by

the Clean Water Act violation, and did not need to prove a broader injury to the environment.

So you see where the concern comes with respect to overthrowing something on a technicality that can have enormous implications. Do you agree with the Supreme Court's decision in *Friends of the Earth* v. *Laidlaw*?

Judge ALITO. Well, it's a precedent of the Court, and I have respect for it, and as you mentioned—and it's governed by *stare decisis*, and as you mentioned, it was decided after the decision of my court in the *Magnesium Electron* case. And I haven't gone back and thought about the question of whether *Laidlaw* creates doubt about the soundness of the decision in *Magnesium Electron*. If it does, then it does, and if the issue were to come up again before the Third Circuit, for example, and I sat on the issue, then I would follow Supreme Court precedent if I concluded that it was in conflict with the decision of the prior court of appeals decision.

We have—our jurisdiction, under the Constitution, is limited to cases and controversies, and the Supreme Court has said that means you have to have a plaintiff who has suffered injury in fact. And although there was a disagreement on the panel about the procedure we should use going forward, everybody on the panel agreed—Judge Roth and I who were in the majority, and Judge Lewis who dissented on a procedural point that I'll get to—that the plaintiffs in that case had not even alleged personal injury. They alleged that they enjoyed the Delaware River in a variety of ways. As I recall, they walked along the canal path, they ate fish from the river, they drank water from the river, but there was no evidence that the discharges into a creek some distance upstream from the river had had any effect whatsoever on the river, and therefore, there was nothing to support a claim that they were personally injured by the discharges of this plant.

Now, there would presumably be other people who could take legal action against the plant for its violations of the law, and nobody would condone that, but our obligation under Article III is to confine ourselves to cases within our constitutional jurisdiction.

Senator FEINSTEIN. Of course you are going to have two cases challenging the application of the Clean Water Act to nonnavigable waters under the Commerce Clause, and as you probably know, we have lost 90 percent of the wetlands in the United States. This is a very big deal. I mean there are many of us that would hate to see wetlands be made virtually impossible because it is very difficult to prove when something becomes navigable, as opposed to nonnavigable, which is kind of the question that is before the Court. I only say that because if this march to restrict Congress continues, you could strike down the Endangered Species Act, you could strike down the Clean Water Act, you could strike down the Clean Air Act, and I think that would be catastrophic for the United States.

If I can, let me just switch to another topic. A year ago all of us became very concerned and involved and some horrified with the Terri Schiavo case, and as I recall the case, the local courts held that her life support could be turned off. The State Supreme Court held the same thing. And then there was an effort—and I think a Federal district court held it—to bring it up to the Supreme Court.

What do you believe the role of the Federal courts should be in the arena of end-of-life decisions?

Judge ALITO. Well, there's a constitutional issue, certainly, at the bottom of that and there are issues of jurisdiction. There are statutory issues and Congress specifies the jurisdiction of the lower courts and so Congress can give us a role in decisions of this nature or Congress can keep the Federal courts out of it and leave it to the State courts where, for the most part, issues in this area have been adjudicated. But if there is a Federal constitutional right involved, then someone may have jurisdiction—then, of course, the Federal courts have traditionally been a forum for the adjudication of Federal constitutional rights.

The underlying statutory—I'm sorry, the constitutional issue is the one that the Supreme Court addressed in the *Cruzan* case and in the case of *Washington* v. *Glucksburg*, and this is obviously one of the most sensitive issues that comes up in our legal system and involves something that a lot of people have had to face and a lot more people are going to have to face decisions involving the end of life, and with the advances in medical technology, this is going to be a very tough issue for an awful lot of people.

In *Cruzan*, the Court proceeded on—they said, we assume that there is a constitutional right to refuse medical treatment that a person doesn't want, and there certainly has long been a common law right to refuse medical treatment that a person doesn't want. If somebody gives you medical treatment and you say, "I don't want it," and they perform an operation on you or do something like that, that's a battery under the common law and you can be sued, and the Supreme Court assumed that that was a fundamental right under due process but said that there wasn't a violation of the right under the circumstances in *Cruzan*, where the State of Missouri had imposed certain restrictions—regulations that had to be complied with before a person who was comatose could be taken off life support.

And then in *Washington* v. *Glucksburg*, they addressed the issue of whether there was a constitutional right to assisted suicide and they concluded that there was not, that there were—and they applied the standard to be applied under the Due Process Clause or its substantive component, whether a right is firmly rooted in the traditions of our country and implicit in the concept of ordered liberty, but there were some concurring opinions that recognized that these were issues that were on the cutting edge of medical technology, let me put it that way, or they were issues on which more empirical evidence might become relevant in the future.

Senator FEINSTEIN. Thank you very much. I notice I just have 40 seconds left. Will we have another round, Mr. Chairman?

Chairman SPECTER. Well, that is something that—let us talk about. I would very much like to finish today. As I said earlier, that may be an ambitious schedule, but let us talk about it.

Senator FEINSTEIN. Thank you.

Chairman SPECTER. Senator Sessions?

Senator SESSIONS. Thank you, Chairman Specter.

Judge Alito, I want to thank you for your patience and good spirits and your thoroughness in answering questions. You have been very forthcoming. I think very few people could disagree that on

case after case that you have been asked about, you have gone as far as you legitimately should go to express your understanding of the law and what is important there.

I know your entire record has been examined extensively. You think about it, the FBI does a background check. They found out every place you lived and talked to your neighbors and checked your criminal history. The Department of Justice has a big inquiry that they do before they submit your nomination to the President, or the President submits your nomination to the Senate. The American Bar Association has interviewed 300 of your colleagues before they made their recommendation that you are well qualified in a unanimous vote. The Senate has its questionnaire. Outside groups look at it and create studies and data. They read everything you have written to find things that they might be unhappy with. So I think, all in all, you are coming through this with very little mud upon you, for which I congratulate you. I think it is something that you can be proud of. Most of us on this side of the aisle would not like to have our record scrutinized in the way yours has been.

I know some of us have made mistakes in our statements already in the hearing, we have to admit. I will admit that I was one of them. I first said that you were ranked No. 4 in being the most independent judge out of 900 judges in the country. As I see the numbers more clearly, you were No. 4 out of 98 appellate judges examined in that system, but that still shows that you are an independent, nonideological judge, willing to—one of the factors they used was whether or not you always agreed with nominees of your party, and so I think that speaks well for your record and that is why you have gained such a broad respect from your colleagues.

I just wanted to briefly mention some of these studies that go into your background. People have looked at it, incredibly, to the most minute detail. You were asked earlier about saying that you only rule one out of eight times for immigrants seeking asylum, but looking at the asylum cases nationwide, most of those are the government's position is affirmed. It has already been decided by a lower court or administrative body. You are simply reviewing their decision.

But in immigrant asylum cases nationwide, the court of appeals generally ruled for the asylum-seeker 11 percent of the time. During your record on the bench, you ruled for asylum-seekers 18 percent of the time. In your published opinions, the average court of appeals judge in America ruled for immigrants 8 percent of the time. In your published opinions, you ruled for them 19 percent of the time.

I think this not only shows that the charges against you there are not well placed, it shows just how carefully your record is being examined by people as you move through the system.

Another example, civil rights. I think your critics have cherry-picked from some of your 4,800 cases that you have ruled on. In your opinions on civil rights, your panel was unanimous 90 percent of the time, and when you sat on a panel where both the other judges were Democratic appointees, your decision was unanimous 100 percent of the time. So I think that speaks well for your overall record on civil rights. It certainly would indicate that you are not hostile to a legitimate civil rights complaint.

You were asked about one environmental case by Senator Feinstein, and you ruled on that case based on standing. That is an important issue in the legal system, don't you agree?

Judge ALITO. It is—

Senator SESSIONS. It is a well recognized principle.

Judge ALITO. It is a constitutional principle.

Senator SESSIONS. It does not have to do with whether you were for or against the environmental issue in question, but simply whether the person bringing the suit was a legitimate person to bring that suit.

Judge ALITO. That's right, and it doesn't have anything to do with Congress's power to regulate the environment under the Commerce Clause. That's a separate question. Congress—it's totally separate. One has to do with the scope of congressional power. The other has to do with who can bring the suit.

Senator SESSIONS. And with regard to environmental cases, you have rendered, according to one of these studies, you have authored six environmental opinions. You sided with the environmental regulatory body in five of those six opinions. Indeed, Professor Cass Sunstein, who has served as an advisor to the Democratic members of this Committee on changing the ground rules of confirmation, which was really a precursor to the commencement of a filibuster, Professor Cass Sunstein said this about you. Quote, "This is a judge who, if the text is pro-environment, he is very likely to follow it. This is not someone who, like some judges, has a kind of pro-business orientation in his approach to the law." I think that is also a statement that you can take pride in.

I would offer for the record, Mr. Chairman, another article by Stuart Taylor of the National Journal, Monday, December 12, in which he, in a very effective way, dismisses much of the complaints that have been made against Judge Alito—

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

Senator SESSIONS. He says the systematic—this is his quote. "The systematic slanting, conscious or unconscious, of this and many other news reports have helped fuel a disingenuous campaign by liberal groups and Senators to caricature Alito as a conservative ideologue. In fact, this is a judge who, while surely too conservative for the taste of liberal ideologues, is widely admired by liberals, moderates, and conservatives who know him well as a fair-minded, committed to apolitical judging and wedded to no ideological agenda other than restraint in the exercise of judicial power," close quote. I would offer that for the record.

Also, with regard to your challenges on *Vanguard*, on matters that have impacted your integrity, I would like to quote from the American Bar Association's interview questionnaires that they did on you among those who know you well. This is what they put in their conclusion. "Conclusion: We accept his explanation and do not believe these matters reflect adversely on him," talking about those conflict allegations. They go on to say, "To the contrary, consistent and virtually unanimous comments from those interviewed include he has utmost integrity, he is a straight-shooter, very honest and calls them as he sees them." These are quotes from different lawyers and judges. "His reputation is impeccable. You could find no

one with better integrity. His integrity and character are of the highest caliber. He is completely forthright and honest. His integrity is absolutely unquestionable. He is a man of great integrity." And then they conclude, "On the basis of our interviews with Judge Alito and with well over 300 judges and lawyers and members of the legal community nationwide, all of whom know Judge Alito professionally, the Standing Committee concluded that Judge Alito is an individual of excellent integrity." So congratulations on that finding.

Judge Alito, many important decisions of the Supreme Court in recent years touch on the deepest values of the American people. They deal with things like *Kelo* and the property that they own, matters of faith and morality, decency and pornography. Do you have a sense of where the American people are with regard to these issues? Can you indicate to us that you have any appreciation for the legitimacy of some of those concerns?

Judge ALITO. Well, I do, Senator, and I—

Senator SESSIONS. Regardless of the technical laws it involves, but just that fundamental policy.

Judge ALITO. I think I have an appreciation of people's concerns. Certainly with respect to *Kelo*, which is a recent decision and I can't comment on how I would rule on any matter concerning that, and it involves the power to take property for public use through eminent domain, I certainly understand that what occurred in that case, which, as I understand it, was the taking of the homes of people of modest means for the purpose of building a large commercial facility that would be—that was thought by the city to be beneficial to the economic welfare of the city, but this is an enormous blow to the people whose homes are being taken. People live in homes and they have a sentimental attachment to them. They have memories that are attached to the homes. They can remember what happened in particular rooms. The neighborhood means something to them, the neighbors mean something to them. The things in the home mean something to them. And taking their home away and giving them money in return, even if they get fair market value for the home, is still an enormous loss for people. So I certainly can appreciate what they feel in that respect.

Senator SESSIONS. Well, let's talk about that a little bit. Because this is a matter of real power and it is a matter that the Congress gets drawn into sometimes whether we want to be drawn into it or not. We have discussed *Roe* v. *Wade*, people remain concerned about that. The polling numbers continue to drift against that decision. We talk about the district court opinion I believe Senator Brownback raised, a Federal court, on marriage, on redefining the traditional statutory definition on marriage contained in States and in State constitutions around the country. In *Kelo*, it is pretty clear to me that the Court just changed the meaning of the words. The Constitution said you could take property for public use; the Court felt that was too restrictive, basically, and a majority just changed it to say you could take property for a public purpose, which could include some private redevelopment on the area, in their minds.

See, that is not founded in the Constitution. That is an overreach, in my opinion. On the Pledge of Allegiance case, the *Newdow* case, the Ninth Circuit, which includes approximately 20

percent of the people in the United States, ruled that the Pledge of Allegiance was unconstitutional. The Supreme Court sort of sidestepped the fundamental issue and said that there was not standing on behalf of Mr. Newdow, and sent that back to a lower court. He now got him some plaintiffs that apparently have standing. He has taken it to the district court in California, and he has won that case. They have concluded that the Ninth Circuit law remains in effect so that 20 percent of the population of the United States, really, are not able, if you follow that opinion, to render the Pledge of Allegiance. Yet we have chaplains and In God We Trust in the Senate chamber and those kind of issues.

So I don't believe that that is founded in the Constitution. I think the American people do not. And they are asking some real questions of us. So I guess I won't try to get you drawn into those.

But I want to do this. The doctrine of judicial review, *Marbury* v. *Madison*. You already indicated Hamilton didn't favor that. But the Court found it. But it is not expressly stated in the Constitution, is it?

Judge ALITO. No, it's not.

Senator SESSIONS. And it definitely shifts the balance of power between the branches because the Court now has the power to, by a stroke of its pen, five of its nine members, to strike down any law they say violates the Constitution. That is true, is it not?

Judge ALITO. Well, they decide constitutional questions, and the doctrine has been established since *Marbury* v. *Madison*, that's right.

Senator SESSIONS. Well, but there are explicit powers given to the Congress. And Senator Coburn raised some of those. Article III, Section 2 has these words: "In all the other Cases before mentioned,"—this is the Constitution's grant of power to the courts—"the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Now, those words are in the Constitution, are they not?

Judge ALITO. Yes, they are.

Senator SESSIONS. And as you said, if the words are expected to have some meaning, you would give them some meaning, at least, would you not?

Judge ALITO. I think that's undisputed, that they have a meaning.

Senator SESSIONS. So Congress has some power here. We have not exercised that power, certainly in recent years. In *Ex Parte McCardle*, the Supreme Court in 1869 agreed that, though the judicial power is conferred by the Constitution, it is conferred under such exceptions as Congress shall make. Then there is the Impeachment power—the Senator mentioned that. And then the establishment of lower courts. Article III, Section 1 says, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time establish." That indicates that Congress can establish or disestablish courts, does it not?

Judge ALITO. I think it's undisputed that the so-called inferior courts—and I don't particularly like the term as a judge of the

court of appeals—but the so-called inferior courts are totally the creation of Congress.

Senator SESSIONS. Now I would just ask you to comment on this thought. Chief Justice Roberts, in his hearings—and I asked him some questions similar to this—indicated that he was concerned about activism by the Court, overreaching by the Court, and he felt that this overreaching had the—created a danger that it could undermine respect for law in our country. Do you share that view?

Judge ALITO. I agree that overreaching by the courts can undermine respect for law. Our authority is based on the belief that what we are doing is different from what Congress is doing. Because otherwise, why would people tolerate our functioning? Nobody elects us. And we have a system of Government that is fundamentally democratic. It's based on the sovereignty of the people. So how do you explain an unelected branch of Government making decisions?

So all of our authority is based on the idea, which was expressed in *Marbury* v. *Madison*, that the Constitution is law. It's not conceptually different from statutory law. And our job is to interpret the Constitution—it has a meaning—and apply it to the situations that come up.

Senator SESSIONS. Well, right now there is a strong feeling that I share that the Court on some very important issues that people care deeply about is exceeding its authority. They are calling on me and members of—and those of us in Congress to do something about it. I get a lot of letters saying withdraw jurisdiction, why aren't you supporting legislation to do that? And Congress, I think, has shown restraint.

But I hope that when you become a member of this august body, the Supreme Court—and I believe you will—that you will take those concerns with you and share with the members of the Court that their views on policy issues are of no greater value than mine, frankly—at least in my opinion they are not—and that the Congress has been showing some restraint here. But we really want the Court to be more modest and to draw back from some of its intervention in policy issues that are causing much angst around the country.

If you want to comment on that. Otherwise, Mr. Chairman, I would yield my time.

Judge ALITO. Well, Senator, I think your policy views are much more legitimate than the policy views of the judiciary because Members of Congress are elected for the purpose of formulating and implementing public policy. And members of the judiciary are appointed for the purpose of interpreting and applying the law.

Senator SESSIONS. Thank you very much.

Chairman SPECTER. Thank you, Senator Sessions.

We will now stand in recess until 4:20.

[Recess 4:04 p.m. to 4:20 p.m.]

Chairman SPECTER. The hearing will resume.

We will turn to Senator Feingold for 20 minutes.

Senator FEINGOLD. Thank you, Mr. Chairman.

Good afternoon, Judge. I hope, if nothing else, you associate me with breaks in the proceedings, because it seems to happen every time my questions are up.

Judge, yesterday I asked you about your preparation for these hearings over the past few months with a variety of practice sessions. You confirmed that you had had these sessions and that a great variety of subjects came up in them, and that is fine. I know this is not an easy process, and I would certainly expect you to prepare in this way.

What I want to ask now, though, is simply if you can provide a list of all the people who participated in any of those practice sessions, and I would request that the folks here sitting behind you in back of the Department of Justice help you put that list together this evening and get it to us tomorrow morning so that we have time to ask about it during tomorrow's session, if necessary. Can you do that for me, Judge?

Judge ALITO. I certainly have no objection to that.

Senator FEINGOLD. Thank you very much. Now I want to get into a subject that really requires some attention here and hasn't had much attention given the important role that it plays in the job of a Supreme Court Justice, and that is the issue of capital punishment or the death penalty.

Judge Alito, the idea that defendants are entitled to effective legal representation is a fundamental part of our criminal justice system. In fact, of course, it is enshrined in the Sixth Amendment's guarantee that the accused have "the assistance of counsel for his defense." Nowhere is this guarantee obviously more important than in cases where the defendant's life is on the line. In a death penalty case you decided in 2004 called *Rompilla* v. *Horn*, you rejected the defendant's argument that his attorneys had failed to do an adequate investigation to prepare for his sentencing hearing. As a result, key mitigating evidence about his horrible childhood was never presented to the sentencing jury, which ultimately sentenced him to death.

As you know, the Supreme Court reversed your decision, ruling that the defense attorney's failure to even review evidence they knew the prosecution was going to introduce at sentencing violated the Sixth Amendment. This case was one of several Supreme Court cases in recent years to express particular concern—particular concern about the adequacy of indigent representation and the fairness of the capital sentencing process.

In fact, in several recent decisions, including *Rompilla*, the Court has overturned death sentences because defense attorneys did not do adequate investigations to turn up potential mitigating evidence and because jury instructions did not clearly allow jurors to consider any and all possible mitigating evidence. And Justice O'Connor, whom you have been nominated to replace, has, of course, often been the author or the deciding vote in these cases.

Judge, what are your views on these issues? Is the Court's recent emphasis on the importance of fully developing and considering mitigating evidence in capital sentencing proceedings headed in the right direction?

Judge ALITO. It is vitally important that all criminal defendants receive effective representation, and I could not agree with you more strongly that this is of the utmost importance in death penalty cases where so much is at stake.

In the *Rompilla* case that you mentioned, we had to apply the standard of review that is set out in the habeas corpus statute as revised by Congress. And where there has been a determination on the merits by the State courts on an issue like whether a defendant received effective representation within the meaning of the Sixth Amendment and where the State courts have applied the correct legal standard, we are not allowed to disturb their decision unless what they did was unreasonable.

Senator FEINGOLD. Well, let me ask you then, because you are obviously pointing out the fact that you approached the *Rompilla* case as an appellate court judge bound by prior Supreme Court precedent, and yet you found that no constitutional violation had occurred. And I believe when we discussed this case in my office, you indicated you still think your decision was correct.

So the question now is: Would your approach have been any different as a Supreme Court Justice? What about your decision on the outcome of the case?

Judge ALITO. Well, my decision, I spoke directly to the issue in the *Rompilla* case as I saw it when it came before me. And my evaluation of the performance of the attorneys in that case was fully set out in the opinion that I wrote. They were—one of them was a very experienced criminal defense attorney. He was the head of the public defender's office, and there was no dispute whatsoever that this was an attorney of competence and experience and great dedication to the defendant in this case, and that attorney was assisted by another attorney in the office, and together they were extremely dedicated to this case.

Now, a number of judges took a look at this. All of the Pennsylvania judiciary, with the possible exception of one justice—I can't remember clearly whether there was one justice who disagreed—thought that there had been effective representation provided in this case.

Senator FEINGOLD. This really isn't about the difference between being on the court of appeals and the Supreme Court. You apparently, based on what you know, would have ruled the same way had you been on the Supreme Court.

Judge ALITO. Well, my evaluation of the facts of the case would be the same. Now, if a case came—

Senator FEINGOLD. In other words, that there was not a violation of the Sixth Amendment.

Judge ALITO. Well, I should add, however, that if a case came up in the future, the Supreme Court's decision in that case is a precedent that I would have to deal with. And they—

Senator FEINGOLD. Fair enough.

Judge ALITO [continuing]. Expressed a view as to how the standard applies to the facts of the case. It was a 5–4 decision. But it would be a precedent that I would follow.

Senator FEINGOLD. Well, now let's go back to my original question, which is, Do you think the Supreme Court has been heading in the right direction in these cases?

Judge ALITO. Well, I think that the Supreme Court is correct in viewing this as a very important part of the criminal justice system, and in particular, a very important part of the representation of clients in Eighth Amendment cases.

Senator FEINGOLD. Isn't the Court doing more than that? The Court is moving in the direction of giving greater recognition and ruling on the inadequacy of counsel in this case.

Judge ALITO. And I think it's entirely appropriate that there be a searching review in every case as to whether a defendant in any criminal case, but in particular, of course, in a capital case, has received the representation that the defendant is entitled to under the Sixth Amendment.

Senator FEINGOLD. Do you think your replacing Justice O'Connor will change the direction of the Court in this regard?

Judge ALITO. I would approach these cases under the law that the Supreme Court has established in this area, with the recognition that I have attempted to explain of how important I believe this right is in all cases and in death cases in particular. When the Supreme Court reviews a case that has come up through the Federal system, in a habeas proceeding, then the Supreme Court, just like my court, should apply the standards that are set out in the habeas corpus statute.

Senator FEINGOLD. Let's go to a different one. *Wiggins* v. *Smith* is a Supreme Court case decided in 2003 also addressing inadequate mitigation investigation. In that case, Justice O'Connor, writing for the majority, found trial counsel ineffective for failing to conduct an adequate investigation into possible mitigating evidence that could be presented at sentencing. Had the attorney done adequate investigation, he would have found abundant evidence of childhood physical and sexual abuse as well as diminished mental capacity. Do you think that case was right decided?

Judge ALITO. Well, I discussed *Wiggins* in *Rompilla*, and I thought that it was distinguishable. *Wiggins*, as described, as I recall it, was a case where the attorney had reason—the attorney simply didn't conduct an investigation without any sound strategic reason for not investigating a particular matter.

Senator FEINGOLD. So you have no sense that that was wrongly decided?

Judge ALITO. I have no sense that that was wrong. I thought it was different from the *Rompilla* case.

Senator FEINGOLD. According to two independent studies, your record in death penalty cases has been more anti-capital defendant even than most Republican-appointed judges. In fact, in every disputed capital case that you heard, that is, cases in which a panel of three judges did not all agree, you would have ruled against the defendant. How do you explain this seeming tendency to favor the Government in capital cases?

Judge ALITO. I have only sat on a handful of capital cases, and in some of them I voted to uphold the death penalty, and in a number of them I voted to strike down the death penalty. In *Carpenter* v. *Vaughn*, I voted to strike down the death penalty. In the most recent death penalty case I sat on, the *Bronshtein* case, I voted to strike down the death penalty because of the procedure that was followed at the penalty phase in that case. In the *Cruz* case, I was part of a panel that vacated a decision of the district court rejecting the claim of a habeas petitioner. There have been other cases where I voted to uphold the death penalty.

Senator FEINGOLD. Justice Stevens recently gave a speech at the American Bar Association in which he raised a number of serious concerns about the administration of the death penalty. He pointed to aspects of capital proceedings that he believes unfairly tilt the balance in favor of the prosecution both at the trial and sentencing stages. Specifically, he raised concerns about the jury selection process, arguing that jurors are questioned so extensively about the death penalty that they might assume their role is primarily to decide this sentence for a presumptively guilty defendant.

He also argued that a representation of indigent defendants remains an issue that has not been adequately addressed, and he noted that elected State judges may have a "subtle bias" in favor of death because they have to face re-election.

Now, I know all of us on this Committee have the greatest respect for State court judges, but we all can understand the pressures of a re-election campaign. So what are your views on the potential of these three issues—the jury selection, the inadequate representation, and an elected judiciary—to skew a capital prosecution against the defendant? And do you share these concerns that Justice Stevens outlined?

Judge ALITO. I certainly share a concern that there should be a fair procedure for the selection of jurors. That certainly is a concern. The issue of the election of judges at the State level or the appointment of judges at the State level is a matter for State legislatures to decide, and within my circuit, we have three States. In New Jersey and in Delaware, the State judiciary is appointed; in Pennsylvania, the State judiciary is elected. And I've had the opportunity to view the work of all three of the Supreme Courts in those States, and I think they all are of a very high quality. I think the elected judges in Pennsylvania do a conscientious effort to carry out their responsibilities, and I think—I have a high regard for the judiciary in all of those States.

So based on the experience of—on my experience, I think you can have highly competent and certainly conscientious State judges who are appointed and the same sort of judges who are elected. And, of course, we do have habeas corpus and it is an important—it's important to make sure that constitutional rights are respected, and the scope of the review that we conduct under habeas is up to Congress. Congress reformulated the standards in the AEDPA, in the Antiterrorism and Effective Death Penalty Act of 1996, limiting our review, and it's our obligation to conduct the kind of review that Congress has indicated we should be conducting.

Senator FEINGOLD. Well, Judge, it sounds like you perhaps have a lesser level of concern about some of these matters than Justice Stevens. The only thing I would note is that one of the most striking things about the history of Justices that have gone to the Court sometimes who are pro-death penalty, an amazing number have come to the conclusion that this is the one area where, once they get there, they realize that these problems are much more severe than they might have thought before they became Supreme Court Justices, and I, should you be confirmed, look forward to how you react to these issues after you've become a Supreme Court Justice, should you do so.

In the past few years, the Supreme Court has limited the application of the death penalty based on the Eighth Amendment's ban on cruel and unusual punishment. In *Atkins* v. *Virginia*, the Court ruled that mentally retarded inmates cannot be executed, and in *Roper* v. *Simmons*, it held that individuals who were minors when they committed capital crimes cannot be executed as punishment for their actions.

Do you agree with these decisions?

Judge ALITO. Those decisions applied the standard that the Supreme Court formulated sometime earlier in determining whether the imposition of the death penalty on particular categories of defendants would violate the Eighth Amendment, and they looked to evolving standards of decency. And that is a line of precedent in the Supreme Court, and those are precedents of the Supreme Court, and they're entitled to the respect of *stare decisis*.

Senator FEINGOLD. Can you just tell me what your general approach to the Eighth Amendment would be in the context of the death penalty?

Judge ALITO. My approach would be to work within the body of precedent that we have. As I mentioned earlier, the Supreme Court has devoted a lot of attention to this issue since 1976 when it held that the death penalty is permissible, provided that adequate procedures are implemented by the States so that the decision about who receives the death penalty and who does not is not arbitrary and capricious, so that there is a rationality to the selection process. And the rules in this area are quite complex, but I would work within the body of precedent that is available.

Senator FEINGOLD. Let me go to a topic that we have talked about before. We had a good discussion of the recusal issue in the *Vanguard* case yesterday, and I hadn't intended to ask more about it. But your discussions with Senator Kennedy and Senator Hatch today make further questioning a little bit necessary.

Senator Hatch noted that the Committee's questionnaire asked about financial conflicts of interest during the period of your initial service as a judge. Now, the reason for wording the question like that, of course, is that nominees have no way of knowing when they are up for confirmation whether they will have the same investments 5, 10, 25 years later. The Committee obviously can't ask for a comprehensive list of possible future financial conflicts. So, for example, if you have stock in Microsoft and you list that as a financial conflict on your questionnaire, you still have to recuse yourself from a Microsoft case 15 years later if you still have the stock. Isn't that right?

Judge ALITO. If you're required to recuse yourself if you have stock in Microsoft, even one share, you must recuse yourself.

Senator FEINGOLD. You still have to recuse yourself even if it is 15 years later, right?

Judge ALITO. Certainly that's true.

Senator FEINGOLD. So the question in the Senate questionnaire about financial investments is not time-limited based on the question being about initial service on the court, is it?

Judge ALITO. Well, I want to be clear on my answer respecting this as it bears on the *Monga* case, the *Vanguard* case, because that's what we're discussing.

The wording of the Senate questionnaire was not the reason for the way I settled the case, and I've tried—

Senator FEINGOLD. I just want to know if you have any question in your mind why the question is phrased that way on the questionnaire.

Judge ALITO. Reading the question, it does seem to me that "initial period of service" is a temporal limitation.

Senator FEINGOLD. I want to be sure we don't leave the impression from these hearings that people don't have an obligation to recuse themselves from a financial conflict just because of the passage of time. You have already indicated if that financial conflict continues, that is an indefinite and permanent restriction until that financial holding is gone. Isn't that—

Judge ALITO. Absolutely, and that's under the Code of Judicial Conduct, Canon 3(C)(3) I think it is. If you have a financial interest, you must recuse yourself, and that's, of course, a continuing obligation.

Senator FEINGOLD. It is not temporal?

Judge ALITO. The obligation to comply with the code of conduct for Federal judges applies to every Federal judge for as long as they serve.

Senator FEINGOLD. And that is why I have to say that I am a bit frustrated that people are trying to obscure what I think was pretty clear testimony by you yesterday by bringing up this period of initial service issue. In response to Senator Kennedy, you made it clear again that your failure to recuse in the *Vanguard* case had nothing to do with the suggestion that your promise was time-limited. But I want to get this on the record again, and hopefully this will lay any confusion to rest. This idea that your promise to the Committee was somehow limited to your initial service on the court, that was not the reason you failed to recuse yourself from the case in 2002, was it?

Judge ALITO. It was not the reason in 2002. I do think reading the question, it has a temporal limitation. If that wasn't the intent, I think people could read it—certainly when you say "initial period of service," people will read that to mean—

Senator FEINGOLD. This has nothing to do with why you didn't recuse yourself.

Judge ALITO. It did not have to do with what I did in the *Monga* case.

Senator FEINGOLD. And it is not as if you noticed that Vanguard was a party, remembered your promise to the Committee, and then made a specific decision not to recuse because the promise had expired?

Judge ALITO. No, it was not that at all.

Senator FEINGOLD. And you finally added Vanguard to your standing recusal list in December 2003 and it is on your list today. Isn't that right?

Judge ALITO. It is on my list today.

Senator FEINGOLD. Do you plan to recuse yourself from Vanguard cases that come before the Supreme Court if you are confirmed for as long as you keep your Vanguard mutual funds?

Judge ALITO. Well, if I am confirmed, I will very strictly comply with the ethical obligations that apply to Supreme Court Justices.

Supreme Court recusals are a bit different from recusals in the court of appeals, and so the obligation to sit when you are not recused is one that has to be considered very seriously by somebody on the Supreme Court or, I would think, on a State supreme court, for example.

Senator FEINGOLD. Is there any question, if you still have holdings in Vanguard and a case comes before the Supreme Court that you should recuse yourself?

Judge ALITO. Well, under the Code of Judicial Conduct, I don't believe that I am required to recuse myself in Vanguard cases. And I would strictly comply with the ethical obligations that apply to a Supreme Court Justice.

Senator FEINGOLD. You are not going to make a promise here that you are not going to rule on Vanguard cases while you have holdings in Vanguard when you are on the Supreme Court?

Judge ALITO. Well, what I want to say about recusals on the Supreme Court is that the decisionmaking process on the Supreme Court, or any court with a fixed membership, a fixed number of jurists who sit on each case, recusal in that situation creates—affects the decisionmaking process because instead of having 9 Justices, you have 8, you have the potential for a tie.

On the court of appeals, that is a much less significant consideration because we always sit in panels of three, we have many judges on our court and many cases, so if I don't sit on a case involving Vanguard, it just means somebody else will sit on the case involving Vanguard, it will still be decided by a three-judge panel.

Senator FEINGOLD. I would add on that point that that may be true, but it is also true that the Supreme Court is the last stop, and if somebody does not recuse himself, there is really no remedy, and that is why it is so important that somebody would recuse himself.

Judge ALITO. It is very important for somebody on the Supreme Court to fulfill strictly the obligation not to sit when the person should not sit, but it's also important for—given the matters that I just discussed—for a Justice to sit if the Justice is not required to recuse.

Senator FEINGOLD. Judge, my time is up.

Mr. Chairman, we do not yet have the communication from Judge Alito to the clerk on December 10th, 2003 that caused Vanguard to be added to his standing recusal list, and whether that was an e-mail or a form that Judge Alito filled out or something else, we have requested it, so I am just asking for the assistance of the Chairman in getting that document so we can complete the record.

Chairman SPECTER. Senator Feingold, we will take a look at it and see what the facts are.

Senator FEINGOLD. Thank you.

Chairman SPECTER. Thank you, Senator Feingold.

Senator Graham?

Senator GRAHAM. Thank you, Mr. Chairman.

Judge Alito, maybe we could continue with the Vanguard issues just for a moment, and I know you have been asked every conceivable combination of questions, but Senator Feingold is very sincere about ethics in Government. He practices what he preaches, and he

has been one of the leaders trying to make this place operate better. My impression of you is that you are a good model for judges in terms of ethical conduct based on what everybody says who knows you. I do not claim to be a close associate of yours, but the ABA has looked at this and said that it did not reflect poorly on you. Three hundred lawyers and judges who know you have said that you are just really sort of what we want in a judge, and maybe that is not enough, but that is a pretty good start. I do not think you could get 300 people to say that about me or some of us, but.

The question I have, the criminal prosecutor or lawyer in me has this question to ask: why would you make a conscious decision not to recuse yourself? Why would Judge Alito sit down in the corner of a room and say, "I think I've got a conflict, but I'm just going to let it go and hear the case anyway?" I am baffled as to why you would make a conscious decision in this situation not to recuse yourself. Do you have an explanation?

Judge ALITO. There's no reason why I would make such a conscious decision. I had nothing whatsoever to gain by participating in this case, and nobody has suggested that I did. This case involved some thousands of dollars. Vanguard manages billions of dollars of funds. The idea that the outcome of this case could have some effect on the mutual funds that I hold is beyond preposterous, and I don't understand anybody to have suggested anything like that.

Senator GRAHAM. I have been asking myself that question quietly, what is in it for this guy? Why would he bring all of this grief upon himself consciously? Is it to intentionally break a promise to the Senate so you would go through hell for 3 days? I do not think so. So I am going to accept your word, like the ABA, and I am going to move on, and I do not know if anybody else will.

Now, your days at Princeton, the more I know about Princeton, it is an interesting place.

[Laughter.]

Senator GRAHAM. What is an eating society?

Judge ALITO. It's a—the eating clubs are privately owned facilities where upperclassmen join for the purpose of taking their meals. The first 2 years, when I was there—the situation is now a bit more diversified as far as eating is concerned—but when I was there, and traditionally, the freshmen and sophomores ate in university dining halls, and then as juniors and seniors they had to find other places to eat, and these were private facilities.

Senator GRAHAM. What is a selective eating society?

Judge ALITO. It's one where you apply to be a member like a fraternity, and you go through a process that is somewhat similar to that, and they select you if they like you.

Senator GRAHAM. Were you a member of a selective eating society?

Judge ALITO. No, I was not.

Senator GRAHAM. Did people not like you, or—

[Laughter.]

Senator GRAHAM [continuing]. You just did not apply?

Judge ALITO. I didn't apply.

Senator GRAHAM. Let me tell you who did apply. Donald Rumsfeld was a member of a selective eating society at Princeton, and

that is an interesting comment I thought. Woodrow Wilson, Jim Leach, good friend of mine over in the House. Mitch Daniels, the Governor of Indiana, was a member of a nonselective eating society. Senator Claiborne Pell was a member of nonselective eating societies. And other Princeton alumni who are Members of Congress could not verify their participation or lack thereof in eating clubs, including Senator Sarbanes, Bond, Frist and Representative Marshall, and I promise you, I will get to the bottom of that before this is all done.

[Laughter.]

Senator GRAHAM. This organization that was mentioned very prominently earlier in the day, did you ever write an article for this organization?

Judge ALITO. No, I did not.

Senator GRAHAM. Some quotes were shown from people who did write for this organization that you disavowed. Do you remember that exchange?

Judge ALITO. I disavow them. I deplore them. I—they represent things that I have always stood against, and I can't express too strongly.

Senator GRAHAM. If you do not mind, the suspicious nature that I have is that you may be saying that because you want to get on the Supreme Court, that you are disavowing this now because it does not look good. Really, what I would look at to believe you or not—I am going to be very honest with you—is how have you lived your life? Are you really a closet bigot?

Judge ALITO. I'm not any kind of a bigot. I'm not—

Senator GRAHAM. No, sir, you are not. And you know why I believe that? Not because you just said it, but that is a good enough reason because you seem to be a decent, honorable man. I have reams of quotes from people who have worked with you, African-American judges—I have lost my quotes, I do not know where they are—but glowing quotes about who you are, the way you have lived your life, law clerks, men and women, black and white, your colleagues who say that "Sam Alito, whether I agree with him or not, is a really good man."

And do you know why I believe you when you say that you disavow those quotes? Because of the way you have lived your life and the way you and your wife are raising your children. Let me tell you this, guilt by association is going to drive good men and women away from wanting to sit where you are sitting. And we are going to go through this ourselves as Congressmen and Senators. People are going to take the fact that we got a campaign donation from somebody who is found out to be a little different than we thought they were, and our political opponents are going to say, "Aha, I got you." And we are going to say, "Wait a minute. I didn't know that. I didn't take the money for that reason." You know what? I am going to believe these Senators and Congressmen for the most part because that is the way we do our business. We meet people here every day. We have photos taken with people, and sometimes you wish you did not have your photo taken. But that does not mean that you are a bad person because of that association.

Judge Alito, I am sorry that you have had to go through this. I am sorry that your family has had to sit here and listen to this.

Let's talk about another time not so long ago, and another judge, and some of her writings, and see if the Senate is changing for the better or for the worse. Justice Ginsburg, who I need to go have a cup of coffee with because I constantly bring her up, and I do not dislike the lady, I admire her. But let's put it bluntly, under today's environment from a conservative's point of view, she would have a very hard time, because Justice Ginsburg was the General Counsel for the ACLU from 1973 to 1980, and if you want me to tar somebody by their association, I can put up some pretty wild cases from my point of view where she was involved. But you know what? I respect her because her job as an attorney for the ACLU is to represent the most unpopular causes. As far as I can tell, during her time with the ACLU, she was honest, she was ethical, and she fought for the most unpopular causes, and for that, I respect her.

But you put some things down on an application about your view of the law in *Roe* v. *Wade*, and it is taking an unbelievable effort on your part, I think, to convince people that when I was a lawyer I did this, when I applied for a job I was doing this, and as a judge I will do this.

Here is what Justice Ginsburg said in an article she wrote titled "Some Thoughts on Autonomy and Equality in Relationship to *Roe* v. *Wade*." "The conflict, however, is not simply one between a fetus's interest and a woman's interest, narrowly conceived. Nor is the overriding issue State versus private control of a woman's body for a span of 9 months. Also in the balance is a woman's autonomous charge of her full life's course, her ability to stand in relation to man, society and the State as an independent self-sustaining equal citizen."

She wrote further, "As long as the Government paid for childbirth, the argument proceeded, public funding could not be denied for abortion, often a safer and always a far less expensive course short and long term. By paying for childbirth but not abortion, the Government increased spending and intruded upon or steered a choice. *Roe* had ranked as a woman's fundamental right. The public funding of abortion decisions appear"—denying a requirement of public funding appear "incongruous following so soon after the intrepid 1973 ruling. The Court did not adequately explain why the fundamental choice principle and trimester approach embraced in *Roe* did not bar the sovereign, at least at the previability stage of pregnancy, from taking sides and being required to provide funding for the abortions of poor women."

If that writing does not suggest an allegiance to *Roe*, if that writing does not suggest from her point of view as the author of that article, not only is *Roe* an important constitutional right, the Government ought to pay for abortions in certain circumstances. If she were here today, and a Democrat President had nominated her, and we take on the role that our colleagues are playing against you, not only would she not have gotten 96 votes, I think she would have been for a very rough experience. And what has changed?

Justice Ginsburg openly expressed a legal theory about *Roe* v. *Wade*. My question to you, if I am arguing a case that would alter *Roe* v. *Wade*, would I have the ability, because of her prior writings, to ask her to recuse herself based on those writings alone?

Judge ALITO. I don't think you would, Senator. I think it's established that prior writings of a member of the judiciary do not require the recusal of that member of the judiciary.

Senator GRAHAM. I think you are absolutely right, Judge. Let me tell you what she said at the hearing when it was her time to sit where you are sitting. "You asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated. The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision that she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices."

A sentiment that I think our pro-choice colleagues share, a sentiment that I disagree with because I think the decision does affect humanity, and that is the unborn child. I do not question her religion. I do not question her patriotism. She gave an answer that was very honest and was very direct, and pro-life Republicans and pro-life Democrats never thought about disqualifying her. She did not go through what you went through. Pro-life Republicans and pro-life Democrats set her comment aside and judged her based on her whole record and believed she was worthy to sit on the Supreme Court, and she got 96 votes.

And what you have said in your writings about the other side of the issue pales in comparison to what she said before she came to this body.

I don't know how many votes you are going to get. You are going to get confirmed, and it is not going to be 96. Judge Roberts got 78, and I am afraid to say that you are probably going to get less.

To my colleagues, I know abortion is important. It is important to me, it is important to you. I know it is an important central concept in our jurisprudence. But we can't build a judiciary around that one issue. We can't make judges pledge allegiance to one case. We can't expect them to do things that would destroy their independence. You can vote yes, you vote no. You can use any reason you would like. I just beg my colleagues, let us not go down a road that the country can't sustain and the judiciary will not be able to tolerate.

People set aside her writing, set aside her candid statement and gave her the benefit of the doubt that she would apply the law when her time came. She replaced Justice White. We knew that that vote was going to change. I don't think any Republican had any doubt that if there was a *Roe* v. *Wade* issue, she would vote differently than Justice White, but you never know.

The one thing I can tell the public about you and John Roberts is that you are first-round NFL draft picks, but I don't know what you are going to do ten or 20 years from now because I think you are men of great integrity, and I may be very well disappointed in some of your legal reasoning, but I will never be disappointed in you if you do your job as you see it fit.

The last thing I am going to read—do you know Cathy Fleming?

Judge ALITO. I do. She was an attorney, a supervisor in the U.S. Attorney's Office in New Jersey.

Senator GRAHAM. Did you ask her to write a letter on your behalf?

Judge ALITO. I did not, no.

Senator GRAHAM. "Judge Alito did not ask me to write this letter. I volunteered."

[Laughter.]

Senator GRAHAM. I am glad you said that, by the way.

[Laughter.]

Senator GRAHAM. "I am a lifelong Democrat. I am the president-elect of the National Women's Bar Association. I chair the corporate integrity and the white collar crime group at a national law firm. I do not speak on behalf of either my law firm or the Women's Bar Association. I speak for myself only. But by providing my credentials as an outspoken women's rights advocate and liberal-minded criminal defense attorney, I hope you will appreciate the significance of my unqualified and enthusiastic recommendation of Sam Alito for the Supreme Court. Sam possesses the best qualities for judges. He is thoughtful. He is brilliant. He is measured. He is serious. And he is conscious of the awesome responsibility imposed by his position. I cannot think of a better quality for a Supreme Court Justice. It is my fervent hope that politics will not prevent this extraordinary capable candidate from serving as an Associate Justice on the U.S. Supreme Court."

I share her hope. Thank you. I yield back my time.

Chairman SPECTER. Thank you, Senator Graham.

Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman. Thank you, Judge Alito.

First, I want to go over some of the things you said yesterday. Judge Alito, you testified yesterday that you would keep an open mind, isn't that right?

Judge ALITO. I did and I do.

Senator SCHUMER. Now, are you aware of any nominee in the history of the Republic who has come before the Senate and testified he would keep a closed mind?

Judge ALITO. I am not aware of that, but I can only speak for myself. I will keep an open mind on all issues.

Senator SCHUMER. You also testified yesterday that no one, not even the President, is above the law, right?

Judge ALITO. That's certainly true.

Senator SCHUMER. Yes. And are you aware of any nominee in the history of this Republic of whatever political philosophy, judicial philosophy, or denomination who has come before the Senate—party denomination—and testified that, actually, there are a few people who are above the law?

Judge ALITO. I am not aware of a nominee like that, Senator.

Senator SCHUMER. And you also testified that the Court should have respect for the Congress, isn't that right?

Judge ALITO. Yes.

Senator SCHUMER. Do you know of any nominees who came before the Senate and said, "The heck with you guys. I don't have any respect for the Congress."

Judge ALITO. Senator, I can only speak for myself, and those are true expressions of what I think.

Senator SCHUMER. I know that, but all I want to say is—and I don't doubt your sincerity in saying them, but this morning's news-

papers were filled with headlines to the effect you would keep an open mind. I don't find that really to be news, nor do I find it very helpful in figuring out what kind of Justice you would be.

My friends on the other side of the aisle have repeatedly said you have answered over 200 questions. Now it is probably 300. But a response is not an answer, and you have responded to more than 300 questions, but in all due respect, you haven't answered enough of them. So again, I think we ought to make clear that at least to many of us here, we haven't gotten the answers to questions, yes or no, on some important issues.

With that, I would like to return to *Roe*, something that we discussed yesterday at some length. You did say yesterday that you would keep an open mind. You said, first, you would look at *stare decisis* and then you would keep an open mind after going through *stare decisis*. But when I asked you questions about your prior statements to see if you would keep an open mind so I could make a determination, so the American people could make a determination, you really didn't answer the question.

Now, we have heard pledges about having an open mind before. I want to read you one. It is another hearing, someone who sat in your chair. "I have no agenda, Senator. I have tried here as well as in my other endeavors as a judge to remain impartial, to remain open-minded, and I am open-minded on this particular issue." I will bet you can guess who that nominee was, Clarence Thomas on the issue of the Constitution and the right to choose, the very issue I have asked you about, when he sat in that chair 15 years ago.

So someone pledging an open mind doesn't tell us very much, because I think there were a lot of people on this Committee who were surprised—I wasn't there—were surprised by how Justice Thomas ruled based on his testimony. He didn't tell them enough.

Now, yesterday, as you know, I asked you whether you believe today that the Constitution protects the right to an abortion, given that in 1985 you flatly said that it doesn't, and you didn't answer that question. Then I asked you whether the Constitution protects the right to free speech, and you said yes. Then I asked, how could you answer one and not the other, and your answer as to why you could discuss one and not the other was essentially that the words "free speech" appear in the Constitution, but that, and this is your words, "the issue of abortion has to do with the interpretation of certain provisions in the Constitution, the 14th Amendment."

Now, Judge Alito, the words "one person/one vote" are not in the Constitution. You know that. And yet you said yesterday, and I think you repeated today to Senator Kohl and maybe Senator Feinstein, as well, but what you said yesterday was, quote, "I think that one person/one vote is very well settled now in the constitutional law of our country." So you were able to answer on the basis of something as to whether it is settled, not being in the—the words are not in the Constitution.

But you were queried by a few of my colleagues and you had a different explanation. Now, you said you can answer on the other issues because it is settled law. It is not going to come before the Court. So let us go over settled law a little bit.

In case after case, you have been telling us—you have been comfortable telling us that certain cases are settled, and yet you won't

use that word with respect to *Roe*. You have done it in a host of other cases and issues. I will read a few. "So I think that one person/one vote is very well settled now in the constitutional law of our history," in response to Senator Kohl. "The status of independent agencies, I think, is settled in the case law." That was in response to Senator Leahy. "But I do think that most of those Commerce Clause cases in the years proceeding *Lopez*, the ones that come to mind, I think, are well-settled precedents," in reference to Senator Feinstein. "I think the scope of immunity that the attorney has is now settled by *Mitchell* v. *Forsythe* and that's the law."

So can you answer the question? Is *Roe* settled or not? It is less of a concern which way you answer. I would just like you to answer the question. You can say, *Roe* is not settled. *Roe* can absolutely be reexamined. I think a lot of people think that is the answer you want to give, but it is controversial and you may not want to give it because it is controversial, even though some of these other issues will come before the Court. Commerce Clause cases will come before the Court. Certain types of one man/one vote cases will come before the Court. Certain types of administrative agencies will come before the Court.

So why is it only when it comes to *Roe* you can't tell us whether it is settled, whether it is not settled, or how it is settled, and you can pick any formulation you want. Other judges have commented on *Roe* being settled. Lindsey Graham pointed out—he is not here, but Ruth Bader Ginsburg talked about her view and she still got a lot of votes on the other side of the aisle. The same might happen to you.

So the question, Judge Alito—

[Laughter.]

Senator SCHUMER. The question, Judge Alito, is why won't you talk to us about *Roe* in terms of whether it is settled or not when you will about so many other issues, even issues that would come before the Court?

Judge ALITO. The line that I have tried to draw, and I've tried to be as forthcoming as I can with the Committee. I've tried to provide as many answers as I could, and obviously, I'm speaking here extemporaneously in response to questions. The line that I have tried to draw is between issues that I don't think realistically will come before the Court, and on those, I feel more freedom to respond. One person/one vote is an example of that—

Senator SCHUMER. What about Commerce—sorry to interrupt, but we have limited time. What about Commerce Clause? *Raich* came to the court a couple of years ago. *Raich* has roots all the way back in *Wickard* v. *Filburn*. You talked about Commerce Clause cases being settled.

Judge ALITO. Well, it depends on which Commerce Clause cases you're talking about. Certainly, the initial Commerce Clause cases that moved away from the pre-New Deal understanding of the Commerce Clause have been on the books for a long time. Maybe I have been more forthcoming than I should have been in some areas, and if that's the case in providing these extemporaneous answers, I can be faulted for that. But the line that I have to draw, and I think every nominee, including Justice Ginsburg, has drawn, is to say that when it comes to something that realistically could

come before the Court, they can't answer about how they would decide that question. That would be a disservice to the judicial process.

Senator SCHUMER. I understand your view. I just think there are some inconsistencies there. I would argue you ought to err on the side of being more forthcoming. This is the last chance we and the American people will have to make a decision before a lifetime appointment.

But I want to move on to another issue also related to *Roe*. Now, you did say that in 1985, you believed that the Constitution did not protect the right to an abortion, and at that time, you were a mature legal mind. You were 35. You were already a Federal prosecutor. You were serving in the Solicitor General's Office. You had a pretty good understanding of the Constitution. You had argued cases related to *Roe* before the Supreme Court, I think, 12 times by 1985. So you were a well-seasoned, mature, established legal mind at that time, is that fair to say?

Judge ALITO. Well, Senator, most of what you said is certainly correct, but I had not argued any case involving *Roe* before the Supreme Court.

Senator SCHUMER. I see. You had argued 12 cases before the Supreme Court?

Judge ALITO. Yes, that's correct.

Senator SCHUMER. Sorry. Now, let me ask you this. When you wrote that statement, you did not, as we discussed yesterday, when you wrote that the Constitution does not protect the right to an abortion, you had no exceptions. So that would mean, at least in 1985, your view then, there would be no constitutional protection for a woman to terminate her pregnancy even if the termination was needed to preserve her future ability to have children, right?

Judge ALITO. Well, Senator, it was a general statement. It didn't go into—it didn't—

Senator SCHUMER. But it had no exceptions. You could make that—

Judge ALITO. It was one sentence and it certainly didn't represent—there was no attempt—

Senator SCHUMER. You didn't write any exception for that situation, correct? It just said, the Constitution does not protect. It was without exception. And yesterday, you didn't argue with me when I mentioned that, without exception.

Judge ALITO. I don't recall you using the word, "without exception."

Senator SCHUMER. I think I did.

Judge ALITO. Senator, it's one—well, I'm not disputing that—

Senator SCHUMER. OK. So if you believe—

Judge ALITO. Could I just answer that question?

Senator SCHUMER. Yes, please.

Judge ALITO. It's one sentence and it certainly is not an attempt to set out a comprehensive view of the subject.

Senator SCHUMER. No, I understand that, but it was a very strong statement. It didn't talk about any exceptions at all, and the way I read that statement, even if a woman was raped by her father, she would have no constitutional protection to have an abor-

tion and terminate that pregnancy. If you believe the Constitution protects no right to an abortion, that would follow, wouldn't it?

Judge ALITO. I think the statement speaks for itself, and it's one sentence and it's not an effort to set out a comprehensive—

Senator SCHUMER. Well, knowing these examples, do you still refuse to distance yourself in any way from a broad, unqualified statement without exception that the Constitution does not protect the right to an abortion, no ands, ifs, or buts is my words, but—

Judge ALITO. What I actually said was that I was proud of my participation in the *Thornburgh* case in which the government made the argument that it made in the *Thornburgh* case—

Senator SCHUMER. Right, but you said in the previous sentence of that statement that you personally held those views.

Judge ALITO. That's correct, but what I was talking about there was the *Thornburgh* case and nothing more than the *Thornburgh* case.

Senator SCHUMER. I understand, but you haven't rethought the position at all, even knowing these extreme cases and the hardship that it might cause—

Judge ALITO. What you've pointed out is exactly why, if the issue were to come up and one were to get beyond *stare decisis*, the whole judicial decisionmaking process would have to be gone through. You'd have to know—

Senator SCHUMER. You didn't think that through in 1985?

Judge ALITO. I was not involved in—

Senator SCHUMER. When you wrote the statement. When you wrote that statement.

Judge ALITO. And when I wrote this statement, what I was saying was that I was proud of what I had done in relation to the *Thornburgh* case, which was to write the memo that the Committee is aware of, which did not argue that *Roe* should be overruled. It did not argue that the Government should argue that *Roe* should be overruled, but that the decision should be challenged on other grounds that were quite similar—

Senator SCHUMER. I understand what you wrote, but you also—we can bring the statement up here, but I don't want to go over the thing of yesterday. I would just ask you to think of all the consequences of a broad statement, even from 1985, that the Constitution does not protect the right to an abortion. There is not an exception of health to the mother, not an exception of rape or incest, not an exception of any of these others. I didn't see any of those in your job application.

But I want to conclude on one—

Judge ALITO. Senator, it was one—

Senator SCHUMER. Go ahead, please.

Judge ALITO. It was one sentence, and I think what you're saying highlights the importance of not addressing this until the judicial process takes place where all of this complexity would be taken into account.

Senator SCHUMER. In all due respect, sir, I think it highlights the importance of and obligation to discuss it, particularly in light of a strong statement before, but we will have to differ on that.

I want to go back to the CAP issue in conclusion, because some of the statements just don't add up and I just want to try to figure

this out a little better. You graduated from Princeton in 1972. I am just going to state, to save us a little time, a series of facts here. You filled out the application to apply for the job in the Reagan administration in 1985, where you mention membership in that group. Now, is it fair to say you joined sometime around 1972?

Judge ALITO. I think that's very unlikely.

Senator SCHUMER. Unlikely?

Judge ALITO. Very unlikely.

Senator SCHUMER. When do you—you have no idea when you joined?

Judge ALITO. I don't, but if I had done anything substantial in relation to this, including renewing membership or being a member over a lengthy period of time, I feel confident that I would remember that.

Senator SCHUMER. OK. So you don't remember renewing membership, writing out a check at a certain time, getting a magazine, this Prospect magazine, once a month, once a quarter, once a year? You have no recollection of any of that?

Judge ALITO. I don't.

Senator SCHUMER. OK. Well, here is what the—and let me just ask you one other question. I take it in 1985 you were a member of a whole lot of different groups. I mean, you were a member of the Bar Association. You might have been your neighborhood guy, I respect that, maybe a neighborhood association in New Jersey where you lived, maybe other Princeton alumni organizations. In your 1990 application, there are a bunch of other organizations you list as being members of. So you were a member of a whole lot of groups.

Judge ALITO. I was a member of some other groups, not a whole lot—

Senator SCHUMER. Yes, OK, a bunch. More than two?

Judge ALITO. Some other groups, yes.

Senator SCHUMER. OK. Here is what I don't understand. I think here is what a lot of people don't understand. You are a member of other groups. You hardly have any recollection of this organization. And yet, somehow in 1985, you put it on your application. Why did you? Why did you list that particular organization on your application when you have such vague recollection of it? Why didn't you put the National Bar Association—I mean, the American Bar Association or one of the other groups that you were a member of? It wasn't a long list where you were trying to list—you somehow plucked this group, which you now say you have almost no recollection about, and put it on the application, and this group, as we have heard, is controversial. Just try to give us some understanding of your state of mind in 1985, why that group, with its tawdry history even public then, although you said, in all fairness, you didn't know about it, but why that group? Why was it plucked out and put on the application?

Judge ALITO. Well, I deplore all of those statements that were shown on the chart.

Senator SCHUMER. Understood.

Judge ALITO. I would never associate myself with those statements—

Senator SCHUMER. What made you pick that group? I understand. I am not trying to—

Judge ALITO. I think you have to look at the question that I was responding to and the form that I was filling out. I was applying for a position in the Reagan administration, and my answers were truthful statements, but what I was trying to outline were the things that were relevant to obtaining a political position. I mentioned some very minor political contributions. I didn't mention contributions to charitable organizations, and that's not because the contributions to charitable organizations were unimportant. It's just that—

Senator SCHUMER. Can you reach back, because it is an important issue now—it has become one—and try to figure out your state of mind then and what made you pick this organization. What did you—I mean, I see why you picked the Federalist Society. That is obvious. Why did you pick this one?

Judge ALITO. Well, Senator, since I don't remember this organization, I can't answer your question specifically, but I think that the answer to the question lies in the nature of the form that I was filling out and the things that I put. I think the illustration of the political contributions goes right to the point. Why did I mention small political contributions and not charitable contributions?

Senator SCHUMER. Can I ask you—

Judge ALITO. It wasn't that the charitable contributions were less important. It was that they were not as relevant to obtaining a political position.

Senator SCHUMER. Why didn't you put it on your application in 1990? It wasn't there.

Judge ALITO. I didn't remember it.

Senator SCHUMER. But you remembered it from 1972, or whenever you joined, to 1985, formed in 1972. Why I think you probably joined earlier is because of what you said about ROTC, which is a much bigger issue in its early history than its later history. And you remember that. You remember it up until 1985, and then by 1990, you had forgotten it.

Let me just say, I am glad—this is by way of explanation. That is why Senator Kennedy made his request. I am glad, Senator Specter, that you have acceded to it. I think there are unanswered questions here that we really have an obligation to answer, and maybe the documents we get will give us some of those answers. Thank you, Mr. Chairman.

Judge ALITO. Senator, I have—

Senator SCHUMER. Please.

Judge ALITO. I have told the Committee everything that I can about this organization, and the most important thing I want to tell the Committee is that I have no association with those comments that were made, even if they were made in letters to the editor or in articles that simply represented the views of the authors of those articles. They are not my views now. They never were my views. They represent things that I deplore. I have always deplored any form of racial discrimination or bigotry. I was never opposed to the admission of women to Princeton. After I had been there for a few months, I realized the difference between the non-coeducational atmosphere that was there and the coeducational atmos-

phere that I had had throughout my prior schooling. When it came time for me to join an eating facility, I chose one that was one of the most coeducational facilities on the campus.

Senator SCHUMER. I just can't figure out why you put this group on here.

Chairman SPECTER. Senator Schumer, your time is up, Senator Schumer.

Senator Cornyn?

Senator CORNYN. Judge Alito, let me tell you how desperate your opponents are to defeat your nomination. Late last Wednesday—or, excuse me, last Thursday, a name of a witness was listed relative to this whole issue of Concerned Alumni of Princeton that included the name of a man named Stephen Dujak. Is that name familiar to you?

Judge ALITO. Not other than from seeing the witness list.

Senator CORNYN. Well, by the end of the day on Friday, his name was gone from the witness list of those witnesses intended to be called by the other party. As it turned out, it was revealed that in April of 2003, that he had authored an op-ed piece for the Los Angeles Times entitled, "Animals Suffer a Perpetual Holocaust," and in that article, he wrote this. He said, "Like the victims of the Holocaust, animals are rounded up, trucked hundreds of miles to the kill floor, and slaughtered. Comparisons to the Holocaust are not only appropriate but inescapable, because whether we wish to admit it or not, cows, chickens, pigs, and turkeys are capable of feeling loneliness, fear, pain, joy, and affection as we are. To those who defend the modern-day Holocaust on animals by saying that animals are slaughtered for food to give us sustenance, I ask if the victims of the Holocaust had been eaten, would that have justified the abuse and murder? Did the fact that lamp shades, soaps, and other useful products were made from their bodies excuse the Holocaust? No. Pain is pain."

Judge Alito, I read that to point out to you the desperation of your opponents. This was to be a principal witness who was going to come in and say why your membership in Concerned Alumni of Princeton was a terrible thing. But the fact is that I think they have stumbled by their overreaching by demonstrating the desperation that they feel and how few ways they have to criticize your testimony, your career, your integrity, and who you are as a person based upon the facts and I think it speaks volumes.

It is clear to me, at least, that part of the reasonings or the rationale given for a "no" vote against you by some on this Committee and perhaps on the floor of the Senate will be that you have not been responsive to questions. We have a chart here that I think is instructive. This is as of 3 p.m. on day two. We couldn't get any more current than that. But as this indicates, so far in this hearing, 441 questions have been asked and 431 have been answered, or 98 percent. Justice Ginsburg, and we have heard a lot about her and what she would answer and would not answer and what her philosophy was, her beliefs, before she was confirmed by the Senate with only three votes against, she had 384 questions asked and she answered 307 of those for an 80 percent answer rate.

You know, listening to the back and forth about whether you have been responsive to questions reminds me of a saying that I

heard recently: "I can answer the question, but I can't understand it for you."

In other words, I think you have done, to the best of your ability and to the limits of your ethical responsibility, tried to be responsive to the questions here. Obviously, no one can make that decision but the Senators who will ultimately vote on that. But certainly the public and the world, people all across this great country who may be listening to this hearing and will be judging for themselves both the fairness of the proceeding and your responsiveness to the questions, I believe that they will conclude that not only have you been responsive but that you have been very forthcoming in answering the questions that have been asked of you, but that, like Justice Ginsburg and others before her, you believe that it is important to maintain the independence of the judiciary, that you are not willing to make the judiciary subservient to the Senate or the Congress in order to get a vote for confirmation. And I applaud you for that.

You know, yesterday I made a mistake. I know Senator Sessions confessed a mistake and, as it turned out, I went over and talked to Senator Biden because I had quoted him and it turned out I didn't quite quote him accurately. But I told him we have corrected the record to make sure it reflected his words, because it is important to me to make sure that we are accurate and we are clear.

But yesterday I made a mistake and referred to you as Judge Scalito. And I was embarrassed by that, and I asked your—begged your pardon for that. For those that may not be in on the joke, the idea is, the argument by some is somehow you are a clone of Judge Scalia. Well, I have found for myself everything we have heard, everything I have come to learn about you is that you are a clone of no one, that you are an individual who is particularly gifted and talented and experienced and someone who has been, notwithstanding the abuse that you suffer during the confirmation process, willing to offer yourself for public service in a very important role, and that is as a member of the United States Supreme Court.

But yesterday my colleague from New York put up some quotes. Now, it was late in the day and I think most of the press had gone—and maybe that is a good thing. People had gotten tired, but you had to still sit here and listen to the questions and respond to those. But he put up a quote, which was relatively innocuous on its face, and it asked about things like do you believe that continuity in the law is important. And you said yes and it seems unarguable to me. But then he said, well, that was a quote from Clarence Thomas. And I suppose that was going to attribute to you all of the baggage that those on the left feel that Justice Thomas carries and all of the views that he has espoused and all of his performance on the bench.

Later, he asked whether you agreed with another quote, and here again it was a sort of black-letter law, good-government quote. And you agreed that, yes, you agreed with that quote. And he said, Ah-ha, Judge Bork said that. Meaning somehow that you were carrying whatever baggage people on the left feel that Judge Bork carries and you somehow embrace or subscribe to everything he believes.

I want to give you an opportunity, Judge Alito, to tell us whether you feel like you are a clone of Judge Scalia, Judge Thomas, Judge Bork, or whether you believe that you are your own man, you come to your own conclusions based on careful study and your experience in the law. Would you comment on that for me, please?

Judge ALITO. Yes, Senator. I am who I am and I'm my own person. And I'm not like any other Justice on the Supreme Court now or anybody else who served on the Supreme Court in the past. I don't think any jurist is a duplicate of any other jurist. I think that the Committee and anybody who's interested in the sort of judge I am can get a very clear picture of that by looking at my record on the court of appeals. And I've been on the court of appeals for 15 years and have sat on over 4,000 cases. And most of the cases that come to the court of appeals never go any further. We're the last stop in 99 percent of the cases, probably higher than that. And we know that when we're deciding those cases.

And I think if anybody reads the opinions that I've written and the opinions that I've joined, they can see exactly the sort of jurist that I am. They will find some opinions I'm sure that they will disagree with. But if they look at the whole set of opinions that I've written or joined, they can get a very clear picture of me. I'm not like anybody else. I don't claim to have the abilities of some of the distinguished members of the Supreme Court now or in the past. I have my—whatever abilities that I have. But they are my own.

Senator CORNYN. Let me tell you what Cass Sunstein has said about you. You may be familiar with the op-ed piece that was written in the Akron Beacon Journal on November 3, 2005. This is—of course, you know Professor Sunstein from the University of Chicago, a brilliant and liberal legal scholar. But he concludes in this op-ed—and this is how he describes you based upon his review of your life's work as a judge.

He said, "Alito sits on a liberal court"—and this is an analysis of your dissents. "Alito sits on a liberal court, so his dissents can be from relatively liberal rulings. None of Alito's opinions is reckless or irresponsible or especially far-reaching. His disagreement is unfailingly respectful. His dissents are lawyerly rather than bombastic. He does not berate his colleagues. Alito does not place political ideology at the forefront. He doesn't claim an ambitious or controversial theory of interpretation. He avoids abstraction. He's not endorsed the view associated with Justices Antonin Scalia and Clarence Thomas that the Constitution should be interpreted to fit with the original understanding of those who ratified it. Several of his opinions insist on careful attention to governing legal text, but that approach is perfectly legitimate, to say the least."

Judge Alito, I think it is important for people listening to understand that you are indeed your own man and that you do the very best job that you can with the skills and the talents that God has given you, and that you are willing to serve, and we ought to applaud you for that. And it is really, to me, demeaning to suggest some sort of guilt by association or that you must be a clone of some other judge or someone who outside groups hold up to disrespect and ridicule.

So I hope that, as I say, those listening, both in the Senate and outside, will make up their mind about you based upon the evi-

dence that we have heard and that is available and not based on those sort of specious comparisons.

Now, let me ask—you know, believing as I do that you have been responsive, and expecting as I do that those who vote against you will claim that you have been nonresponsive notwithstanding the chart I showed you and your willingness to respond to the questions, you know, Senator Schumer—who is an enormously talented and very bright lawyer in his own right—was pressing you on whether *Roe* v. *Wade* is settled. And, I've really tried to analyze for myself, when is it that judges and nominees are willing to go out on a limb, so to speak, and say, yes, that's settled law or to talk more expansively about an issue; and when is it that they feel less comfortable, less free, more constrained by their ethical obligations or their desire to preserve the independence of the judiciary?

And what I have concluded—and I would like to get your reaction to this—is the more settled, to use the word Senator Schumer has, the more accepted in the society, in our culture, the more free nominees feel to talk about it; but the more a nominee feels like this is an issue that not only is going to come back, it is going to come back soon—as a matter of fact, it may be on the Court's docket now—the less free, the more bound by your ethical obligations you feel, the more you feel it is important to preserve your independence as a judge.

And we have mentioned a couple of them—*Brown* v. *Board of Education*, which expresses a commitment to equal justice under the law that all Americans embrace, virtually speaking. You have felt free to express a view on that case, have you not, sir?

Judge ALITO. I have. The line I've tried to draw is whether something realistically could come up in litigation before the court of appeals or before the Supreme Court. And I—

Senator CORNYN. Does that mean that you don't expect *Brown* v. *Board of Education* to be attacked, or someone to come before the Court and ask that it be overruled?

Judge ALITO. I don't. There's no realistic possibility of that, so I felt freer to talk about something like that.

Senator CORNYN. But you do believe, and I think with good cause, that there will be continuous attempts to address the abortion issue because of its divisive nature and because Americans are so divided on that issue, or at least some aspect of the issue. To what extent, for example, can the Congress pass laws which ban the barbaric practice of partial birth abortion, to what extent can Congress or the States pass laws that provide for minors to seek—requiring them to seek parental—or provide their parents notice, with an appropriate judicial bypass for those who are abused or neglected or abandoned by their parents? That is an issue that is at the forefront of America's consciousness and really, I think, sort of the subtext under which a lot of the wars over judicial nominations are fought. Would you agree with that, more or less?

Judge ALITO. It's an issue that is in litigation now, and I think you can look at the course of litigation over the past 20 years and you can see a number of cases—and of course this has been highlighted—in which the Supreme Court has been asked to overrule *Roe* and it has repeatedly refused to do that. But there's nothing—

there's no comparable pattern, for example, with respect to *Brown* v. *Board of Education* or one person, one vote.

Senator CORNYN. Well, in the closing two and a half minutes that I have, I mentioned the Cass Sunstein op-ed, which, from my reading, even though I am sure you and Professor Sunstein don't see eye-to-eye on all legal issues, he seems to be highly complimentary of you, is the way I interpreted those two paragraphs I read out of the op-ed piece.

Now, a national newspaper, the Washington Post, on January 1st—that is the Washington Post, not National Review—did an analysis of your voting record on the Third Circuit. They found that in virtually every type of case, whether labor, employment—your record was no different than the average Republican-appointed judge. And to me, that is sort of the—said another way, that means that you are within the conservative mainstream in terms of your judicial philosophy.

Now, I know that you and other legal scholars have some trouble with this approach by political scientists to try to survey your opinions and categorize them and say, well, this is who you are, because you don't decide cases that way, do you? You decide individual cases based upon the legal arguments, the merits, and the facts. Isn't that correct, sir?

Judge ALITO. That's right, and it would be a bad thing if judges started keeping these scorecards and said, oh, I've ruled a certain number of times in favor of one side; when the next case comes up, I'd better rule on the other side. That's exactly what we don't want judges to do.

Senator CORNYN. You anticipated my next question, and that would be if somehow it disqualifies you because of how political scientists have somehow ranked your sympathy with certain types of cases, how often you have ruled in favor of one type of litigant and another—as opposed to an individual case-by-case decisionmaking process contemplated by the Constitution—I doubt it will be long before prospective nominees to the Federal judiciary will be keeping that kind of chart. And when litigants come into court, they are going to be tempted to look at that and say, well, I've ruled for too many plaintiffs, I'd better rule for a defendant this time. Or, no, I've shown too much sympathy for civil rights plaintiffs, I'd better rule for the government this time. Which would totally skew your responsibility as a Federal judge, in my view.

Judge Alito, my time has run out. Thank you for your response to my questions.

Judge ALITO. Thank you, Senator.

Chairman SPECTER. Thank you, Senator Cornyn.

We will take now another break for 15 minutes.

I have had requests from two Senators on the Democratic side for a third round. We have three more Senators to question on the 20-minute round—

Senator LEAHY. We have several more than the two.

Chairman SPECTER. Well, Senator Leahy, that is what I would like to ascertain so that we can figure out the schedule for the balance of the evening. We have 1 hour more for three Senators at 20 minutes; I want to figure out what we are going to do the rest of the evening. I want to figure out when we are going to bring on

the outside witnesses who are available tomorrow. So if there are other requests, I would like to have them.

But now we will stand in recess until 5:55.

[Recess 5:40 p.m. to 5:55 p.m.]

Chairman SPECTER. We will proceed now to the last three Senators who have not had a second round of 20 minutes—Senator Durbin, Senator Brownback and Senator Coburn.

As I had mentioned before, I have had requests from two Senators for a third round. Senator Leahy advises that there are others and I would like the specifications. Senator Biden is prepared to proceed—has requested 20 minutes and is prepared to proceed. Senator Feinstein has requested 10 minutes and she has a doctor's appointment, so she won't be able to be here this evening, and we will accommodate her on that.

But I would like to know who else wants time so we can plan what we are going to do for the balance of the evening and hereafter. I have had requests on my side of the aisle as to whether we are having a Friday session and I have had a request as to whether we are having a Saturday session. And I told both of those requestors to stand by. And I do piecework, so I am here for the duration.

Senator Leahy.

Senator LEAHY. Mr. Chairman, I have been told that each one of the people on this side want another round. I know I want to look at the transcript this evening and I will have a few more questions. Obviously, you can do what you want. Judge Alito has shown that he has the stamina of Hercules. I am not sure that all the rest of us do. Senator Coats is hanging in there, but he is able to bail out now and then.

I would suggest you finish with the Senators who are here tonight. That would get us out of here around seven or a little later; come back in the morning. This is very similar to what we did with Chief Justice Roberts. Come back in the morning, and I have a feeling that whatever rounds it takes, we would probably wrap it up in relatively expeditious order.

But then we wouldn't be looking like we are trying to ram this through. It is a lifetime appointment, after all. We get it done. I think most of the outside witnesses have been told that they were going to testify on Friday, anyway, in all likelihood. That is my suggestion.

Chairman SPECTER. Well, that is not true. There are people who can't be here on Friday among the outside witnesses who were looking at Thursday.

Senator LEAHY. Well, who knows? We will probably be wrapped up in time so that we can leave here sometime Thursday.

Chairman SPECTER. Well, Senator Leahy—

Senator LEAHY. It is up to you.

Chairman SPECTER [continuing]. The only way we will know what is going to happen—I want to know who wants more time so I can see what is going to go on tomorrow, if we are going to go beyond Senator Feinstein tomorrow. We had this exact same situation with Chief Justice Roberts and we worked on into Wednesday evening and then we got an understanding as to what we were going to do on Thursday.

Senator LEAHY. Well, we are into Wednesday evening now already, so I mean we have done—

Chairman SPECTER. Well, why don't we proceed with our few witnesses so as not to spend any more time, and if I could have the advice from you—

Senator LEAHY. Sure.

Chairman SPECTER.—Senator Leahy, and from Senator Kennedy. Senator Durbin has 20 minutes. He probably has more time than he needs.

Senator LEAHY. I have yet to find a situation in this Committee, Mr. Chairman, when you and I haven't been able to work things out because you have always been eminently fair.

Chairman SPECTER. OK. Well, to put all the cards on the table, the only compelling force, if there such a thing as a compelling force for Senators, is to figure out how to avoid working this evening by telling me what you want to do tomorrow. That is a fairly simple formula.

Senator LEAHY. Who was the Leader, Mr. Chairman, who once said moving the Senate around was like transporting bull frogs in a wheel barrow?

Chairman SPECTER. Senator Baker, who is author of the "herding cats."

Senator Durbin, you are recognized for 20 minutes.

Senator DURBIN. Thank you very much. And, Judge Alito, if I am not mistaken, this is how we started the day. I think we are now into about eight-and-a-half hours, which means we are both on overtime by any measurable workplace standard in America. Thank you for your endurance, and to your family as well. I know it is a stressful and tough situation.

Let me say at the outset I asked you a question earlier today about settled law and John Roberts's statement before the Committee. I have spoken to one of your corner men over here, Ed Gillespie, and he and I have a difference of opinion about what it says in the record. I commend to my colleagues the record itself, September 13, 2005, page 145, and I stand by my earlier statement. Enough said about that.

I want to ask you about two substantive issues. We are not going to go to Princeton or any other place. The unitary Executive: the reason it is important is that there are some people even on the Supreme Court who believe the unitary Executive theory—and I don't know if it is always associated with the Federalist Society, but sometimes associated with the Federalist Society and their members—but the unitary Executive theory gives a President extraordinary power. And under that theory, some argue that a President, particularly in a wartime situation, can ignore and violate laws as Commander in Chief—critically important and timely as we debate eavesdropping and the like.

You have made it clear that when you spoke to the Federalist Society in 2000, you were not talking about scope of the President's power, but you were talking instead as to whether or not he would have control over the executive branch. I hope I am characterizing your statement correctly.

Judge ALITO. That is exactly correct, and I think in the speech I said there is a debate about the scope of what is meant by the

Executive power, but there isn't any debate that the President has the power to take care that the laws are faithfully executed, and that was the scope of the power that I was discussing.

Senator DURBIN. So my question to you is this: What about those who do argue the unitary Executive scope theory? Do you agree with their analysis, do you disagree? Would you be joining Justice Thomas, in particular, in his dissent in *Hamdi*—in arguing that in this situation a President has more power than the law expressly gives him?

Judge ALITO. I don't think that the unitary Executive has anything to do with that. Let me just say that at the outset. I think that—and if other people use that term to mean the scope of Executive power, that certainly isn't the way that I understand—

Senator DURBIN. That is not your point of view?

Judge ALITO. That is not my point of view.

Senator DURBIN. You don't accept that point of view?

Judge ALITO. No. I think—

Senator DURBIN. If an argument is made that that is how they are going to expand the power of the President, as you testify today, that is not your position or your feeling? Say it in your own words.

Judge ALITO. It is not my—the unitary—when I talk about the unitary Executive, I am talking about the President's control over the Executive branch, no matter how big or how small, no matter how much power it has or how little power it has.

To me, the issue of the scope of Executive power is an entirely different question and it goes to what can you read into simply the term "Executive." That is part of it and, of course, there are some other powers that are given to the President in Article II, the commander in chief power, for example. And there can be a debate, of course, about the scope of that power, but that doesn't have to do with the unitary Executive.

Senator DURBIN. So when *Hamdi* draws that line and Justice O'Connor makes that statement about no blank check for a President in times of war when it comes to the rights of American citizens, and there is a dissent from Justice Thomas, who argues unitary Executive, scope of powers, more power to the President, you are coming down on the majority side and not on the Thomas side of that argument. Is that fair to say?

Judge ALITO. Well, I am not coming down—I don't recall that Justice Thomas uses the term "unitary Executive" in his dissent. It doesn't stick out in my mind that he did. If he did, he is using it there in a sense that is different from the sense in which I was using the term.

Senator DURBIN. Fair enough. Let me move to another area. I hate to return to that infamous 1985 memo, but there is one element of it we have really not asked you about, and that is your reference to the Establishment Clause. So instead of going into that memo, let me just try to explore with you for a moment your feelings about religion in our diverse society and under the Constitution. You have heard some questions from the other side about it from Senator Brownback, Senator Cornyn and others, and I would like to try to get into this a little bit.

There seems to be a debate within the Court between two standards for judging conduct as to whether it is constitutional in relation to freedom of exercise of religion, as well as establishment. And the two theories, if I can describe them quickly, are the *Lemon* theory which has three tests that the Burger Court came out with in 1971 and the new coercion theory.

Are you familiar with both of those theories?

Judge ALITO. I am, and there is actually a third theory, the endorsement test.

Senator DURBIN. Where do you come down? Do you subscribe to any one of those as an accurate analysis of what the Founding Fathers meant under the Establishment Clause?

Judge ALITO. I don't think the Court has settled on any single theory that it applies in every case. There are cases in which it finds the *Lemon* theory, the *Lemon* test, which now has two parts, whether the statute has—whether whatever is at issue has a secular purpose and whether the primary effect is to advance or inhibit religion. There are instances in which it applies that. It tends to apply that in cases involving funding.

There is the endorsement test, and it applies that in certain cases. Typically, it applies those in cases involving things like the displaying of symbols that may have religious—that have religious significance. So it itself has not found a single test that it applies in all of these cases.

Senator DURBIN. Well, where are you? If the Court is divided, and it appears it is, where do you come down? I mean, do you—please tell me.

Judge ALITO. Well, I don't have a—I do not myself have a grand, unified theory of the Establishment Clause. As a lower court judge, of course, my job has been to apply those precedents, and this is an area in which I think the Court has been—you can just see by the number of cases that it has decided it has been attempting to find the best way of expressing its view of what the Establishment Clause requires.

I certainly agree that it embodies a very important principle and one that has been instrumental in allowing us to live together successfully as probably the most religiously diverse country in the world, and maybe in the history of the world. And it's a very important principle, but I myself do not have a grand, unified theory of this.

Senator DURBIN. Let me ask you a few starting points. The question was asked of John Roberts about his personal religious and moral belief. And I would ask you in the most open-ended fashion. We all come to our roles in life with life experience and with values. When you are calculating and making a decision, if you were on the Supreme Court, tell me what role your personal religious or moral beliefs will play in that decision process.

Judge ALITO. Well, my personal religious beliefs are important to me in my private life. They are an important part of the way I was raised and they have been important to Martha and me in raising our children. But my obligation as a judge is to interpret and apply the Constitution and the laws of the United States, and not my personal religious beliefs or any personal moral beliefs that I have, and there is nothing about my religious beliefs that interferes with

my doing that. I have a particular role to play as a judge and that does not involve imposing any religious views that I have or moral views that I have on the rest of the country.

Senator DURBIN. That is virtually the same answer given by Justice Roberts and I think from my point of view that is the right answer. It is the same challenge many of us face on this side of the table with decisions that we face.

Now, I asked Judge Roberts the following: Does the Free Exercise Clause, in addition to the Establishment Clause, protect the right of a person to be respected in America if they have no religious beliefs, the non-believers?

Judge ALITO. Yes, it does. It is freedom to worship and not worship, as you choose, and compelling somebody to worship would be a clear violation of the religion clauses of the First Amendment.

Senator DURBIN. Let me go to a specific case, the *Black Horse Pike Regional Board of Education* case, in which you were involved. And it is an interesting case and I hope this fact pattern that I describe to you is correct.

The school board policy allowed the seniors at this school to vote on having a graduation prayer, and the decision, it was suggested, was whether that was coercing students who didn't agree with that religious prayer or had no religious belief.

What is your feeling, or what was your feeling at that time when it came to that decision?

Judge ALITO. Well, that was the case that followed *Lee* v. *Weisman* and preceded the *Santa Fe* case, which dealt with a prayer before a football game. *Lee* v. *Weisman* involved a situation in which the principal—and that was the most directly relevant and a rather recent precedent at the time of the Black Horse Pike case.

In *Lee* v. *Weisman*, the principal of a middle school, as I recall, decided that there would be an invocation at the middle school graduation, and selected a member of the clergy, a local rabbi, to deliver the prayer and specified the nature of the prayer that would be appropriate for the circumstances. And the Supreme Court held that that was a violation of the Establishment Clause.

The case that we considered in the *Black Horse Pike* case involved a situation in which the high school left it up to the students through an election to decide whether there would be a prayer at the high school graduation and left it up to them to select the person who would conduct the prayer, the student who would lead them in the prayer, if that was—if they decided by a vote to do that.

And so our job at that point was to decide whether this fell on one side or the other of a line that I referred to earlier which Justice O'Connor very helpfully—the distinction that she drew between government religious speech, which is not allowed, and private religious speech which is protected. The government itself cannot speak on religious matters, but the government also can't discriminate against private religious speech. And we had here a situation—

Senator DURBIN. That goes back to the *Oliva* case where the student comes up with the drawing of Jesus, and that is a voluntary, personal and private expression, as you have described it.

Judge ALITO. That is correct, and the Supreme Court has recognized this in any number of cases. In the *Rosenberger* case and the *Good News Club* case and the *Lamb's Chapel* case, they have drawn this distinction.

So here we had a situation involving an election by the students to pick somebody to lead them in prayer, and which side of the line did it fall on? Well, it wasn't individual student speech, but it was collective student speech by way of an election. And that was what we had to decide, which side of this line it fell on. And Judge Mansmann, who wrote the opinion that I joined in that case, explained why we thought it fell on the side of the line of individual student speech.

Senator DURBIN. Let me ask you about that. Let me explore for a second. You are dealing with a school board policy. A school board is a government agency. They have set up the policy, so it is not coming entirely from a voluntary personal situation, like the *Oliva* case. And you know that the majority is going to rule in the decision on whether there will be a prayer and what the substance of the prayer will be.

How, then, could you respect the rights of the minority, including people with different religious beliefs and non-believers, if you leave it up to a majority vote?

Judge ALITO. Well, that is why—that factor is why it was a case that didn't—there could be debate about which side of this line it fell on. Now, I think there also was a disclaimer that was distributed at the time of the graduation explaining to anybody who was in attendance that the prayer was not endorsed—if there was a prayer, it wasn't endorsed by the school board, and that this was a decision of the students.

There are factors there that fall on one side of the line. There are factors there that point to the case being put on one side of that line, factors that point to putting the case on the other side of the line. And Judge Mansmann's opinion explained why she thought, and I agree, that it would fall on the private student speech side of the line. But it was a question that was debatable.

And then the *Sante Fe* case came along later. It didn't involved exactly the same situation, but it involved a related situation, and that is now the Supreme Court's expression of its opinion in the form of a precedent on the application to—the application of this test that I have been talking about, a situation like this.

Senator DURBIN. As you have described it, this is not an easy call. There are circumstances on both sides, and yet in your dissent you use the phrase referring to the majority as "hostility toward religion." It seems to me that you could make a case that I am not hostile toward religion, but trying to be sensitive to the rights of all to believe or not to believe in America and come down on the opposite side of the case.

Were you overstating your position in using that phrase "hostility toward religion" in describing the majority?

Judge ALITO. That was—it was Judge Mansmann's opinion, in which I joined, and I don't remember the phrase "hostility to religion." Obviously, it must be in there. I certainly don't think that she meant to suggest that those who were objecting to this were proceeding in bad faith, or even that they were hostile to religion.

I think what she—I can't speak for her and I don't recall the specific language, but looking at it now, the way I would put it was that she probably thought that this was not giving as much room for private religious speech as should be given.

Senator DURBIN. I couldn't tell you what in the heck I ever wrote in law school about anything, but in the second year in law school you wrote a paper, I take it, some research, which you had to tell us about here relative to the issue of religion, and then in the 1985 memo raised the question about the Warren Court on the Establishment Clause.

What was it that the Warren Court decided on the Establishment Clause that troubled you, if you remember?

Judge ALITO. Well, I actually think that the student note from the Yale Law Journal is an illustration of the sort of thing that has interested me and troubled me about the jurisprudence in this area for a long time.

In the law school note, I talked about two—what are called the release time cases. It was the *McCollum* case and *Zorach* v. *Clausen*, both of which were decided just before Chief Justice Warren took his seat. And they involved situations that were quite similar. There was a distinction between the two programs, but they were quite similar and the Court reached contrary conclusions.

And unfortunately this has been a repeating—a recurring pattern in the Establishment Clause jurisprudence, cases that turn on extremely fine distinctions. The Supreme Court held in *Board of Education* v. *Allen*, if I am remembering the correct case, at the end of the Warren Court that it was permissible for a school board to supply secular books to schools that are related to a religious—that are religiously oriented. And then later in another case—I think it was *Wolman*—they said but you can't—but that doesn't apply to other instructional material, other secular instructional material.

And this has been the thing about the Establishment Clause that has bothered me, the absence of just what your initial question was pointing to, some sort of theory that draws distinctions that don't turn on these very fine lines.

Senator DURBIN. Tell me about the Establishment Clause in a more contemporary context if you can. You talked about the case of the Warren Court in providing secular books to religious schools, which I find no problem with. I think that is acceptable from my point of view, for whatever that is worth.

But what about the concept and theory of financial support from a government agency to a school that is a religious school where the money is used for the purpose of teaching religion or proselytizing?

Judge ALITO. Well, I think the Court's precedents have been very clear on that that the money—that a government body cannot supply money to a school for the purpose of conducting religious education. And I don't recall any—I don't recall a suggestion in dissenting opinions—maybe there is one that I am not recalling here that says that that would be permissible.

Senator DURBIN. I am running out of time, but it would go back to my first question. I think under the coercion test, there is some argument among some on the Court and others that not applying

Lemon but using this new coercion test may give them more leeway when it comes to this kind of financial support and vouchers, but I don't want to presume that.

And I thank you for your responses to these questions.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Durbin.

Senator Brownback.

Senator BROWNBACK. Thank you, Mr. Chairman.

We started off this morning and we will end today. I want to thank you for all the questions you have answered. You have answered the questions that I have had, and I have heard much of the rest of the discussion. I think we have covered many of these points so many multiple times. We have just overdone it on some of these.

So, Mr. Chairman, I am satisfied with the questions that he has answered. I will be supporting your nomination in front of the Committee and on the floor. I think you are an outstanding nominee, and I have appreciated your thoughts that you have put forward here. I think if approved—and I hope you are, and I think you will be approved by the full Senate—you are going to serve as an outstanding Justice on the U.S. Supreme Court. And I will be supporting you here in the Committee and on the floor, and with that, Mr. Chairman, I would yield back my time.

Chairman SPECTER. Senator Brownback, thank you. Thank you for 19 minutes and 6 seconds.

[Laughter.]

Chairman SPECTER. Senator Coburn?

Senator COBURN. Well, Mr. Chairman, I will give you some time back, but it won't be quite that much. Thank you.

I have a couple of charts I want to show just to clarify the record. I want to again make sure everybody knows that in 1985, there is a quote in the Princeton Packet, the campaign to eliminate the Army ROTC program and what was perceived as the decline of Princeton athletics, it was also known that this CAP program was soliciting through mail membership and support. There also was a disclaimer in this that I want to make sure is in the record as well, and it says, "The appearance of an article in Prospect does not necessarily represent an endorsement of the author's belief by the Concerned Alumni of Princeton. CAP has never taken a formal stand on coeducation at Princeton or elsewhere."

And I liken that to—I am a member of the American Medical Association, but I will tell you, I don't agree with everything that is written in JAMA. As a matter of fact, I take great, great umbrage at some of the things that are written there and some of the ideas that are put forward that aren't done well, that go counter to good medicine, but that doesn't mean I endorse—because I am a member of the American Medical Association, because I am a member of JAMA, it doesn't mean that I endorse everything that that organization or that magazine might put out.

And so I think Senator Graham had it right. You know, this idea of association with anything means that you take it all, whether, in fact, that is the truth or not, and that is not good work on this Committee, and it is not truthful, and it is not intellectually honest.

I want to spend just a few minutes going back. You had mentioned earlier about one of the things the Court didn't do is they can't take necessarily all the technology or all the science and how it applies to things, and that things, in fact, might change. And I mentioned earlier this morning in our questions about the Stenberg case and the *Doe* v. *Bolton* and this concept of health, and that one of the things as a practicing physician who has delivered 4,000 babies, who also had a grandmother who came into this world as a result of rape—so I have a special view on the consequences of rape—this concept of health, I am interested in your thought on it, because one of the things I think about it is the health of the woman when? At the time or later? Because of what we do know about the consequences of *Roe* v. *Wade* and the actual act of abortion and the impact that that has on a woman's health.

For example, you are twice as likely to commit suicide if you have had an abortion. Now a study, a longitudinal study shows that. Twice as likely to have alcohol or drug dependency if you have had an abortion. About 60 percent more likely to have a preterm delivery.

So as the Court looks at that and also looks at the fact—this health question, then also looks at health and then also looks at viability—when I was in medical school it was unusual for a preterm infant at 28, 29, 30 weeks to survive. And we routinely see infants at 24 weeks that survive. As a matter of fact, I have a nephew 24-, 25-week delivery. The only deficit he has is he is blind in one eye. He weighed 1 pound 2 ounces when he was born.

And so technology means something, and so the fact that we are not going to commit to give a blanket answer—and I am convinced that the only way you will get certain votes off this Committee and out of the Senate is if you were to write a blood oath that there is nothing that could interrupt any type of abortion on demand at any time.

So my question to you is: How is it that the courts should—any court should take into consideration these questions about technology and science and how they impact the law? And the other thing I would add to that—and I mentioned it in my opening statement—is we consider somebody alive when they have a heartbeat and brain wave. And we consider them dead when they don't have those things. And how is it that the court can't look at that science and say we have a heartbeat and a brain wave, we know when viability is now outside of the womb, should those factors play in the decision of the court, or just we just blanket *stare decisis* and say *Roe* and *Casey*, it is all settled, and we are not going to look at the science? Should that play a role?

Judge ALITO. Well, Senator, I guess I would answer that by saying that you would have to—you would look at the factors that are relevant under the *stare decisis* analysis and ask the role of the sort of data that you have outlined, ask how that would be involved in the factors that go into the *stare decisis* analysis. And then if you get past that to the second step, of course, you would ask the same question whether—what bearing that information has on the resolution of the question at that step.

Just speaking in general, not talking about abortion at all, in general, in deciding any legal issue, I think courts should be recep-

tive to any information that has a bearing on the decisions that they are making. There is no such thing in general as bad knowledge, and I think that is relevant to the decisionmaking process that judges go through. They should be receptive to information that is relevant, that the parties want to bring to their attention, and then decide how it figures in the application of the legal standards that they are applying in the particular case.

Senator COBURN. Let me ask you another question, and I want you to be careful how you answer this because I think at some time this probably will come before you, and I am not trying to get you pinned down. If I am driving a car today and I hit a pregnant woman who has a 36-, 37-week fetus, and the woman survives and the fetus dies, I can be held accountable for the death of that fetus. And by law, we value that as a life—unborn but a life.

If I am the pregnant woman and say I want to terminate that fetus at 37 weeks, there is nothing in this country today that keeps me from doing that, even though on one side of the law we say it is a life.

How did we get there to where it is not a life or it is a life? Tell me, somebody logically explain that to the American people that how if I kill it, it was a life, but if I choose to take it voluntarily, it is not a life. Can anybody logically explain how we got there and what the consequences going down the road are going to be for us as a Nation when we have laws that send two completely different signals about the same individual?

Judge ALITO. Well, let me try to just explain my understanding of where the law rests on those two questions. The first is a question of tort law, or maybe it is a question of—well, it is a question of tort law, and decisions are made by State legislatures. Maybe in some instances it comes about through the development of common law through the State courts regarding the scope of State tort law and protection—a tort can be created that applies in the situation of the auto accident you mentioned or a legislature may choose to structure the tort law differently. But that has been a decision that has been left for the State legislatures to decide, and they have taken a variety of approaches in doing that, I believe.

The second, of course, is the issue of *Roe* and the cases that follow after it, and those are based on an interpretation of the Fifth Amendment and the 14th Amendment of the Constitution, and they are not the result of decisions—of legislative decisions made at the State level or at the Federal level.

Senator COBURN. Can you rationalize any way the logical explanation of how that could be, though? I mean, if you had somebody that wasn't from this world and they came in and they said, oh, yeah, if you kill it, it was alive, but if you choose to—if you accidentally kill it, it was alive, if you choose to kill, it wasn't? Can you come to—I mean, I am having trouble getting my mind around that concept that there is any logic there. I just wondered if you were.

Judge ALITO. Well, the answer is that the tort situation has been left for its development under State law, and States have taken a variety of approaches expressing the values that the legislature believes should be embodied in the tort law. And in the abortion context, of course, States have laws regulating abortion, and they're free to enact whatever statutes they want on this subject as long

as they comply with the Constitution. But we have decisions of the Supreme Court that establish constitutional requirements in the area. I think that's the explanation. The decisions are made by different bodies.

Senator COBURN. Just one other comment. For the American public to know there are 1.3 million abortions in the U.S. each year. This is from the Alan Guttmacher Institute. And it is very interesting for us to know the purpose that people—why people have an abortion, why women choose to terminate their unborn children: 21 percent say they can't afford a baby; 21 percent say they don't want the responsibility; 16 percent say the baby could change their lives; 12 percent have problems with the relationship or want to avoid single parenthood; 11 percent are not mature enough or don't want to have more children; 3 percent have a possible fetal health problem, of which two-thirds are Down syndrome or spina bifida; 1 percent resulted from rape or incest; 1 percent, the husband or the partner doesn't want them to have a baby; and 1 percent is they didn't want anybody else to know somebody had sex with them. And of that, 48 percent of the women who have an abortion in this country have already had one previously. So, in fact, our country, through the auspices of an activist court, in my opinion, has moved to use abortion not as a health issue, but as a convenience issue. And we have done great damage because we have a schizophrenic policy.

My hope, Judge, is that science and technology and recognition of life on some parameter ought to be applied, and my hope is, as they get to the court, that we have common sense. And it doesn't have to be my way. You know, it could be Senator Schumer's or Senator Durbin's view. You know, the fact is there is a legitimate disagreement about rape and incest and medical malformations and all these other things, but we need in this country to have the confidence in the Supreme Court restored, and I think it has taken a hit just like this institution has taken a hit, because it is making decisions that are not based on fact and good law. It is making decisions like we have made decisions, based on expediency. And my hope is, is that you will be confirmed. I think you have great character and great integrity, and integrity I think is the No. 1 issue, not your legal mind, your heart and your soul, and how you view honesty and straightforwardness, and that the result will be that we will see some leadership that will put science and fact, and combine it with the law, and restore the confidence in the Supreme Court.

I asked Judge Roberts, I asked, "Why do you think we have lost it, some of the confidence of the Court?" And he said, "Because we've gotten into areas of policy and not law." And I tend to agree with him, and it is my hope that you would agree with that as well.

I yield back the balance of my time.

Chairman SPECTER. Thank you very much, Senator Coburn.

We are trying to figure out what the schedule is going to be for the balance of the evening, and for the balance of the week. We now have Senator Biden, who has requested 20 minutes, and Senator Feinstein 10, and Senator Durbin 10, all of which will be done tomorrow. Anybody who wants a fourth round? I want to do the

third rounds tonight so that we can move ahead promptly tomorrow.

Senator LEAHY. Mr. Chairman, I think that if we want to do this we should remember the judge and his family have been sitting here all day. He has been answering questions. He has shown more equanimity than most of us would. You sat here through the whole thing. I sat here through most of it, but Senators can come and go. He cannot. He has had to sit through all of it. His family has had to sit through all of it, and that has to be a strain. I do not think most teenage sons would show that much attention on these things.

I would suggest that we would probably have far better questions if we can go back and go over the transcript. I know what I want to do, I want to go over some of it—I am not going to have an awful lot of questions, but I would like to go back to three or four places from my notes that I have some questions. I want to read the transcript so when I ask the question, in fairness to the judge, it is about what is specifically in the transcript.

This is the same thing we did with Chief Justice Roberts. We came back on that last day, as I recall, and I think we wrapped up around 1, 1:30 in the afternoon.

Chairman SPECTER. No. We wrapped up about 11 o'clock, a little before.

Senator LEAHY. Oh, did we?

Chairman SPECTER. A little before 11.

Senator LEAHY. When you are having so much fun time goes by so quickly.

Chairman SPECTER. We do not have word from Senator Kohl or Senator Feingold. Suppose we put the maximum of 25 minutes on the next round for tomorrow, and suppose we start at 9 o'clock? That means the only people that have to be here are Senator Leahy and myself at 9.

Senator LEAHY. I will be here at 9. I am here usually a lot earlier than that.

Chairman SPECTER. Senator Schumer just on the auctioneer said yes?

Senator LEAHY. That is OK. I will go along with it. And understand though, and I would assume—you have always been fair—if we run into some extraordinary problem, somebody may need a few more minutes.

Chairman SPECTER. Anybody who satisfies your extraordinary problem test will get more time. Make it your test.

Senator LEAHY. Thank you very much.

Chairman SPECTER. Without objection, so ordered.

Judge Alito, you have shown remarkable stamina, and you have shown, in my opinion, remarkable patience. I think it is unwise for any Senator, including the Chairman, to do too much commenting about anybody else's questioning, but you have been patient. And people may not like your answers, but they are your answers. We have precedent for that. Nobody has even said they are misleading. They have said they just do not like them. But you have been consistent, and very patient in stating your position, even though you have been called upon to state it repetitively, and repetitively, and repetitively. So I think it is well within the ambit of fairness to say

that you have been patient, and you have shown real stamina, as has Mrs. Alito, and as has your loyal family.

So that we will proceed at 9 o'clock tomorrow, and we will have 20 minutes for Senator Biden, 10 minutes for Senator Feinstein, 10 minutes for Senator Durbin, and my expectation is we will not have a great deal of time for Senator Kohl. I am not sure about Senator Feingold. And that anybody else will be limited to 25 minutes on the final round, subject to the Leahy exceptional circumstance standard.

Recess.

[Whereupon, at 6:37 p.m., the Committee was adjourned, to reconvene on Thursday, January 12, 2006, at 9 a.m.]

NOMINATION OF SAMUEL A. ALITO, JR., OF NEW JERSEY, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

THURSDAY, JANUARY 12, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9 a.m., in room 216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Grassley, Kyl, DeWine, Sessions, Graham, Cornyn, Brownback, Coburn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin.

Chairman SPECTER. The hearing will resume on the confirmation proceedings for Judge Samuel Alito to the Supreme Court of the United States.

Good morning, Judge. Saw your family in the hallway as we were coming down. Everybody appears to be bright and rested and ready.

Judge ALITO. Thank you, Senator.

Chairman SPECTER. The Committee staff, accompanied by representatives of Senator Kennedy, went through the Rusher files yesterday, finishing up their work, I am advised, at about 2 a.m. this morning, and provided me with a memorandum that the Committee staff reviewed more than four boxes of documents from the personal files of William Rusher concerning CAP. Judge Alito's name never appeared in any document. His name was not mentioned in any of the letters to or from the founder, William Rusher. His name was not mentioned in any of the letters to or from CAP's long-term executive director, T. Harding Jones. His name does not appear anywhere in the dozens of letters to CAP or from CAP. The files contained canceled checks for subscriptions to CAP's magazine, Prospect, but none from Judge Alito. The files contained dozens of articles including investigative expos written at the height of the organization's prominence, but Samuel Alito's name is nowhere to be found in any of them.

The Rusher files contained lists of the board of directors, the advisory board, and the contributors to both CAP and Prospect Magazine, but none of these lists contains Samuel Alito's name. The files contain minutes and attendance records from CAP meetings in 1983 and 1984, just before Samuel Alito listed the organization on his job application, but Samuel Alito did not attend any of those

meetings, at least according to those records. He was not even mentioned in the minutes. The files contained dozens of issues of CAP's magazines, but none of the articles was written by, quoted or mentioned Samuel Alito. CAP founder, William Rusher, said, "I have no recollection of Samuel Alito at all. He certainly was not very heavily involved in CAP if at all."

Before turning to Senator Leahy for his allotted time, I would yield to him if he has any opening comments he chooses to make.

Senator LEAHY. Mr. Chairman, as we know, this will be the last opportunity for the American people to learn what Judge Samuel Alito thinks about the fundamental constitutional rights, whether he is going to serve to protect their liberty, their privacy from Government intrusion. I think it is even more critical today because of the efforts to expand Presidential—

Chairman SPECTER. Excuse me, Senator. Do you want to start on your 25—

Senator LEAHY. Oh. I thought you were asking me—

Chairman SPECTER. Opening comments, sure, yes. We are not going to start your time clock until you tell us.

Senator LEAHY. Just a short opening comment.

Chairman SPECTER. Fine.

Senator LEAHY. I know the judge probably feels like he has been here and doing nothing but being on a hot seat, but we are talking about a lifetime appointment, and it is the most powerful court in the land. It is at a time when we see this effort to expand Presidential powers such as illegal wiretaps on Americans, the President using a signing statement to create exemptions from laws prohibiting torture. These are all important things. The Supreme Court is our ultimate guardian, has to be our ultimate guardian, and we need to know whether Samuel Alito is willing to be that kind of guardian.

I am still troubled by some of the questions. Mr. Chairman, I know you are going to be asking questions, and I will wait to ask mine after that, of course.

Chairman SPECTER. I am going to reserve my time at this juncture, and turn to Senator Leahy for time up to 25 minutes.

Senator LEAHY. Thank you.

In his confirmation hearing last September, we went through hours and hours, days and days for Judge Roberts, now Chief Justice. I asked him if the Constitution permits the execution of an innocent person. He said if they have been falsely convicted and they are innocent, they should not be in prison, let alone executed. I think we all agree with that. But I pushed further because my question was whether the Constitution permits the execution of an innocent person, if you know that they are innocent. He said, "I would think not."

Judge, do you agree with Chief Justice Roberts?

Judge ALITO. I agree that it is one of the most fundamental rights protected by our Constitution, that no one may be convicted of an offense unless they are proven to be guilty beyond a reasonable doubt, and further than that, the Supreme Court's decisions since 1976 dealing with the Eighth Amendment, have attempted to create a whole set of procedural safeguards to make sure that the death penalty is not imposed arbitrarily or capriciously, and this

whole framework is designed to prevent exactly that, to prevent the conviction of an innocent person, and to prevent the imposition of capital punishment on someone who is innocent, or on someone who is guilty of the offense but it not deserving to have that penalty imposed on the person.

Senator LEAHY. Judge, as we know, we saw the cases in Illinois of people a few days away from execution, they have been sentenced to death; they have been convicted; they had their trial, gone to trial; jury came back; apparently appropriate procedure followed on sentencing; they are now sentenced to death. A few days before somebody comes forward at the very last minute because of DNA evidence and says, "Whoops, we've got the wrong person." And then they are let loose. We are finding it in Virginia, and now in other cases it appears that there is a possibility a number of innocent people were executed.

What if you had a case, they have gone through the whole thing, they have been convicted; the judge has followed all of the appropriate sentencing; the jury came back—did everything following the law. And now they are up for execution. Evidence comes up, say DNA evidence, or a confession of somebody else. Would it be unconstitutional then to execute that person?

Judge ALITO. Well, Senator, it is unconstitutional to execute someone who has not been proven guilty beyond a reasonable doubt. Now, depending—

Senator LEAHY. They may have been found guilty beyond a reasonable doubt. What I am saying is that a lot of these people were on death row and then had to be commuted at the last moment, when a few days before the execution they found, whoops, we have the wrong guy.

Judge ALITO. Well, that's the ultimate tragedy that could possibly occur in our criminal justice system, and we should do everything we can to prevent that from ever occurring, and I have not had a case during my time on the court of appeals—I've had only a handful of capital punishment cases where there was a suggestion that that was a possibility.

If the evidence develops at the last minute, then I think—and if this is a—it would depend to some degree on—the procedures would depend on—would be different depending on whether the person had been convicted in State court or in Federal court. The first procedural step in either instance would be to file a petition with the trial court. It would be—if it were in State court, it would be a State collateral relief petition, and those are handled differently depending on the State. And then a file of—I'm sorry. You could go to the State court or you could file a second habeas petition, attempt to file a second habeas petition in Federal court, and follow the procedures that are set out in habeas corpus statute.

Senator LEAHY. I understand all of the steps. Like you, I was a prosecutor, even though we do not have the death sentence in Vermont, we do have real life imprisonment, and I remember those. But you agree though with Chief Justice Roberts that the Constitution does not countenance the execution of an innocent person?

Judge ALITO. The Constitution is designed to prevent that.

Senator LEAHY. The reason I ask this, this is something that was originally raised, as I recall, in the Judiciary Committee by Chairman Specter, the Rule of Four. Are you familiar with that procedure on the Supreme Court? In other words, it takes five Justices to stay an execution, but four to hear one of these cases, so usually if there has been four that have agreed it should be stayed, somebody will make the fifth just as a matter of courtesy. That has not been followed that much recently. Chairman Specter has called it a bizarre and unacceptable outcome to not provide the fifth vote. He once introduced legislation to codify the Rule of Four.

If you were one of the Justices and you are there—and these things always seem to happen, everybody is scattered all over the place—four of your fellow justices have said that they would hold. What would you do? They voted to stay the execution. They are asking you to be the fifth vote.

Judge ALITO. I had not heard of this rule until the hearings for Chief Justice Roberts, but it seems to me to be a very sensible procedure because I think we all want to avoid the tragedy of having an innocent person executed or having anyone executed whose constitutional rights have been violated.

Senator LEAHY. I raise it, as I did with then-Judge Roberts here, because some things you will remember from this hearing, some things you will probably try to forget from this hearing, both you and your family, but I hope this one, at least this idea stays in your mind.

About a decade ago in *Washington* v. *Glucksberg*, the Supreme Court declined to find that terminally ill patients had a generalized constitutional right to a physician's aid in dying, preferring the matter be left to the States. The Court noted: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality and practicality of physician-assisted suicide." Chief Justice Rehnquist wrote, "The Court's holding permits the debate to continue as it should in a democratic society." I remember reading that. I found it very practical, aside from the legal things, a very practical response.

Last spring, we witnessed a fierce legal battle over the medical treatment of Terri Schiavo. She was in a persistent vegetative state for more than a decade, and ultimately after she died, the autopsy showed that. But we found politicians rushing to the cameras, engaged in extraordinary measures to override what the State courts determined be her own wishes, State courts who had heard countless cases on this. Suddenly this became the thing politicians all over the place rushing for it. The power of the Federal Government was wielded by some to determine, in my view, deeply personal choices. The President even came back to Washington in the middle of one of his vacations to sign special legislation on this. Do you agree with the idea advanced in the *Cruzan* case that the wishes of an unconscious patient, to the degree they can be known, should govern decisions regarding life-sustaining therapies?

Let us assume that the wishes are clearly known. Should they be followed?

Judge ALITO. Well, the *Cruzan* case proceeded assumed for the sake of argument, which is something that judges often do, that there is a constitutional right to say—that each of us has a con-

stitutional right to say, "I don't want medical treatment." And the *Cruzan* decision recognized that this was a right that everybody had at common law. At common law, if someone is subjected to a medical procedure that the person doesn't want, that's a battery and it's a tort, and the person can sue for it. It is illegal. The Court did not—

Senator LEAHY. One of those cases where we got something from that foreign law, in this case English common law; is that correct?

Judge ALITO. Well, that's correct, and I think that our whole legal system is an outgrowth of English common law.

Senator LEAHY. That popped in to my mind because I was thinking of some of the people talking about paying attention to foreign law. Most of our law is based on foreign law. But go ahead, common law.

Judge ALITO. Most of our common law is an outgrowth of English common law, and I think it helps to understand that background often in analyzing issues that come up.

Senator LEAHY. But you agree with *Cruzan*? I am thinking if somebody has a "do not resuscitate" order, do you agree with that?

Judge ALITO. That's a fundamental principle of common law, and *Cruzan* assumed for the sake of argument that that would be a fundamental constitutional right, but that is a right that people have had under our legal system for a long time, to make that decision for themselves.

Senator LEAHY. My wife is a nurse and she was working on the medical-surgical floor, and she would mention about people with these DNR, do not resuscitate. Would you agree that a patient would have a right—for example, if you have a living will, you have a right to designate somebody who can speak for you in a case of terrible injury or unconsciousness, speak for you on a do not resuscitate, or do not use heroic measures and all the rest, do you agree with that?

Judge ALITO. Yes, Senator. That's, I think, an extension of the traditional right that I was talking about that existed under common law, and it's been developed by State legislatures, and in some instances by State courts, to deal with the living will situation and with advances in—which I think is in large measure a response to advances in medical technology which create new issues in this area.

Senator LEAHY. We have three separate and co-equal branches of Government, as the Constitution says. We have these checks and balances, and most of us feel that the Congress is going to carry out that check and balance. They have to carry out real oversight and make sure the Government is accountable to the American people. If you do not do that, corruption and incompetence sets in. We have given a lot of powers to our Government in the fight against terrorism and others, and the check and balances to make sure there is oversight. Do you believe in the general principle of the Congress having major oversight powers?

Judge ALITO. I don't think there's any question about that.

Senator LEAHY. Let me go to this, and I was thinking of this as we were talking about the Schiavo case. I do not want you to have to get involved in what many found was kind of a sorry exercise when people are already suffering enough, a sorry exercise by the

Congress, so I will not talk about the House committees' unbelievable subpoena to Terri Schiavo. But let me ask you this: could the Judiciary Committee issue a subpoena for a defendant on death row in a State prison, if we believed he was about to be executed and thought he was innocent?

Judge ALITO. Could the subpoena—could this Committee issue a subpoena—

Senator LEAHY. And enforce it?

Judge ALITO. To have the defendant come and testify before the Committee?

Senator LEAHY. Yes. Say it is an hour before execution, for example, to make it even a tougher case.

Judge ALITO. It's not a question that I ever thought of. Sitting here I can't think of an objection to it, but I would have to—I would have to hear whatever arguments there were to be made.

Senator LEAHY. This may seem to be bouncing around here a little bit. I am trying to go over again in my own mind, after looking at the transcript last night, some of the things we were saying. You were in a discussion with a number of Senators about views of the court, or how the American people view courts, and how basically in a democracy courts have to have the respect of people if they are going to be able to carry out their orders. *Brown* is probably one of the key examples there where the Chief Justice worked 2½ years until he got a unanimous Court decision.

Justice O'Connor gave a speech decrying the present climate of antipathy between the judiciary and some Members of Congress, and I have spoken with her and others—and the late Chief Justice—about this. She expressed concern about efforts to limit Federal court jurisdiction in areas that some Members of Congress think the Federal courts should not be involved. We have seen a number of efforts to strip the Federal courts of jurisdiction when some Members of Congress felt they disagreed with them.

Now, I thought some of these issues were settled by *Marbury* when Chief Justice Marshall said, "It is emphatically the province and duty of the judicial department to say what the law is."

Now, the court-stripping bills are not without precedent. Recent efforts have failed. I recall one where three Senators finally talked it down until it ran out of time. I was one of the three. Senator Lowell Weicker of Connecticut was one of the other three. On the way out, the third one put his arm around us and said, "I think we are the only true conservatives in this Senate." We both said, "Thank you, Barry Goldwater. We appreciate you joining us in this." I took it as a great compliment.

Now, imagine that in the early 1950s Congress enacted a law that purported to strip all Federal courts, including the Supreme Court, of jurisdiction to hear cases and appeals involving the segregation of public schools. Would such a law have been constitutional?

Judge ALITO. Well, there's a debate among scholars about the extent of the authority of Congress to structure the appellate jurisdiction of the Supreme Court, and there are those who say that Congress has the authority to eliminate appellate jurisdiction by topic, and there are those who say that if—and they rely on the language of Article III. And there are those who say that to take away juris-

diction over a category of cases such as that would be a violation of another constitutional provision, in that instance a violation perhaps of the Equal Protection Clause.

And there is this debate that it has not—that it is not something—

Senator LEAHY. Have you taken part in that debate?

Judge ALITO. Pardon me?

Senator LEAHY. Have you taken a position in that debate?

Judge ALITO. I have not taken part in that, and I have read—

Senator LEAHY. Would you like to?

Judge ALITO. Not at this time.

[Laughter.]

Senator LEAHY. I don't know why that surprises me.

Judge ALITO. The case law is not definitive on this question. According to the scholars, *Ex Parte McCardle* is a case that can be interpreted in a number of different ways.

Senator LEAHY. You know, we had many in the Congress at that time, had they thought that *Brown* v. *Board of Education* was about to come down the way it did, probably would have made efforts to strip the authority of the Supreme Court to hear it. And I am afraid that as we find some of these efforts where the courts become a very convenient whipping boy to people looking for votes or whatever, that that might happen again. And I would suggest you think long and hard on it.

Let me ask you this, and it probably invites more effort to find out. On more than one occasion, the House of Representatives has included a provision in an appropriations bill—and we all agree that the Congress has the power of the purse—but in an appropriations bill saying that none of the funds can be spent enforcing a particular court decision, pick something that they feel is unpopular at the moment, so they say no money can be spent to enforce it.

Let us say the Court has ruled basically on a constitutional issue saying this shall be enforced; the Congress says, no, we won't allow money to be spent. Does that violate the Constitution?

Judge ALITO. Well, that's also a provocative constitutional question. I can't recall an instance where that has been done with respect to a constitutional decision. Perhaps it has been. I do recall back during the 1980s that it was done with respect to an issue of antitrust. And I would assume that if there wasn't—well, obviously if there isn't a constitutional question raised by that limitation on the expenditure of funds, and if you're talking about a non-constitutional question, maybe there is no constitutional issue raised, there wouldn't be an obstacle to Congress's doing that.

With respect to a constitutional question, that's a provocative constitutional issue that—I don't know the answer to it, and I cannot think of precedent on that point. I don't believe there is any.

Senator LEAHY. Let's take a nonconstitutional—I want to make sure I understand your answer. Decisions come down of whatever nature. You mentioned antitrust. Whatever it is comes down from the Court, and it is going to require some enforcement. And the Congress says, no, we are not going to put the money in there. Can the Congress do that?

Judge ALITO. Well, I'd have to know the facts of the case and hear the arguments on both sides of it. Unless there was a constitutional objection, then that falls within one of the most important powers of the Congress, the expenditure of funds Congress exercises. The Framers wanted Congress to have the control of the purse because Congress is the branch that is closest to the people. And I would think that—and Congress obviously has great latitude in this area.

I don't know what constitutional objections would be raised to doing that with respect to a nonconstitutional question, but I'd have to understand exactly what was—

Senator LEAHY. Well, it is something to keep in mind because it may happen. You know, if we can grandstand, if Congress can grandstand the way it did on the Schiavo case, you have to wonder what else may come down.

One of the advantages or disadvantages of being here for a long time, I have actually been here for the hearings on every member of the Supreme Court, including that of former Chief Justice Rehnquist. And Senator Specter and I have served here together a long time. And I went back to one of his questions. He asked then-Justice Rehnquist whether Congress can strip the Supreme Court of jurisdiction over First Amendment cases involving freedom of speech, press, or religion. And I think the Chairman remembers this. He can be a rather tenacious questioner, as I know from some of my weekend phone calls from him. But he kept pushing then-Justice Rehnquist until he finally got an answer. In the end, then-Justice Rehnquist gave his view. He said the Congress could not remove the Court's jurisdiction over First Amendment cases.

So let me ask the same question that Senator Specter asked in 1986. Does Congress have the authority to say the Supreme Court does not have jurisdiction over First Amendment issues of freedom of speech, press, and religion?

Judge ALITO. Well, I would give the same answer to that that I gave to the more general question you asked a few minutes ago about taking away the Supreme Court's appellate jurisdiction over a topic of cases. It's not a question that I have obviously had to deal with in my capacity as a judge or something that I have written about or studied in any sort of a focused way. My understanding of the writing on the question is that there's a division of thought among leading constitutional scholars on the issue, and there are some who argue that Congress has plenary authority to define the appellate jurisdiction of the Supreme Court, and there are others who argue that if Congress takes away the authority of the Supreme Court to hear a particular type of case, that there could be a violation of another constitutional provisions, and in that instance it would be the First Amendment. And as a matter of constitutional law, I don't feel I can go further than that. I have—

Senator LEAHY. But, Judge, this is somewhat similar to the initial answers given by then-Justice Rehnquist. But he ultimately came down and said in that hearing that Congress could not remove the Court's jurisdiction over First Amendment cases.

Are you telling me that—and I just wanted to make sure I fully understand your answer—you are not willing to go to the extent then-Justice Rehnquist did at his hearing?

Judge ALITO. I gave a speech a while ago addressing this question from a practical standpoint or touching on it from a practical standpoint, and I said that I thought that doing something like this would be an awkward and undesirable way of proceeding because it would lead to a lack of uniformity in decisions. If jurisdiction is taken away from the Supreme Court but jurisdiction remains in the courts of appeals, then conflicts in the circuit would develop—conflicts in the circuits would develop and you'd have conflicting decisions potentially in different parts—governing in different parts of the country and no way to resolve the issue. And if the jurisdiction was taken away from the Federal courts in general, then you would potentially have conflicting State court decisions. So the First Amendment, or whatever constitutional provision was at issue, would mean something different potentially in Vermont than it did in New Hampshire or in some other State.

So there are undesirable practical consequences of proceeding in that way. I'm—

Senator LEAHY. Your answer would be the same, I assume, if I was asking the question about the Fourth or the Fifth or the Sixth Amendment, basically the same?

Judge ALITO. It would be, Senator. I have just not studied this issue in enough depth to be able to give an answer. I would have to study it in depth and probably hear it in the context of a case. What I do know is that there is a division of authority among leading constitutional scholars, and I would not want to hazard an answer to the question here without going into the question with a lot—studying the question in considerably greater depth than I have.

Senator LEAHY. This will be my last, and I appreciate the courtesy of the Chairman, who, I might say, has run this hearing with total fairness, as he always does. I may have some followup questions in writing, but this will be last chance to ask you anything.

Under your theory of the unitary Executive, are citizen suit provisions, such as those in our environmental laws, allowing citizens to act basically as private attorneys general and sue polluters, are they constitutional?

Judge ALITO. I don't see a connection between the unitary Executive theory and that issue, and I think Congress has the authority to create a private cause of action for anyone that Congress chooses to create such a cause of action for, subject only to whatever limitations are imposed by the Constitution. But we often grapple with the issue of whether Congress intended to create a private cause of action for a particular class of plaintiffs. That's a difficult issue that comes up with some frequency in Federal litigation. But where Congress speaks directly to the question and says that people with—and defined the category of cases, the category of plaintiffs who can bring a suit, a citizen suit, or whatever it is, then that's definitive, of course, subject only to whatever limitations the Constitution imposes.

Senator LEAHY. Judge, that is an answer—the substance of what you said is something obviously I would like, but I am still troubled

by it because in November 2000, right after the Presidential election, you came and spoke to a meeting of the Annual Federalist Society Lawyers Convention about the powers of the President. And when you discussed your theory of the unitary Executive, you criticized the Supreme Court's upholding the independent counsel statute, among other things. Is your answer today different than what you were saying then?

Judge ALITO. What I said in that speech was that the Congress—I'm sorry, the Constitution confers the Executive power on the President, and when we are dealing with something that is within the President's Executive power, without getting into the scope of Executive power, and there I was focusing on the President's duty to take care that the laws are faithfully executed. That's explicitly set out in the Constitution, so there can't be any debate about whether or not the President has that power.

When we're dealing with something that is within the scope of the President's Executive power, the President should have the authority to control the executive branch, and the latest expression of the Supreme Court on that issue at the time was the *Morrison* decision, and the *Morrison* decision formulated the governing standard in what I would call functional terms. And it said that Congress has the ability to—has the authority to place restrictions on the President's ability to remove inferior executive officers, provided that in doing so Congress does not take away the President's authority to control the executive branch. And I was talking about the importance of maintaining the principle that the President is the head of the executive branch and should control the executive branch.

Senator LEAHY. But you did at that time criticize the Supreme Court's upholding the independent counsel statute, did you not?

Judge ALITO. I said that it was inconsistent with what you could call the pure theory of the unitary Executive. But at the time, of course, *Morrison* had been decided, and it was a resounding 8–1 decision, and it is a very important precedent of the Court.

Senator LEAHY. If you had been there, it might have been 7–2? Is that what you are suggesting?

Judge ALITO. Well, if it comes up before me, if I am confirmed, then *Morrison* is a strong expression of the view of the Supreme Court on the question, and an 8–1 precedent on an issue that was important and controversial at the time when it came up before the Court, and it was very clear and, as I said, a resounding decision by the Supreme Court on the question.

Senator LEAHY. Well, I do not want to intrude on other Senators' time, and I may do a followup question with you. Thank you for your answers. We have obviously agreed on some things and disagreed on others. I appreciate you taking the time to answer.

Mr. Chairman, I appreciate your time.

Chairman SPECTER. I am going to use just a little of my reserved time to comment on what Senator Leahy raised about the issue with Chief Justice Rehnquist on his statement that you could not take away the jurisdiction of the Supreme Court of the United States on First Amendment issues. That was as interesting a dialog as I have had in my tenure here, and I have had a few, and it arose in a curious context.

I had asked the Chief Justice about the question and he refused to answer. And overnight, the staff had found an article written by a young Arizona lawyer named William H. Rehnquist in 1958, which was published in the Harvard Law Record, not the Harvard Law Review but the Harvard Law Record. And in that article, lawyer Rehnquist said that the Senate Judiciary Committee was derelict in its duty in questioning Justice Whittaker at his confirmation hearing in not asking pointed questions about due process or equal protection.

When my turn came, I came back to then-Justice Rehnquist and said, how about it? Are you that William H. Rehnquist. He admitted he was, didn't have much choice. And I said, well, how about this article? And he emphatically said, "I was wrong."

[Laughter.]

Chairman SPECTER. But that provided—

Senator HATCH. He was under oath.

Chairman SPECTER. That provided an opening, and I proceeded to continue the line of questioning. Finally, he allowed as to how Congress couldn't take away the Court's power over the First Amendment.

It seems to me patently clear that Congress cannot take away the jurisdiction of the Supreme Court on constitutional issues. It cannot do it. That is the principal function of the Supreme Court of the United States, is to interpret the Constitution. And if the Congress could take away that authority, the Court's authority would be vacuous.

But then, as you might expect, I asked him about the Fourth Amendment, search and seizure, and Fifth Amendment, privilege against self-incrimination, went right down the line. He refused to answer every question. And I said, well, why will you answer questions on the First Amendment and not on the rest of them? He wouldn't answer that, either.

[Laughter.]

Chairman SPECTER. Chief Justice Rehnquist was confirmed 65 to 33, which confirmed an observation which I have made from time to time, Judge Alito, that nominees answer just about as many questions as they think they have to to be confirmed. He may turn out to be a notable exception, but I think that is a valid generalization. It also confirmed my experience that nominees remember these proceedings and nominees are influenced by these proceedings in very subtle ways.

We don't extract promises, but when Senator Leahy very adroitly asks you about the rule of four on granting cert, four Justices say the cert is granted but it takes five to stay an execution in a capital case, how ridiculous can you be? Senator Leahy wondered if you would remember that. Well, I predict you will, if confirmed, remember that. In fact, I predict you will remember it even if you are not confirmed.

But to this day, Justices' comments to me about questions they had here—every time I see Justice Souter, he says he still hasn't made up his mind on whether Korea was a war or not. And the other Justices—I won't go into any more detail.

I am going to reserve the balance of my 20 minutes and 54 seconds. Senator Hatch?

Senator HATCH. I will reserve my 25 minutes.

Chairman SPECTER. Senator Kennedy, you are recognized for 25 minutes.

Senator KENNEDY. Thank you. Good morning.

Judge ALITO. Good morning, Senator.

Senator KENNEDY. Just to initially follow-up on the last area of questioning by Senator Leahy about a unitary Executive, I have asked you questions about this earlier in the week. My colleagues have. I am not going to get back into the speech that you gave at the Federalist Society. Well, I will mention just the one part of it that is of concern.

"If the administrative agencies are in the Federal Government, which they certainly are, they have to be in one of those branches, legislative, executive, judicial, and the logical candidate is the executive branch. The President has the power and the duty to supervise the way in which the—-to which subordinate executive branch officials exercise the President's power, carrying Federal law into execution."

So we asked you about that power and that authority and you responded, as I think you just repeated here, that the *Humphrey's* case was the dominant case on this issue. Am I roughly correct? I am trying to get through some material. Is it—

Judge ALITO. Yes. It was the leading case that was followed up by the *Morrison* case.

Senator KENNEDY. Followed up by the *Morrison* case as the controlling case on these administrative agencies. But what you haven't mentioned to date is your dissent from the *Morrison* case. We have been trying to gain your view about the unitary Executive. Most people believe we have an executive, legislative, and judicial branch—and now we have this unitary Executive which many people don't really understand and it sounds a little bizarre. You have indicated support for it. You have commented back and forth about it. You have indicated the controlling cases that establish the administrative agencies. You refer to the *Morrison* case as guiding the authority.

But then in your comments about *Morrison*, you then proceed to outline a legal strategy for getting around *Morrison*. This is what you said. "Perhaps the *Morrison* decision can be read in a way that heeds if not the constitutional text that I mention, at least the objective for setting up a unitary Executive. That could lead to a fairly strong degree of Presidential control over the workings of the administrative agencies in the area of policymaking."

Our question in this hearing is what is your view of the unitary Executive. You have responded to a number of our people, but we are interested in your view and your comments on the *Morrison* case, which you say is controlling, but we want to know your view and it includes these words—"that could lead to a fairly strong degree of Presidential control over the workings of the administrative agencies in the area of policymaking." Now, that would alter and change the balance between the Congress and the President in a very dramatic and significant way, would it not?

Judge ALITO. I don't think that it would, Senator. The administrative agencies—the term "administrative agencies" is a broad term and it includes the Federal Reserve—it includes agencies that

are not regarded as so-called independent agencies. It includes agencies that are within—that are squarely within the executive branch under anybody's understanding of the term, agencies where they are headed by a Presidential appointee whose term of office is at the pleasure of the President, and that's principally what I'm talking about there, the ability of the President to control the structure of the executive branch, not agencies—the term "administrative agencies" is not synonymous with agencies like the FTC, which was involved in the *Humphrey's Executor* case, where the agency is headed by a commission and the commissioners are appointed by the President for a term of office and there are conditions placed on the removal of the commissioners.

Senator KENNEDY. The point, Judge, the answer you gave both to my colleagues Senator Leahy, Durbin, and to me, and the quote, "the concept of a unitary Executive does not have to do with the scope of Executive power" really was not accurate. You are admitting now that it has to do with the administrative agencies and this would have a dramatic and important reconsideration of the balance between the Executive and the Congress. I haven't got the time to go through, but we are talking about the Federal Reserve, Consumer Product Safety, the Federal Trade Commission, a number of the agencies that would be directly considered and that have very, very important independent strategy.

Judge ALITO. Senator, as to the agencies that are headed by commissions, the members of which are appointed for terms, and there are limitations placed on removal, the precedents—the leading precedent is *Humphrey's Executor* and that is reinforced, and I would say very dramatically reinforced, by the decision in *Morrison*, which did not involve such an agency. It involved an officer who was carrying out what I think everyone would agree is a core function of the executive branch, which is the enforcement of the law, taking care that the laws are faithfully executed, and yet—

Senator KENNEDY. But the point here is that you take exception to *Morrison*. You are very clear. We are interested in your views. We understand *Humphrey's* and *Morrison* are the guiding laws, but we talked about *stare decisis* and other precedents. But you have a different view with regards to the role of the Executive now, an enhanced role, what they call the unitary Executive, and that has to do, as well, with the balance between the Executive and the Congress in a very important way in terms of these administrative agencies.

I haven't got the time to go all the way through, but we did have some discussion about those agencies and how it would alter the balance of authority and power between the Congress and the Executive. That is very important. It is enormously interesting. We have had Professor Calabresi from Harvard University spell this out in great detail, and I know you have separated yourself a bit from his thinking, to the extent that he would go in terms of administrative agencies. The point is, there would be a different relationship if your view was the dominant view in the Supreme Court between the Executive and the Congress and that is really the point.

Judge ALITO. But Senator Kennedy, what I have tried to say is that I regard this as a line of precedent that is very well developed

and I have no quarrel with it and it culminates in *Morrison*, in which the Supreme Court said that even as to an inferior officer who is carrying out the core Executive function of taking care that the laws are faithfully executed, it is permissible for Congress to place restrictions on the ability of the President to remove such an officer, provided that in doing so, there is no interference with the President's authority, and they found no interference with that authority there. That is an expression of the Supreme Court's view on an issue where the claim for—where the claim that there should be no removal restrictions imposed is far stronger than it is with respect to an independent agency like the one involved in *Humphrey's Executor*.

Senator KENNEDY. The point is that you differed with *Morrison* and outlined a different kind of a strategy. I want to move on.

I want to come back just briefly again to the Vanguard issue, where I continue to be troubled and puzzled by your answers to me and others. Now, just to get back to the starting point, in your sworn statement to the Committee when you were nominated to the circuit court in 1990, on page 15 of that statement, you wrote this about your recusal practices. "I do not believe that conflicts of interest relating to my financial interests are likely to arise. I would, however, disqualify myself from any cases involving the Vanguard Companies." So according to your sworn promise, you were going to recuse yourself from cases involving the Vanguard Companies, is that correct?

Judge ALITO. I said I would disqualify myself from any cases involving the Vanguard Companies.

Senator KENNEDY. All right. You also said you would recuse yourself from any case involving your sister's firm—

Judge ALITO. That's correct.

Senator KENNEDY.—and cases in which you were involved in the U.S. Attorney's Office, is that correct?

Judge ALITO. Yes, that's correct.

Senator KENNEDY. And there has been some discussion as to whether that commitment covered only the initial period of your judgeship, and I am not going to go into that. I am not going into that.

I just want to know about the steps you took to meet your commitment to the Committee even in the initial years. On Tuesday, you told Senator Feingold that you had no recollection of whether you put Vanguard on your recusal list when you were first appointed to the bench in 1990. Is that still right?

Judge ALITO. That's correct. I don't have the initial list that was submitted to the clerk's office and I think I clarified in response to Senator Feingold's question that that is a list for—that is a list that is used by the clerk's office to make the first cut on recusal issues, but it is not by any means the last word.

Senator KENNEDY. OK. And in 1990, you owned $80,000 of Vanguard funds, is that right? And over the years, it grew to hundreds of thousands, is that correct?

Judge ALITO. It grew, yes.

Senator KENNEDY. So you were getting reports from Vanguard now either monthly or quarterly or annually, were you not, reporting—

Judge ALITO. Yes, I was.

Senator KENNEDY. All during this period of time?

Judge ALITO. Yes.

Senator KENNEDY. Do you know whether Vanguard was on your recusal list in 1991?

Judge ALITO. I don't know what was on my—the list that was with the clerk's office prior to the time when the system was computerized. I have seen recently, and I believe you have copies of the lists that were on the computer, and those lists do not include Vanguard. There is no question about that.

Senator KENNEDY. We received your standing recusal list from the Third Circuit earlier this week. It is dated January 28, 1993, and Vanguard is not on it. You have your sister's law firm on it. You have your cases from the U.S. Attorney's Office on it, but not Vanguard, your largest investment. Here are the recusal lists for 1994, 1995, 1996, and Vanguard is not on any of them, either. Do you have any reason to disagree with the report from the Clerk of the Court?

Judge ALITO. I don't, Senator. I don't know whether—I have no comment on the list. That's the list that they had and I don't know exactly how that list came about, but that's the list they have.

Senator KENNEDY. What does it say at the top of the 1/28/93 list under the date? As I understand, it says "no changes."

Judge ALITO. As of 1/28/93, no changes. That's correct.

Senator KENNEDY. So this was 1993, so there were no changes in that from 1992, and you have listed probably eight or nine different items on there, have you not?

Judge ALITO. There are eight items listed.

Senator KENNEDY. OK. So you have got eight items on there. Vanguard isn't on it, and it says no changes from the previous year. So I assume that means the 1992 list was the same, so that you did not have Vanguard on the 1992 list, either. Do you remember whether you ever placed Vanguard on your recusal list at any time between the time you were sworn in and January 1993?

Judge ALITO. As I said, I don't have a copy of lists that predate this. In fact, I didn't have a copy of these lists and I don't know, obviously, I can't recall what was on the earlier lists.

Senator KENNEDY. Well, in 1994, you removed the U.S. Attorney's Office from your recusal list, is that right?

Judge ALITO. Yes.

Senator KENNEDY. So you did revisit the recusal list at that time.

Judge ALITO. I notified the clerk's office to take the U.S. Attorney's Office off the list. I actually think I have a copy of the letter that I sent there. I don't believe that I looked at the list and crossed it off the list. I sent them a letter and I outlined—I say, it has now been 4 years. This was an instance—another instance of my going beyond what I had to do. I recused myself from everything from the office, not just things that were there while I was in office. But after the passage of 4 years, I thought that the cases that I had had any possible connection with had washed out and so I sent a letter, and I have a copy of the letter, saying, take it off this list but notify the U.S. Attorney's Office and the public defender's offices that they should notify the clerk's office if any case

comes up in which they have any reason to believe that any aspect of the case was in the U.S. Attorney's Office while I was there.

Senator KENNEDY. Well, I just mention, one of the things you had to do was put Vanguard on the list, was it not, because you gave the assurances to the Committee, sworn testimony, that you were going to recuse yourself. That was one of the things—

Judge ALITO. Senator, if it was not on the initial list, then that would be an oversight on my part. I said in answering the question to the Senate, I don't believe conflicts of interest are likely to arise. They really rarely do arise with respect to mutual funds. That's one of the main reasons why judges and other people who have to worry about conflicts invest in mutual funds, and no Vanguard case came before me—no case involving Vanguard came before me for 12 years.

Senator KENNEDY. The point is, judges—as I understand and is their responsibility—take the whole issue on recusal extremely seriously and review those lists very, very carefully. Given the assurances and the pledge and the promise under oath to the Committee. Now we find out that it is not on your list, and over the period of these last weeks, we have heard so many explanations, Judge. This is what confuses us.

We hear first of all that it is a computer glitch. Then we hear, well, it doesn't really apply because it is an initial service list, so Vanguard really wasn't in it because I didn't make the decisions on it until after I had been in 12 years. I made the pledge to the Committee. I don't know how good that pledge was, or how many years it was good, but that initial pledge—initial service meant I didn't have to do it. And then we heard the excuse of, well, it was a *pro se* case, and we had different computers. That was what was mentioned in my office. It is a *pro se* case. We have different computers. There are different computers in the clerk's office than exist in the law firms here in Washington from all over the country. I could never quite understand it because a *pro se*—obviously talking about individuals—you would think that that might even have a higher kind of a requirement.

But the facts are that you never put that Vanguard on your recusal list, and all of these papers were in your control. And that, I think, is a matter of concern to the—it should be to all of us.

Judge ALITO. Senator, could I just say a brief comment on that?

Senator KENNEDY. Yes.

Judge ALITO. I have tried to be as forthcoming in explaining what happened here as I possibly could be, and I am one of those judges that you described who take recusals very, very seriously. And I served for 15-and-a-half years. I sat on the merits on well over 4,000 cases.

In addition to that, let me just mention the statistics for a recent year, and I think these are typical of my entire period of service. During the last calendar year, I received over 500 petitions for rehearing; most of those are in cases I didn't sit on initially; over 400 motions. Most of those are in cases I didn't hear on the merits, and many of those are just as important as appeals on the merits because they involve things like whether someone is going to be removed to a country where the person claims that they will be subjected to persecution, or they are applications by habeas petitioners

for permission to proceed with—to take an appeal in a habeas case. And if we don't issue the certificate of appealability, that is the end of the matter for that petitioner, who may be serving a very lengthy sentence or a life sentence.

So we are talking about well over a thousand cases a year. Now—and this is over a course of 15 years. This *Monga* case is one case and I have said there was an oversight on my part in not focusing on my personal practice when the issue came before me. And when the recusal issue was brought to my attention, I did everything that I could to make sure that nobody could come away from this with the impression that Ms. Maharaj got anything other than an absolutely fair appeal.

But I have tried to explain the whole thing. I have not given conflicting answers, but I have been asked a number of different questions and there are a number of steps that were involved in what took place. The fact that it was a *pro se* case doesn't—I mentioned that not because *pro se* cases are any less important than any other category of cases. They are very important, but it is the fact that our court uses a different system for *pro se* cases. We don't have these clearance sheets, and that is when I have typically focused on the issue of recusal.

Senator KENNEDY. Well, I thank you, Judge. I think if we had in the beginning—we all make mistakes and I have certainly made more than my share. But if we had a statement on this, I think we could have cleared this all up in the very beginning if it was just said it was a mistake, it wasn't on the list, it should have been on the list, as we are saying now. We would never have had to get all this or go through this.

But we have had a series of explanations—the light not going off when I looked over the *Vanguard* case, the computer glitches, the changes of the computers, I wasn't told by my clerks. We had all of those statements, and so this was what troubled many of us on the Committee about getting straight answers on an issue which is of great importance.

Mr. Chairman, I will use the remainder of my time with a brief comment. I want to thank our Chairman for the fair and dignified way that he has conducted the hearing. I thank our ranking member, Senator Leahy, for his usual courtesies, as well. And I thank Judge Alito for your willingness to serve, and thanks to your family for being here and for the support they have given throughout these hearings.

These stakes are very high, and that was reflected in the variety of questions posed over the past 3 days. We started these hearings seeking answers. We have come with even more questions about Judge Alito's commitment to fairness and equality for all.

Unitary Executive: We discussed Judge Alito's expansive views on Presidential authority. He distanced himself from the theory of the so-called unitary Executive, one that promotes extremely expanded Executive power. He gave the Committee platitudes about Supreme Court precedent and the Constitution, but his comments before this Committee run away from his statements of the past, some as recently as 5 years ago, that embrace this very radical, and I believe bizarre theory.

Professor Stephen Calabresi, one of the originators of the unitary Executive theory, says that the impact on this Nation is vast and dramatic. It obliterates the independence of agencies that protect the public, such as the Consumer Products Safety Commission, the Elections Commission, Securities and Exchange Commission, and much more.

It makes no sense to describe the effects of this bizarre theory in any other terms. That is how its founders brazenly described it. Somehow, Judge Alito expects us to buy his unique and lonely portrayal of this radical theory as something less than it is.

On the Concerned Alumni of Princeton, much has been made of the wide interest in Judge Alito's interest in this organization and its frankly bigoted views. I was pleased that Judge Alito distanced himself from its repulsive anti-woman, anti-black, anti-disability, anti-gay pronouncements—views that were especially pronounced at the time that Judge Alito believes he joined.

But we still do not have a clear answer to why Judge Alito joined this reprehensible group in the first place. We still do not know why he believed that membership in the group would enhance his job application in the Reagan Justice Department. We still don't know why he chose this organization among so many others organizations that he likely belonged to, but somehow can't remember why.

In Vanguard, some of our Republican colleagues find it shocking that we would even question Judge Alito about his failure to recuse himself from Vanguard cases. But the real shock is that Judge Alito failed to meet his sworn promise to this Committee more seriously. He says it was an oversight that he corrected 12 years after he made that promise.

But now we know from his own testimony and records that he apparently never put Vanguard on the recusal list, even immediately after his promise to this Committee. He has failed to give us any plausible explanation. The bottom line is that he just didn't think his commitment to the Committee and to the U.S. Senate was important enough to honor.

On the 1985 job application, in my office Judge Alito tried to distance himself from the ideological views and legal opinions expressed in the 1985 job application to the Reagan Justice Department. He brushed it off as just a job application. Now, he has tried before the Committee to distance himself from the stunning statement that the White House and Congress somehow are superior to the Supreme Court, the keeper of our liberties.

He didn't back away one inch from his view that a woman's right to make her own reproductive decisions is not protected under the Constitution. He didn't back away from his criticism of the principle of one person/one vote.

On the cases he decided, in case after case we see legal contortions and inconsistent reasoning to bend over backward to help the powerful. He may cite instances to think that he helped the little guy, but the record is clear that the average person has a hard time getting a fair shake in Judge Alito's courtroom.

We are not expecting judges to produce particular results in their decisions, but we do expect fairness for understanding the real-world impact of their decisions. Frankly, it would be more com-

forting if Judge Alito gave individuals the same benefit of the doubt in his courtroom that he is asking from this Committee on Vanguard, CAP, the unitary Executive, and women's privacy.

Now, the debate over the nomination continues. In the end, this debate really is about the path of progress and the kind of America we hope to become. America is noblest when it is just to all of its citizens in equal measure. America is freest when the rights and liberties of all are respected. America is strongest when all can share fairly in its prosperity. And we need a Court that will hold us true to these guiding principles today and into the future.

Thank you very much, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Hatch has stated his wish to reclaim at this point some of his reserved time.

Senator Hatch.

Senator HATCH. I don't intend to be very long, but I really believe that bringing up Vanguard or the Princeton matter goes beyond the pale at this point in this hearing, and let me just make this case.

Some of your critics, Judge, have focused a lot of attention on the actions over the Vanguard matter, and I think most people who think, think this is really a case of much ado about nothing. Certainly, no law required you to recuse yourself in that case. As a matter, the law, helped put together by one of the leading Democrat ethicists and professors of law, reads as follows: "financial interest means ownership of a legal or equitable interest, however small, or a relationship as director, adviser or other active participant in the affairs of a party, except that ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund."

Now, you did not participate in the management of the fund, right?

Judge ALITO. No, I certainly did not.

Senator HATCH. OK. That is what the law says. So what is this big case that is being made? It must be that since you signed, among dozens of pages, the Committee form that says in the initial service you agreed to recuse yourself in the Vanguard matter, and then you made a mistake later, 12 years later, which you rectified—in other words, you lived up to your word in every sense of that term, whether or not you considered the initial service or not.

But anybody who looks at it would have to say, my gosh, that doesn't mean 12 years from now. But you even ignored that and said I recognize that I made a mistake. I recused myself even when I didn't have to recuse myself and did everything I could to live up to my word, which you did. In other words, you lived up to your word.

That is a fair interpretation, isn't it?

Judge ALITO. It is, Senator. I said in the—even if you read the answer as setting out a promise that would exist—that would be binding on me for the entire term of my judicial service, I did disqualify myself in the only *Vanguard* case that ever came before me.

Senator HATCH. And so to imply somehow or other that you were dishonest because you lived up to your word in the end, I think is a little bit beyond the pale.

The ABA reviewed this matter and found that you have an excellent record for integrity. You earned for the second time the highest American Bar Association rating of well qualified.

Now, I put in the record yesterday letters from several ethics professors who have examined this issue and found nothing improper. They agree that you lived up to your word and you didn't have to, nor will you have to in the future. That is what that law says in 28 U.S. Code Section 455(d)(4)(i). That is what it says.

Now, I might add that included a letter from Professor Geoffrey Hazard. Back when Justice Breyer was up for confirmation and questions were raised about the propriety of him hearing a case in which some argued falsely, I think, that he had a financial interest, my friend from Massachusetts, Senator Kennedy, favorably cited a letter from Professor Hazard that was favorable to Justice Breyer. And by the way, I am not going to judge the two cases, but it was every bit as much a case as this weak thing that has been brought against you.

Now, you know, what is going on here is nothing but an attempt to make a big deal about nothing, a small thing, and I think it is being done with a bit of old bait-and-switch, if you ask my opinion. I might add that when Judge Breyer—what happened there in the case of Breyer is I reviewed, I investigated it, and when the facts showed that he did no wrong, as they show you have done no wrong, I came out of the blocks and defended him. And I am glad I did because he, like you, is an honest man. Neither Justice Breyer nor you have gone into public service to make money. That is pretty apparent.

Now, to have this like you have done something wrong because you made a mistake and then you rectified it—my gosh, how many times do we have to beat that old, dead horse?

With regard to other thing, I have my own opinion as to why that is repeatedly brought up, when you have adequately explained that you didn't remember much about it, or anything at all. Now, we find that the Rusher memoranda contained no reference to you. He never heard of you before now. And it makes you wonder, why are they bringing that up? Well, I have got my opinions on that and I think my opinions are right.

The fact of the matter is you have been straightforward here. You have honestly answered the questions. You have answered more questions than almost any Supreme Court nominee in my 29 years in the Senate and I don't think you have been fairly treated. And it makes everybody wonder, why would anybody want to do these jobs?

I know law review graduates who make more than the Chief Justice this year, new graduates from law school. So it is apparent you are going into this because you love your country, you want to serve it. And you have done it well for 15 years, and anybody who knows you knows that. And I know you. So I think it is just wrong to keep bringing these phony issues up. And you have to ask, well, why are they doing it because they are so phony?

That is all I care to say. I will reserve the balance of my time.

Chairman SPECTER. Thank you, Senator Hatch. Your 18 minutes and 9 seconds will be reserved.

Senator HATCH. Thank you.

Chairman SPECTER. Senator Biden has asked for 20 minutes. We are going to be a little more flexible with this final round because I see light at the end of the tunnel, quite frankly. I see our conclusion of these hearings probably not tonight, but tomorrow, not too late. We have started all the sessions exactly on time and we have held to the time limits up until now, which I think we have to do if we want to do if we want ahead. If you once start to slip on when you start or the timing, it just gets out of hand, but at this juncture on a final round we have a little more flexibility. I see the light at the end of the tunnel.

Senator Biden, you are recognized for up to 20 minutes, as you have requested, and if you go a little more, my gavel will stay put.

Senator BIDEN. Thank you, Mr. Chairman. I will try not to.

Judge, I heard the Chairman. I happened to be doing something on Darfur and I was in the conference room and I heard the Chairman say that—which I agree, he and I have talked about this—nominees tend to answer as many questions as they think they have to in order to get confirmed. I would say that that has been the case with all nominees basically since Judge Bork.

I would also add another, I think, truism that has developed is they tend to answer controversial questions in direct proportion to how much they think the public is likely to agree with them. It all goes to kind of a central point here, is what is the public entitled to know about what you think, or what anyone thinks, before they go on the Court. I realize there is this dynamic tension between your independence as a nominee, would you be an independent Justice, and answering questions.

But having said that, let me go to an area that I hope you will engage me in and it goes to Executive power. I have had the dubious distinction because of my role in the Judiciary Committee and on the Foreign Relations Committee in the last three or four times forces have been used by a President to be the guy in charge of, at least on my side of the aisle, drafting or negotiating the drafting of the authority to use force, whether it was President Clinton, before that, President Bush, and even before that, the discussion back on Lebanon with President Reagan, et cetera. So it is something I have dealt with a lot. It doesn't mean I am right about it, but I have thought a lot about it.

Now, there is a school of thought that is emerging within the administration that is making not illegitimate an intellectually thought out claim that the power of the Executive in times of war exceed that of what I would argue a majority of the constitutional scholarship has suggested. The fellow, who is a very bright guy, who is referred to as the architect of the President's memorandum on the ability of Presidents to conduct military operations against terrorists and nations supporting them is Professor Yoo. He has written a book called, "The Power of War and Peace," and he makes some claims that are relatively new among the constitutional scholars in his book and he urges, and he had urged when he was at the administration, the President had these authorities.

For example, he says that the framing generation well understood that declarations of war were obsolete. He goes on to say, given this context, it is clear that Congress's power to declare war does not constrain a President's independent and plenary right and constitutional authority over the use of force. And he goes on and he argues, as you well know this argument, I mean, not from your court, just as an informed, intelligent man, there is a great debate now of whether the administration's internal position is correct, and that is the President has the authority to go to war absent congressional authorization. It was a claim made by Bush I and then dropped. Bush I dropped that the only reason the "declare war" provision is in the Constitution is to give the President the authority to go to war if the President didn't want to. That was the claim made. A similar claim is made here.

So I want to ask you a question. Do you think the President has the authority to invade Iran tomorrow without getting permission from the people, from the United States Congress, absent him being able to show there is an immediate threat to our national security?

Judge ALITO. Well, that is a question that I don't think is settled by—the whole issue of the extent of the President's authority to authorize the use of military force without congressional approval has been the subject of a lot of debate. The Constitution divides the powers relating to making war between the President and the Congress. It gives Congress the power to declare war, and obviously, that means something. It gives Congress the power of the purse, and obviously military operations can't be carried out for any length of time without congressional appropriations. Congress is given the power to raise and support an army, to maintain a navy, to make the rules for governing the land and the naval forces. The President has the power of the Commander in Chief. I think there has been general agreement, and the *Prize* cases support the authority of the President to take military action on his own in the case of an emergency, when there is not time for Congress to react—

Senator BIDEN. Is that the deciding question, that the Congress does not have the time to act?

Judge ALITO. Well, the *Prize* cases, I think, go—are read to go as far as to say that in that limited circumstance, the President can act without congressional approval. A lot of scholars say that what is important as far as congressional approval is not the form, it is not whether it is a formal declaration of war or not, it is whether there is authorization in one form or another. The War Powers Resolution was obviously an expression of the view on the part of Congress—

Senator BIDEN. If I can interrupt, Judge, since I am not going to have much time, the War Powers Resolution is a legislative Act. I don't want to get into that. I am talking about the war clause. The administration argues and Yoo argues that, quote, "I do not think the President is constitutionally required to get legislative authorization for launching military hostilities." That is a pretty central question. That means the President, if that interpretation is taken, the President could invade—and maybe there is good reason to—invade Iraq—I mean, invade Syria tomorrow, or invade Iran tomor-

row without any consultation with the U.S. Congress. That is a pretty big deal. Up to now, Fisher and Hencken and most of the scholarship here has said, no, no, no, the President's authority falls into the zone where he needs it for emergency purposes, where he doesn't have time to consult with the Congress.

But you seem to be agreeing with the interpretation of the President—Professor Yoo that says, no, the President has the authority if he thinks it is necessary to move from a state of peace to a state of war without any congressional authorization. Am I—

Judge ALITO. I hope I am not giving you that impression, Senator—

Senator BIDEN. Oh, OK. Maybe you can clarify.

Judge ALITO.—because I didn't mean to. I didn't mean to say that. I have not read Professor Yoo's book or anything that he or anyone else has written setting out the theory that you described. I have been trying to describe what I understand the authorities to say in this area.

Generally, when this issue has come up, or variations of this issue have come up in relation to a number of recent wars—there were a number of efforts to raise issues relating to this in relation to the war in Vietnam. There was an effort to raise it in relation to our military operations in the former Yugoslavia. In most of those instances, they didn't—most of those instances were the cases were dismissed by the lower courts under the so-called political question doctrine—

Senator BIDEN. As you and I know, that is a different issue. The political question doctrine is a different issue than whether or not you think that—I am asking you as a citizen whether you think that, as the administration is arguing—for example, it argues that the case is made, and I am quoting, that "the Constitution permits the President to violate international law when he is engaged in war." It just states that, flatly, that is what the memorandum of the Justice Department states flatly. The President has that sole authority. He argues that the Congress could have that authority, as well, just violate international law. He goes on to argue, as does the memorandum argue, this is this administration's position, so that is why it is relevant. It says that the President may use his Commander in Chief and Executive power to use military force to protect a nation subject only to the congressional appropriations. That means that the argument the administration is making is the only authority that Congress has is to cut off funds.

Let us say we didn't want the President to invade Iran. The administration argues, we could pass a resolution saying, "You have no authority to invade Iran." and the President could say and the next day invade Iran. Our only recourse would be to cut off appropriations. But as you know, there is no way to cut off specific appropriations. You would have to cut off appropriations for the entire military, which means it is a totally useless tool for the Congress in today's world. You can't say, well, I am going to cut off only the money for the oil that allows the steaming of the ships to get from the East Coast to the Mediterranean Sea and/or to the Persian Gulf.

So it is really kind of important whether or not you think the President does not need the authority of the U.S. Congress to wage

a war where there is not an imminent threat against the United States, and that is my question.

Judge ALITO. And Senator, if I am confirmed and if this comes before me, or perhaps it could come before me on the court of appeals, the first issue would be the political question doctrine that I have described. But if we were to get beyond that, what I can tell you is that I don't have—I have not studied these authorities and it is not my practice to just express an opinion on a constitutional question, including particularly one that is as momentous as this. I set out my understanding of what the Congress—what the Constitution does in allocating powers relating to war between the Executive and Congress and what some of the leading authorities have said on this question. But beyond that—and I haven't read Professor Yoo's book or anything that he has written on this issue—I would have to study the question.

Senator BIDEN. Thank you. Let me move to something you have spoken about, *stare decisis*. I know it has been raised a number of times. That is basically following precedent. As a circuit court of appeals judge, in layman's language, what does that mean, as a circuit court of appeals judge, what does it mean, you are required to adhere to *stare decisis*?

Judge ALITO. We are required to follow decisions of the Supreme Court, to start out with, because it's a superior court. We are—when we sit as a panel, it is our practice, and I think it's the practice of all the courts of appeals, that one panel can't overrule a decision of another panel, so it means that when we sit en banc, it is a doctrine that counsels adherence to prior precedent.

Senator BIDEN. But you are allowed, like you did in *ACLU* v. *Schundler*, you concluded, which I think you had a right to do, that the precedent of your circuit was incorrect and you ruled the other way. I mean, I think you have the right to do that—

Judge ALITO. We can't do that at the panel level. We can't say a prior panel decision is incorrect.

Senator BIDEN. But you can when you sit en banc—

Judge ALITO. Oh, when we sit en banc—

Senator BIDEN.—when all the justices are there.

Judge ALITO. That's correct.

Senator BIDEN. OK. Now, how about when a Supreme Court Justice, a Supreme Court Justice is not required, is he or she, to follow the precedent of the Supreme Court? *Stare decisis* doesn't apply there, does it? It may be practice, but as a practical matter, most scholars say you are required as a Supreme Court Justice to adhere to precedent, is it?

Judge ALITO. Well, *stare decisis* certainly applies. *Stare decisis* takes different forms. There is what some people call horizontal *stare decisis*, which means a lower court has to follow the higher court—I am sorry, vertical *stare decisis*. And then are various forms of horizontal *stare decisis*, which means a court either must or should follow its own prior precedents. And on the Supreme Court, of course, when we are talking about whether the Supreme Court is going to follow a prior Supreme Court precedent, that is horizontal. There, it isn't an absolute requirement to follow a prior precedent—

Senator BIDEN. It is not an absolute—

Judge ALITO. It is not an absolute requirement, but it is the presumption that the Court will follow its prior precedents—

Senator BIDEN. No, I understand that, but no one would argue that if you or any other Justice clearly broke from the precedent of a Supreme Court decision, that you are in any way violating your ethical responsibility as a judge. You are entitled to do that, not that you would, but you are entitled to do that and no one would question that as a matter of right, is that not correct?

Judge ALITO. Well, I think people would question it if you disregarded the factors that go into the *stare decisis* analysis. If you said, I don't believe in—you know, I am not absolutely required to follow prior Supreme Court precedent and I regard every question as a completely open question—

Senator BIDEN. Well, I doubt—with all due respect, the way it would likely take the form is a Justice would say, "I disagree with the line of cases that say that." you know, "a President needs congressional authority." or that a—whatever the line of cases are. They are not likely to say, "I disregard *stare decisis*." It is like what Scalia said in the abortion issue. He said, we should just look at this head-on. *Roe* v. *Wade* is wrongly decided. We should just say so. And he is entitled to do that, and if he had a majority—I am not suggesting what you would do on that—he is entitled to do that and that wouldn't be a violation of any written or unwritten code that relates to a Supreme Court Justice's conduct, would it?

Judge ALITO. Different Justices and different judges have different views about *stare decisis*, but my view is that you need a special justification for overruling a prior precedent and that reliance and reaffirmation are among the factors that are important. But I have also said it is not an inexorable command. In the area of constitutional law, there has to be the ability to revisit a case like *Plessy* v. *Ferguson*. I don't think anybody would want a system of *stare decisis* that made that impossible.

Senator BIDEN. My time is almost gone. I have a few minutes left. I would like to try to get quickly to another area here, if I may, that you have been questioned on, this whole notion of unitary Executive and the questions referencing *Morrison* and the dissent of Scalia, et cetera.

As I reach and teach the dissent of Scalia, he—and I won't take the time, in the interest of time, to read his exact language—he has a very scathing and intellectually justifiable, many would argue, criticism of the test employed by the majority in that case as to determine whether separation of powers has been breached. He argues there are very bright lines, that there can be no sharing of any of the power. If it is an Executive power, it is an Executive power and it is Executive power. He would argue that the alphabet agencies, the FDA, the FCC, the EPA, they are really not constitutionally permissible because the FDA makes a legislative judgment, it makes a judicial judgment, and it imposes fines and penalties, so therefore it does all three things and is sort of the bastard child.

But the majority of the Justices say that as long as the power one branch is using does not unduly trench upon the power of the other branch, or it does not substantially affect its ability to carry out its powers, then that is permissible. Which school of thought do you fall into?

Judge ALITO. Different issues are presented in different factual situations—

Senator BIDEN. That is why I didn't give you a specific issue.

Judge ALITO. Well, I think you need a specific issue in order to answer it. For example—

Senator BIDEN. OK, the FDA. Is it constitutional, the Food and Drug Administration?

Judge ALITO. I don't know that there are—I don't know whether there are statutory restrictions on the removal of the FDA Commissioner.

Senator BIDEN. No, but there are. The FDA does exercise judicial power. It makes judgments. You, Drug Company A, violated the law—

Judge ALITO. And I don't know any constitutional objection to that.

Senator BIDEN. Well, Scalia.

Judge ALITO. I don't know that he would have a constitutional objection to that. My understanding is that he would not have a constitutional objection to their doing that, but I could be mistaken, and I wouldn't want to prejudge any constitutional question that might be presented to me. But I am not aware of a constitutional—if there isn't any limitation on removal, then there obviously isn't a removal issue there. As to the agencies where there are restrictions on the removal of commissioners who are appointed for a term, that issue was dealt with within *Humphrey's Executor* and *Wiener* and in *Morrison*, and *Morrison* was eight-to-one and the other cases would be sort of a *fortior* from *Morrison*.

Senator BIDEN. My time is up, and hopefully, someone will pursue this unitary Executive issue about private suits, because I think what you explained was a little inconsistent, or I don't understand it, but I will let someone else do that. Thank you very much.

Chairman SPECTER. Thank you very much, Senator Biden.

Senator Grassley has asked that his time be reserved. Senator Grassley has other duties which he had to attend to. He was here earlier and will be back. He is also Chairman of the Finance Committee.

Just a word. When Senators come and go, everybody has many committees and many constituents and many visitors and many callers. So when they are not here, you can conclude they are otherwise engaged, and Senator Grassley is now. But his time is reserved.

Senator Kohl has asked for 20 minutes. Senator Kohl, we will set the clock at 20 minutes for you, and as I said earlier, we have some flexibility here.

Senator KOHL. I thank you very much, Mr. Chairman.

Judge Alito, elected officials make decisions on issues every day as we try to best represent the people of our States. And if our constituents do not think that the choices that we make reflect their opinions, then every few years they have an opportunity to vote for someone else.

As you know, that is not the case with the courts. Once confirmed, Federal judges have lifetime tenure and are virtually unaccountable. And that lifetime tenure can result in a judge or in a court that is removed from the thoughts and opinions of most

Americans. As public opinion changes on an issue, the court may cease to reflect the views of the country.

If the courts take positions contrary to what most Americans think about an issue or decide a case, a very important case, in a way that is clearly out of the mainstream of American thought, what can be done about it? And do you think that the courts need to consider public opinion when deciding cases?

Judge ALITO. I think that the courts were structured the way they are so that they would not decide their cases based on public opinion. If the Framers had wanted the Federal courts to follow public opinion, then they would have made Federal judges elected officials, as they are in—as State judges are in many States. They gave them lifetime tenure because they thought there was a critical difference between deciding cases under the Constitution and the laws and responding to public opinion.

Now, they gave the courts limited authority because they wanted most of the decisions that affect people's daily lives to be made by the branches of Government that are directly responsible to the people, so that the people can control their own destiny. The Framers' theory was that sovereignty lay with the people and the Government was legitimate only insofar as it responded to the people. And that's why Congress is structured the way it is; that's why the Presidency is structured the way it is. But the courts were viewed—courts are not a democratic institution, and they were structured the way they are because they saw a difference between the judicial function and the other functions that are performed by the branches of the Federal Government.

Senator KOHL. Well, and yet the courts, particularly the Rehnquist Court has struck down more laws than any court in recent memory. In response to your comment about the legislatures as being involved in the daily lives of people, and the rate that they have been striking down laws during the Rehnquist Court was 6 times faster than during the first 200 years of our Republic. So how do we deal with the fact that while the legislature in your opinion is supposed to represent the daily lives of people, the courts, particularly the Supreme Court in recent years has been striking down the laws of the legislature more often than ever before?

Judge ALITO. Acts of Congress are presumptively constitutional, and I don't think that's just—that saying that is just words. I think that means something. Members of Congress take an oath to support the Constitution, and I think that the presumption of constitutionality means a lot. And I think that judgments that are reached by the legislative branch in the form of findings of fact, for example, are entitled to great respect because of the structure of our Government, the fact that the basic policy decisions are supposed to be made by the legislative branch and carried out by the executive branch, and also for the practical reason or the functional reason that Congress is in a better position to evaluate conditions in our country and conditions in our society and to make findings and to determine what's appropriate to deal with the social and economic problems that we face.

So I would certainly approach the question of determining whether an Act of Congress is constitutional with a heavy pre-

sumption in favor of the constitutionality of what Congress has done.

Now, ultimately *Marbury* v. *Madison* decided the question that when a case or controversy comes before the Supreme Court and the constitutionality of an Act of Congress is challenged, it is the duty of the Court to decide the question. Unless we were going to back to 1819, then that's the practice that the Federal courts have to follow. But they should always do that with an appreciation of their limited role and the role that the legislature is supposed to play.

Senator KOHL. All right. Well, as a followup to that, would you comment on term limits for Federal judges or age limits for Federal judges? As you know, if a judge so wishes, he or she can serve forever. Do you think that is a good thing in our society? Should judges be term-limited? Should judges at least be age-limited? Or should they serve just as long as they wish?

Judge ALITO. Well, those are issues that are decided by the Constitution. The Framers said that Federal judges have life tenure, so without amending the Constitution, I don't think you could have judges serve for a term of years or impose an age limitation on Federal judges?

Senator KOHL. Well, what is your opinion?

Judge ALITO. I'm not really sure. I understand the arguments in favor of doing both of those things, and State courts do that, and although I said yesterday I didn't think we should look to foreign law in interpreting our Constitution, I don't see a problem in looking to the practices of foreign countries in the way they organize their constitutional courts. And I believe that many of them do have term limitations on the length of service of a member of the highest court and other members of the judiciary.

So there are arguments on both sides of the question. If you had a short term of years, you would have a judiciary that was like an elected judiciary, and you would have the advantages and the disadvantages of that kind of structure. But there are arguments on both sides of the question, and it is for other people to decide, not for a member of the judiciary.

Senator KOHL. Right. We are asking you—you know, I appreciate that and I appreciate your thoughtfulness, but, again, this is the only time—today may be the last time that we ever have a chance as a Nation to talk to you. So you have thought on it. I mean, I can't believe you don't have a thought. You know, we are not going to amend the Constitution tomorrow based on your thought that you express today. But what is your thought? Do you think it is a good thing for judges to serve unaccountably forever, with no age limits, no term limit? Or do you think it might be the best thing for our society, for judges after a reasonably long period of time, if you so wish, or at a certain age, to phase themselves out?

Judge ALITO. If I had been a delegate to the Constitutional Convention in Philadelphia in 1787—which is a little hard for me to imagine, but if I had been there, and knowing the way things work out, I guess I would narrow the range of possibilities down to—the range of options that I would consider down to either life tenure or a long term of years so that the judiciary would be insulated from being swayed by popular opinion during a particular period

as to the constitutional questions that come before them, and as between those I'm not sure which I would choose.

If the judiciary is going to exercise the power of judicial review in enforcing constitutional rights, then I would think that one of those two options would be the best. But I wasn't in Philadelphia in 1787, so I had no say on that question.

Senator KOHL. Judge, at the end of its term last year, in a 5–4 decision the Supreme Court ruled in *Kelo* v. *City of New London* that it was constitutional for local government to seize private property for private economic development. Many people are alarmed about the consequences of this ruling because, in the words of Justice O'Connor, under the logic of the Kelo case, "nothing is to prevent the State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory."

So what is your view of the *Kelo* decision, Judge Alito?

Judge ALITO. Well, what I can say is that it's a precedent of the Court, and it built on the *Midkiff* decision which had been handed down a number of years earlier. I know that it touches some very sensitive nerves. When someone's home is being taken away using the power of eminent domain, that is a blow to a lot of people. Even if they're going to get compensated at fair market value for their home, the home often means more to people than just dollars and cents. It's a place that often involves a lot of emotion. They have emotional attachments to it. They've lived in it a long time. They're familiar with the neighborhood. They want to be with the neighbors. They want to stay in the same area. They may have emotional attachments to things in the home.

So it is a tremendous blow, and I suppose that when—I would imagine that when someone's home is being taken away, a modest home, for the purpose of building a very expensive commercial structure, that is particularly galling. But *Kelo* was a decision of the Court, and I've discussed my view about *stare decisis*, and should that issue come up again, then obviously the *stare decisis* factors would have to be, you know, considered as the first—the *stare decisis* question would have to be the first question addressed, and the factors that I've discussed would have to be weighed.

Senator KOHL. Well, your comment is on the one hand and on the other hand, and I do appreciate that. But I would ask you if you would venture an opinion more precisely. Specifically, do you agree in general with Justice O'Connor's dissent?

Judge ALITO. Well, Senator, I don't think I can answer that beyond what I have said. If the issue were to come before me if I'm confirmed, then I would first have to consider whether there's any reason for not following *Kelo*, which is a precedent of the Supreme Court and grew out of the earlier precedent that I discussed, that I mentioned.

Now, I'm not suggesting which way I would decide that question of *stare decisis*, but that is the way our legal system works, that decisions are presumptively to be followed, and I would have to address that question. And if I got beyond it, I would have to go through the whole judicial process that is set up so that questions of constitutional law and other questions are decided in the best way, and reading the briefs, listening to the arguments, partici-

pating in the conference, and only that reaching a decision on the merits of it.

Senator KOHL. All right. As a followup, Judge Alito, if confirmed, you will be replacing Justice O'Connor, who is a Justice who will be remembered by history as one of the most influential justices of the 20th century. She is also, as you know, a much beloved person. How would you be different from her, Judge Alito? How do you think Justice O'Connor ought to be remembered, Judge Alito? And how are you like or not like Justice O'Connor as a judge?

Judge ALITO. She certainly will be remembered for many reasons, and I think with great admiration by—I think she is held in great admiration by the American people at this time, and I think that when people look back, they will have great admiration for her work. She obviously was a pioneering figure and was an inspiration for many people who want to pursue legal careers, and other careers.

She has been a very dedicated Justice and has been known for her meticulous devotion to the facts of the particular cases that come before her and her belief that each case needs to be decided on its complex facts, and that's something that is an important part of our judicial process.

I would try to emulate her dedication and her integrity, and her dedication to the case-by-case process of adjudication, which is what I think the Supreme Court and the other Federal courts should carry out. I think that's one—that is a central feature of best traditions of our judicial system.

Senator KOHL. She was seen as someone who in a general way was at the center of the Court. You never had an idea whether she might look a little left or a little right, but she was seen as the center of the Court, which, as you know, is central to your nomination. And you have said you have great respect for her. You have said you respect her as a Justice who did look at the facts, made judgments based on those facts, which I think is what you would say about yourself, an umpire calling balls and strikes pretty much as they see them.

Do you see yourself as a Justice, if you are confirmed, who in many ways will fill the same role as Justice O'Connor has filled?

Judge ALITO. I think that anybody who is appointed to any judicial position has to be himself or herself, and I don't think that anybody can try to replace the person, can duplicate the approach of the person that that person is replacing. We all have to proceed in accordance with our own abilities and our own outlook, so I don't think that—I think we all have to be who we are. But I think we can emulate the great jurists of the past, which is not to say that we can equal them, but we can look at what they've done and see the things that they've done very well, try to approach what they've done in various areas. And I think that I certainly would try to emulate Justice O'Connor in the ways that I've described. I wouldn't flatter myself to say that I could equal her in any of those ways, but I would certainly try to emulate the way in which she has gone about the conscientious and dedicated and dignified way in which she's gone about the performance of her judicial duties.

Senator KOHL. You may have answered this question already, but as I said, she was at the center of the Court, at least viewed

as a person at the center of the Court, and served a very useful purpose in that respect. Is it, in your opinion, like that you might turn out in a general way to be that kind of a Justice?

Judge ALITO. I can only answer that really by saying what I think I've said before, which is that I'd be the same sort of Justice on the Supreme Court that I've been a judge—as I've been a judge on the court of appeals. I am my own person with whatever abilities I have and whatever limitations I have, and I think if anybody looks at my record on the court of appeals, they can get an idea about the way I approach the work of being a judge, and that is what I would try to do on the Supreme Court. And I don't think I can do anything other than that, and that's what I think I should do, and that's what I would do if I am confirmed.

Senator KOHL. Judge Alito, I thank you very much.

Mr. Chairman, I thank you very much.

Chairman SPECTER. Thank you, Senator Kohl.

We will take our break now and resume at 10 minutes after 11.

[Recess 10:55 a.m. to 11:10 a.m.]

Chairman SPECTER. Welcome back, Judge Alito. A thought just crossed my mind that this is the only time when you walk into a room that everybody does not stand up.

Judge ALITO. That happens to me all the time at home, Senator.

[Laughter.]

Chairman SPECTER. I am not saying when you come home, Judge Alito. The reception for a judge or a Senator or even the Chief Justice is very different at home than when he walks into a room and a bailiff shouts "All rise." Just crossed my mind that we were not all standing up. As Chief Justice Roberts said, this is a discussion among equals, that is, until you are confirmed, if confirmed.

Senator Kyl?

Senator KYL. Mr. Chairman, I will reserve my questions for now, thank you.

Chairman SPECTER. Senator Kyl is reserving his time. Senator Feinstein is about the join us, coming in, so we will await her arrival, which should be imminently.

[Pause.]

Chairman SPECTER. I think Senator Feinstein is going to be a few moments more, so let us turn to Senator Feingold.

Senator FEINGOLD. Mr. Chairman, if that is your wish. I certainly defer to Senator Feinstein if she wants to reclaim her time when she comes, but I will get started if you want.

Chairman SPECTER. Let us wait another minute or two for her. She is not in the back room and she is not in the corridor, but let us wait another minute or two for her.

[Pause.]

Chairman SPECTER. Senator Feinstein, you have made another dramatic entrance. We were all assembled for the Committee action on Chief Justice Roberts when you were on the floor from your position on the Appropriations Committee, managing a bill and 17 of us were there.

Senator FEINSTEIN. Not quite, but I thank you for the excuse.

Chairman SPECTER. And you walked in with drama as today. You have asked for up to 10 minutes, Senator Feinstein. We will

set the clock at 10 minutes. I have indicated we have some flexibility. We see the light at the end of the tunnel.

Senator FEINSTEIN. I may take 20 if that is all right with you, Mr. Chairman.

Chairman SPECTER. We will reset the clock at 20, Senator Feinstein.

Senator FEINSTEIN. Thank you.

Good morning, Judge Alito.

Judge ALITO. Good morning.

Senator FEINSTEIN. I want to begin a conversation, hopefully. Let me try to set the precedent for it because others have discussed this as well. You said, and I think everybody agrees, that nobody is above the law, and nobody is beneath the law, and you made comment about the balance of powers, that all branches of Government are equal. There are three of us on this Committee, Senator Hatch, Senator DeWine and myself, that also serve on the Intelligence Committee, and Intelligence has the duty to provide the oversight for the 15 different agencies that relate to America's intelligence activities. So this question of Presidential authority at a time of crisis, not necessarily a full declaration of war, state to state, but a time of crisis becomes very prescient right now. And I wanted to talk to you a little bit about the President's plenary authorities as Commander in Chief, plenary meaning unrestrained and unrestrainable, his plenary authorities to defend the United States, and whether it is true that no law passed by Congress binds him if he determines that it interferes with his Commander in Chief role.

Now, we have explicit powers, as you have said, under the Constitution, and in section 8 we have the explicit power to raise and support armies, to provide and maintain a Navy, to make rules for the Government, and regulation of the land and naval forces, and the National Security Administration, known as the NSA, is within the Department of Defense. It is headed by a general. So it would seem to me that there is an explicit power for the Congress to be able to pass the rules that govern the procedures of the National Security Administration.

Now, again to the Jackson test. When the President's power is the least is when the Congress has legislated, and this is where the Foreign Intelligence Surveillance Act, known as FISA, comes in. FISA is very explicit, and let me read a part of it to you. "Procedures in this chapter and the Foreign Intelligence Surveillance Act, known as FISA, shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted." It does provide—you used the word "general." It does provide two exigent circumstances: one, following a declaration of war, the President has 15 days in which he can wiretap; the second exigent circumstance is an emergency provision that if he needs emergency authority, the Attorney General can authorize it, provided they go to the FISA Court within 72 hours.

I was concerned—there are two questions in this one statement. The first question is: if we have explicit authority under the Constitution to pass a law, and we pass that law, is the President

bound by that law, or does his plenary authority supersede that law?

Judge ALITO. The President, like everybody else, is bound by statutes that are enacted by Congress unless the statutes are unconstitutional, because the Constitution takes precedence over a statute. But in general, of course, the President and everybody else, is bound by a statute. There's no question about that whatsoever. And the President is explicitly given the obligation, under Article II, to take care that the laws are faithfully executed. So he is given the responsibility of making sure that the laws are carried out.

Senator FEINSTEIN. Let me press you on unconstitutional, and a very few of us on this Committee are not lawyers. I am one of them, so let me just speak in common everyday terms. There are two resolutions that were passed, one authorizing the use of military force involving Iraq, and one involving use of terrorism. Never was there any indication that domestic wiretapping of Americans was involved in anything that was done. As a matter of fact, the former minority leader just wrote an Op-Ed piece, in which he said he was approached by the administration shortly before the second resolution was passed, and asked to add certain words that essentially—added the words "deter and preempt any future acts of terrorism or aggression against the United States." and he refused to do it.

Mr. Chairman, if I could place this statement in to record. Since we are going to be having hearings on what has happened, I think this is an appropriate bit of legislative history. I would like to place it in the record.

Chairman SPECTER. Thank you, Senator Feinstein. It will be made a part of the record without objection.

Senator FEINSTEIN. Thank you.

So bottom line, two resolutions passed, no consideration by the Congress or any member that I know of, no legislative history to indicate that we included in these authorizations, authorization to wiretap Americans. The question then comes, I guess, does the plenary power of the President supersede this?

Judge ALITO. I think there are two questions. Maybe there are more than two questions, but there are at least two questions. The first question, to my mind, is a question of statutory interpretation, what is the scope of the authorization of the use of military force? I don't know whether that will turn out to be an easy question or whether it will turn out to be a difficult question, but it is a question of statutory interpretation like any other. Of course, there's a great deal at stake, and maybe a lot more at stake than is involved in a lot of issues of statutory interpretation. But if I were required to decide that, I would approach it in essentially the same way I approach any other question of statutory interpretation, what does the word of the law—what does the law say? Are there terms in there that carry a special meaning because of the subject matter that's being dealt with? And I think legislative history can be appropriately consulted. And I would have to decide that in the context of the whole process of deciding legal questions, as I said, like any other issue of statutory interpretation.

Once a decision was reached on the issue of statutory interpretation, it might be necessary to go further, depending on, I guess, the answer to that question.

I would also say in connection with this that we have a little bit of guidance as to the interpretation of the authorization of the use of military force in the *Hamdi* case, where the Court interpreted that enactment, and determined that the detention of an individual who was captured on the battlefield in Afghanistan fell within the scope of that, and they relied there, I think, on customary practices in the conduct of warfare in determining what fell within the scope of the authorization.

Senator FEINSTEIN. Let me stop you right here, because now—that is right, because detention is a necessary following of an authorization of military force. So detention is logical. When you have a specific statute that covers all electronic surveillance, the question comes, is that statute nullified, and does it necessarily follow that the wiretapping of Americans without—and I am not saying there is not a reason to do this. What I am saying is that we set up a legal procedure by which you do it, and we set two exigent circumstances to excuse a President from having to do it, therefore, doesn't that law prevail?

Judge ALITO. Well, as I said, I think the threshold question is interpreting the scope of that, and it might turn out to be an open and shut argument, it might turn out to be a very complicated argument. I wouldn't presume to issue—to voice an opinion on the question here, in particular because I haven't studied it in the depth that I would have to study it before reaching a judicial decision on the matter. Then depending on how that issue was resolved, it might be necessary to go on to the constitutional question, and I think you've exactly outlined where that would fall under Justice Jackson's method of analyzing these questions. This would be in the category in which—well, if it was determined that there wasn't statutory authorization, then—

Senator FEINSTEIN. There was.

Judge ALITO. Well, if it was determined that there was—

Senator FEINSTEIN. No statutory authorization to wiretap, right.

Judge ALITO. If it was determined that there was statutory authorization, then I don't know what the constitutional would—

Senator FEINSTEIN. But if there was not?

Judge ALITO. There would still potentially be—there might be a constitutional issue. Let me stop there. There would be a Fourth Amendment issue, obviously. If you went beyond—if you determined that there wasn't statutory authorization, then as far as whether—then as far as the issue of Presidential power is concerned, you would be in Justice Jackson's scheme in the category where the President—you would have to determine, if this is the argument that's made, whether the President's power, inherent powers, the powers given to the President under Article II, are sufficient, even taking away congressional authorization, the area where the President is asserting a power to do something in the face of explicit, an explicit congressional determination to the contrary.

Senator FEINSTEIN. Now, in my lay mind, the way I interpret that—and correct me if I am wrong—is that you essentially have

a conflict, and that it has not been decided whether one trumps the other.

Judge ALITO. I think that's close to the point that I was trying to make. The way Justice Jackson described it was that you have whatever Executive power the President has, minus what Congress has taken away by enacting the statute.

Senator FEINSTEIN. Even though you have a statutory prohibition, even a criminal prohibition?

Judge ALITO. Well, I'm not suggesting how the determination would come out. I think it's—that it is implicit in the way Justice Jackson outlined this that Presidential—well, he said it expressly—Presidential power is at its lowest in this situation, where the President is claiming the authority to do something that Congress has prohibited.

Senator FEINSTEIN. Enough of that. Let me move on.

In *W.R. Grace* v. *the EPA*, a chemical company released large amounts of ammonia into the local aquifer in Lansing, Michigan. Under the Safe Drinking Water Act, the EPA ordered the chemical company to clean up the discharge to reduce the concentration of ammonia to a level that wouldn't threaten the health of the community. The chemical company challenged this EPA decision. You cast, as I understand it, the decisive vote to overrule the EPA, permitting the company to leave more ammonia in the aquifer, despite the EPA's determination that this level of ammonia would continue to endanger the water supply.

In her dissent, Judge Mansmann urged deference to the EPA in matters of science, noting that, "The high degree of deference we are to accord the EPA is a cornerstone to the EPA's power enshrined in the Safe Drinking Water Act to protect the public health, the environment and public water supplies from the pernicious effects of toxic wastes."

Do you agree with the dissent that a reviewing court must generally be at its most deferential when reviewing factual determinations within an agency's special area of expertise?

Judge ALITO. I do agree with that. I don't think there is any question about that.

Senator FEINSTEIN. Do you believe that where an agency is taking action to protect the health of citizens, additional deference should be given?

Judge ALITO. I think that deference is owed to the expertise of administrative agencies. That is an important part of administrative law, and when you are dealing with an agency like the EPA, you would defer to their area of expertise. I think that is correct.

Senator FEINSTEIN. Should the EPA be accorded the same deference as other governmental agencies?

Judge ALITO. I don't think—I don't see why it should not. It is the expert on environmental questions and where the APA—I am sorry, the EPA—for example, if the EPA issues regulations interpreting a statutory provision and it is given broad authority under the environmental laws frequently to implement choices that are reflected in the legislation, then I think that it is entitled to a broad measure of deference under the *Chevron* decision. If it issues rules, then any reasonable interpretation of the rules—I am sorry—of the statute is entitled to deference from the courts.

Senator FEINSTEIN. OK. Let me go way back, and I recognize that time has gone by and I recognize you were in a different position, but these questions are really aimed to point out the importance of the Commerce Clause to us.

In 1986, Congress passed the Truth in Mileage Act to prevent odometer fraud. As deputy at the Office of Legal Counsel, you recommended that President Reagan veto the bill because you believed it violated the principles of federalism. In a draft statement for the President, you wrote "It is the States and not the Federal Government that are charged with protecting the health, safety and welfare of their citizens." That is a quote. President Reagan did sign the Truth in Mileage Act.

Does it remain your opinion that it is the States, not the Federal Government, that are charged with protecting the health, safety and welfare of Americans?

Judge ALITO. Both the Federal Government and the States have responsibilities in those areas. Historically, the primary responsibility with respect to that, to those concerns, has been with the States. But with the expansion of Federal regulatory programs, the Federal Government has taken on broader and broader responsibilities in those areas and now has very substantial responsibilities in all of those areas under regulatory schemes that have been in place for a long time and I don't believe are being challenged on constitutional grounds at this time.

If I could just say a word about that memo, which I read for the first time in 20 years recently, as I—it is a brief statement and as I read it, it is based—what it is primarily expressing is not an interpretation of the scope of the Federal Government's—of Congress's constitutional authority, but a recommendation based on the federalism policies of the Reagan administration.

The Reagan administration had a policy of implementing its view of federalism concerns through policymaking decisions. In other words, its policy was to go further in respecting what it viewed as the Federalist system—as our Federal system of Government and the Constitution required to go further as a policy matter. And as I read that brief statement, that is what was being expressed there.

Senator FEINSTEIN. So if I understand that, quickly, what you are saying is this was written as staff in an administration to follow a policy. But are you also saying as a judge this would not necessarily be a position that you would hold in any case?

Judge ALITO. Well, as a judge, I would have no authority and certainly would not try to implement any policy ideas about federalism. Congress can implement policy ideas about federalism. The *Garcia* case, in fact, is based on the view that the primary—and this is what the Supreme Court said there, that the primary way in which the federalism concerns that were expressed in *National League of Cities* was to be implemented in the future was through policy decisions made by Congress.

They said the States are represented in Congress through the membership in the Senate, and protection of the prerogatives of the States should be left to policy decisions made by Congress, or decisions made by Congress in implementing its view of how the system of federalism should work.

And an Executive—a President can take a similar approach. A President can say although the Constitution allows the authority of the Federal Government to go this far, as a policy matter I don't want to go along with legislation that goes up to the limits of what the Constitution allows; as a policy matter, I want to stop short of that. And as I read this memo, that is what we were saying there.

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

Chairman SPECTER. Thank you, Senator Feinstein.

Senator Grassley has stated his interest in reclaiming some of his reserved time.

Senator Grassley.

Senator GRASSLEY. A small part of it, number one, to make a point that I hope would put a lot of my colleagues who have raised questions about some theory you might have about this or that—whatever political science theories you might have about the executive branch of Government, I don't worry about that, and I would hope my colleagues wouldn't worry about that because you could have a hundred theories and they could be all crazy.

But is it not right that you are a person that is bound by the Constitution to only hear cases and controversies that come before the Supreme Court? And so, you know, whatever comes before you, you are responsible for deciding it within the constitutional of case and controversy.

And, second, it seems to me that you are a person that has got the judicial temperament, as you said so many times, that you are going to keep your own personal views out of it. And it seems to me that you are person that has indicated to us that you are going to look at a case within the four corners of the law and the facts that apply to that case, and nothing more.

So any theories you might have about—what was it called, unitary Executive or something? What has that got to do with your deciding a case?

Judge ALITO. Senator, you are exactly right. If cases involving this area of constitutional law come before me, I will look to the precedents of the Supreme Court. And that is what I think I have been trying to emphasize, and there are governing precedents in this area. There is *Humphrey's Executor* and *Wiener*, and most recently *Morrison*, which was an eight-to-one decision.

Senator GRASSLEY. Then the other thing I would take an opportunity to just tell you something and not want any response, but that is on the False Claims Act. This Act was originally passed in 1862 because Lincoln didn't have enough people to prosecute fraud by military people against the Government. So he empowered individuals to do that under *qui tam*.

And then in 1942, I think it was, the law was gutted by taking out the *qui tam* provisions, probably because of World War II and the necessity of getting the job of military construction done. And then in the 1980s, we found a heck of a lot of military fraudulent use of taxpayers' money. We held a lot of hearings on that. It came that there wasn't enough being done by the Justice Department to take care of it.

We saw the Justice Department making a lot of global settlements; you know, some company that had done a massive amount

of wrong in many areas and maybe having the Justice Department settle one little dispute, but give a global settlement so that they would never be prosecuted for anything after that. It led us to beefing up the False Claims Act by putting the *qui tam* provisions in it.

And it was a terrible thing to get through Congress. I think 6 months after we voted it out of Committee, we had every Senator putting a hold on it, some bequest of somebody in the defense industry. And you would take care of that little problem and another put a hold on and another one put a hold on. Finally, the last person was a friend of mine that had a hold on it and I said why did you have a hold on it? Well, some of my friends said that is bad for the defense industry.

And I talked to him about it and he says, you know, you are absolutely right, and we got the last hold off and we got it passed and we got it signed by the President of the United States. And then over the last several years, we have had the defense industry going trying to gut it again. Then we had the Hospital Association trying to gut it because we were using medical care.

And it has brought $12 billion into the Federal Treasury, and I think it has even had the benefit of discouraging a lot of activity that would go on normally that save the taxpayers money without prosecution. But there are people in the Justice Department, professional people in the Justice Department, who don't want some citizen looking over their head and doing their job for them, when they aren't doing it.

A district judge in the mid-1980s, or maybe it was the late 1980s, in, I think, a General Electric case someplace in Ohio, when the Justice Department was trying to cut back the award that the relator was going to get, said to this Justice Department guy, don't you get it? You wouldn't even have a case if it wasn't for this whistleblower coming forth to make their statement and to make their case.

And, you know, it grown into quite a thing now. The only thing I regret about it is there are a lot of lawyers, tort attorneys out there getting rich off of it. But there is also a lot coming into the Federal Treasury, and about 15 percent if what it would cost the Federal Government anyway to bring in this same amount of money if they prosecuted. But they won't prosecute it and they don't know about all of it, and you have got to rely on the whistleblowers to get the information out there.

And so when you are in your private meetings that you have after you get on the Supreme Court and you are talking about these things, I hope you will remember that this was meant to serve a worthy purpose, is serving a worthy purpose, and I would like to have you look at it in a very unbiased way.

[Laughter.]

Senator GRASSLEY. I reserve the rest of my time.

Chairman SPECTER. Judge Alito, Senator Grassley is going to follow that up with a strong letter.

[Laughter.]

Senator GRASSLEY. Well, the Chairman remembers we even had to subpoena William French Smith one time in this whole process.

Senator LEAHY. Chuck, I think we know where you stand on this.

Senator GRASSLEY. OK.

Chairman SPECTER. To use a little bit more of my time, Senator Grassley did more than subpoena Attorney General William French Smith. He started proceedings to hold him in contempt, and that was at about a time when Attorney General Smith was inviting some members of the Judiciary Committee to have lunch. And he was very dour during the entire lunch as far as his attitude toward me and I found out why at the end of the lunch. He wanted to know why I wanted to hold him in contempt. He had insulted Senator Grassley to the nth degree by confusing me with him.

[Laughter.]

Chairman SPECTER. Tell your Anita Hill story, Chuck.

Senator GRASSLEY. Well, just to show you how they get mixed up, you know, he asked the questions of Anita Hill and I was sitting beside him very quietly, because only two Republicans were going to ask questions. And I went back to my constituency and everybody said to me, you were awful to Anita Hill, you just treated her awful, because they got me mixed up with him.

Chairman SPECTER. Wait. I didn't know you were—

[Laughter.]

Chairman SPECTER. I didn't know you were going to tell that part of the—

Senator GRASSLEY. I thought that is the only part we have talked about.

Chairman SPECTER. Judge, we are just trying to use a little time over here to give you just a little respite from the—

Senator LEAHY. Arlen, fortunately none of this is on television so nobody knows what we are saying here with these stories.

[Laughter.]

Chairman SPECTER. Senator Feingold, you haven't told me how much time you would like to have.

Senator FEINGOLD. I think 25 minutes, with flexibility. Maybe I won't have to use it all.

Chairman SPECTER. So granted. Set the clock to 25 minutes and you are recognized, Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman. Good morning, Judge. It is nice to talk to you in the morning for once, and thank you, Mr. Chairman, for the opportunity to ask a third round of questions. I do appreciate the latitude on the time, if it is necessary.

First, Judge, I want to thank you for arranging to have put together the list of people who participated in your practice sessions. I want to say that I am still somewhat troubled by the idea that you were prepared for this hearing by some lawyers who are very much involved in promoting the purported legal justification for the NSA wiretapping program, and obviously this issue of Presidential power is so central to this hearing. In fact, my first questions will also be about this, as well.

I note, for example, that one of the people that participated in these sessions was Benjamin Powell. He recently advised President Bush on intelligence matters and was just given a recess appointment as General Counsel to the National Intelligence Director. I also see the name of White House Counsel Harriet Miers on the

list, and she obviously is involved in the President's position on this matter.

So I am just going to continue to think about this issue and I hope that you and the Department will, too. I think you would agree that at some point in a situation like this, an ethical issue could arise.

Let me go back, though, to what many Senators have asked you about, including most recently Senator Feinstein. I want to try again to clarify this issue, the constitutional authority of the President to violate a criminal statute. You have said repeatedly that the President is not above the law, but you have also been very careful to qualify this statement by saying that the President must always follow the Constitution and laws that are consistent with the Constitution, and that statement sounds good until you look at it real closely. After all, everyone agrees that the President must follow constitutional law. The question is whether Presidents can claim inherent powers under the Constitution that allow them in certain cases to violate a criminal law, and your formulation seems to leave open the possibility that the President can assert inherent authority to violate the criminal law and still be following, to use your words, the Constitution and laws that are consistent with the Constitution.

So I would like to ask you, assuming that you have already done phase one, step one, the statutory analysis, in your view, just because a law is constitutional as it is written, like a murder statute or FISA, that doesn't actually answer the question of whether the President can violate it, does it?

Judge ALITO. I don't think I would separate the constitutional questions into categories. I think it follows from the structure of our Constitution that the Constitution trumps the statute. That was the issue in *Marbury* v. *Madison*. It would be a rare instance in which it would be justifiable for the President or any member of the executive branch not to abide by a statute passed by Congress. It would be a very rare—

Senator FEINGOLD. But it is possible, based on your answer, that a statute that has been determined standing on its own to be constitutional could, in theory, run into some conflict with an inherent, as you would say, constitutional power of the President, which in theory, even under Justice Jackson's test, could trump the seemingly constitutional criminal statute, is that correct?

Judge ALITO. Well, I'm not sure what standing on its own means there. Somebody gave an example in a law review article I remember reading of a statute that said that a particular named individual was to be immediately taken into custody by Federal law enforcement agents and taken immediately to a certain place to be executed. Would the President be bound to, under his responsibility to take care that the laws are faithfully executed, would the President be legally obligated to do that, even though it flies in the face of some of the most fundamental guarantees in the Constitution, and I think we would all say in a situation like that, no, the Constitution trumps the statutory enactment.

Senator FEINGOLD. But it is possible under your construct that an inherent constitutional power of the President could, under

some analysis or in some case, override what people believe to be a constitutional criminal statute—

Judge ALITO. Well, I don't want to—I want to be very precise on this. What I have said, and I don't think I can go further than to say this, is that that situation seems to be exactly what is—to fall exactly within that category that Justice Jackson outlined, where the President is claiming the authority to do something and the thing that he is claiming the authority to do is explicitly, has been explicitly disapproved by Congress. So his own taxonomy contemplates the possibility that says that there is this category and cases can fall in this category, and he seems to contemplate the possibility that that might be justified.

But I don't want to even say that there could be such a case. I don't know. I would have to be presented with the facts of the particular case and consider it in the way I would consider any legal question. I don't think I can go beyond that.

Senator FEINGOLD. I understand that has been your position. I have heard the repeated references to Justice Jackson's test. But all that test says in the end is that the President's power is at the lowest ebb at that point, and I understand and obviously have enormous regard for Justice Jackson and that opinion in particular. But I think in this time it leaves me troubled.

I am concerned that if we are simply going to rely on that in the end without getting a better sense of where you might come down on these kind of matters, it really goes to the very heart of our system of government. And if somehow that—even if the President's power is at a very low ebb at that point, I think it still leaves open the possibility of enough ambiguity and vagueness that could alter the basic balance between the Congress and the Presidential power in a way that could affect our very system of government.

Judge ALITO. Well, Senator, this is a momentous constitutional issue and it is the kind of constitutional issue that generally is not resolved—well, let me say this, that it is often—it often comes up in a context that is not justiciable. But I think it would be irresponsible for me to say anything on the substance of the question here, and by not saying it, I don't mean to suggest in any way how I would come out on the question. I don't mean to suggest that there could be a case where it would be justified or not, particularly on an issue of this magnitude. I think anybody in my position can say no more than this is the framework that the Supreme Court precedents have provided for us, and when the issue comes up, if it comes up, if it comes before me, if it is justiciable, I will analyze it thoroughly, and that's all I can say.

Senator FEINGOLD. And I respect your constraints in this regard, and frankly, this isn't so much about you or your appointment. This is about the possibility you have raised that this may not be justiciable, which is going to be a very serious problem for our system of government. If the U.S. Supreme Court cannot help us resolve these issues because of justiciability issues, at a time of crisis like this in terms of the fight against terrorism, I think it raises one of the most important issues in the history of our country's constitutional debate. I don't think you disagree with that, but it really troubles me that the Supreme Court could possibly not help us resolve this.

Judge ALITO. And I don't want to suggest that it is or it's not justiciable. We would look to the *Baker* v. *Carr* factors, and that is something else that would be very irresponsible for me to express an opinion on in this forum and I want to make it perfectly clear that I'm not doing that.

Senator FEINGOLD. Do you think it could ever be constitutional to admit evidence obtained by torture against an individual who is being charged with a crime?

Judge ALITO. Well, the Fifth Amendment prohibits compelled self-incrimination and it's long been established that evidence that is obtained through torture is inadmissible in our courts. That's the governing principle.

Senator FEINGOLD. So I take that answer to mean it could not be constitutional to admit evidence obtained by torture against individuals being charged with a crime?

Judge ALITO. In all the contexts that I'm familiar with, that would be the answer.

Senator FEINGOLD. Thank you for that answer. I want to followup on one question that Senator Leahy asked this morning about the constitutionality of executing an innocent person. You said that the Constitution, of course, is designed to prevent that. We all agree on that. But let us say that the trial was procedurally perfect and there were no legal or constitutional errors, but later evidence proves that the person convicted was unquestionably innocent. Does that person have a constitutional right not to be executed?

Judge ALITO. The person has—would first have to avail himself or herself of the procedures that Congress has specified for challenging convictions after they've become final. If this individual has been convicted and has gone through the whole process of direct appeal, either in the State system or in the Federal system, then there are procedures. States have procedures for collateral attacks and there are procedures under Federal statutes for collateral attacks on Federal convictions and on State convictions. The person would have to go through the procedures that are set out in the statute.

The system is designed to prevent a person from being executed if the person is innocent, and actual innocence figures very importantly, even in these complex—in sometimes complex procedures that have to be followed in these collateral attacks. For example, usually, there's this doctrine of procedural default, which is not something that ordinary people are familiar with, but it means that if a State prisoner is challenging a State conviction, the State prisoner has to take advantage of the procedures that are available under State law, and if the State prisoner doesn't do that—

Senator FEINGOLD. My question assumes that all that has been done and the process went through and there is no legal or constitutional or procedural problems, but evidence suddenly proves that the person convicted was unquestionably innocent. The question is, does that person in that posture have a constitutional right not to be executed?

Judge ALITO. Well, then the person would have to, as I said, file a petition, and if it was an initial petition, it would fall into one category. If it was the second or a successive petition, it would fall

into another category and the person would have to satisfy the requirements that Congress has set out for filing a second or successive petition.

Senator FEINGOLD. You can't say that the person has a constitutional right not to be executed?

Judge ALITO. Well, I have to know the specific facts of the case and the way it works its way through the legal system. The rules here are complicated. A person has a right. It is one of the most fundamental rights that anybody has. It is a fundamental right and a fundamental objective of our judicial system that nobody is to be convicted without proof beyond a reasonable doubt. If evidence—if there's evidence that the person is not guilty of the offense, then that gets to the very heart of what our whole system of criminal justice is designed to address.

Senator FEINGOLD. I will stop on that topic, but I think there is a real question here. Simply because somebody is adjudicated guilty but they are, in fact, innocent, I would take the view that they still have a constitutional right not to be executed, but I am glad we could talk about that a bit.

Let me talk about affirmative action. In her opinion in *Gruder* v. *Bollinger*, Justice O'Connor recognized the, quote, "real world significance and impact" of affirmative action programs and policies, and she noted that American businesses need skills obtained through exposure to widely diverse people and cultures. A racially diverse officer corps is essential to the military's ability to fulfill its mission to provide national security. And diversity in colleges and universities leads to diversity in civil society, which is, quote, "essential if the dream of one nation, indivisible, is to be realized."

Justice O'Connor expressly gave great weight to the views of military leaders, who said a highly qualified racially diverse military is essential. How much weight would you give to that view?

Judge ALITO. Well, I can speak to the issue of diversity in education from a little bit of my own experience. A couple of years ago, I taught, as an adjunct law professor at Seton Hall Law School, I taught a seminar on civil liberties and terrorism, because in the wake of terrorist attacks on 9/11, it became apparent to me that there were going to be a lot of civil liberties issues raised. It seemed to me that these were issues of the utmost importance, so I put together a seminar on the question.

The first time I conducted the class, we had an extremely—we had a class with people of extremely diverse backgrounds relating to this issue. There was a student who had been in the Special Forces in Bosnia. There was a student who was a Muslim from the Middle East. There were a number of students who had been personally affected by, in one way or another, by the terrorist attacks on the World Trade Center. There were students who felt very strongly about civil liberties. And having these people in the class with diverse backgrounds and outlooks on the issues that we were discussing made an enormous contribution to the class.

So in that setting, I have personal experience about how valuable having people with diverse backgrounds and viewpoints can be, and the Supreme Court has expressed the view that diversity is a compelling interest. Having a diverse student body is a compelling interest. Justice Powell voiced that back in the *Bakke* case and it's

been reiterated in a number of cases and most prominently in—most recently in the *Gruder* case.

Senator FEINGOLD. In fact, in *Gruder*, seven of the nine Justices, all but Justices Scalia and Thomas, reaffirmed Justice Powell's determination in the *Bakke* case that the State has a compelling interest in promoting diversity in the classroom. Do you think that increasing diversity in the classroom is a compelling State interest?

Judge ALITO. Well, I've spoken to my own personal experience about its importance in education and *Gruder* is a precedent that directly addressed this issue in the context of education. It's the Supreme Court's recent word on this issue.

Senator FEINGOLD. I hope you will think it fair that nothing about what you just said would suggest to me you think it is anything less than a compelling State interest.

Judge ALITO. It is a precedent and the Supreme Court has dealt with this over a period of time, and that's the conclusion that they've drawn.

Senator FEINGOLD. On another subject, do you believe that Congress has the power under the Constitution to prohibit discrimination against gays and lesbians in employment?

Judge ALITO. I would have to—I can't think of a reason why Congress would not have that power, but I would have to be presented with the arguments.

Senator FEINGOLD. In 2001, you wrote an opinion overturning a public school district's antiharassment policy, that protected, among other people, lesbian and gay students. You said the school policy in the case, *Saxe* v. *State College Area School District*, violated the First Amendment, and the case was brought by students who believed that the policy interfered with their ability to speak out against the "sinful" nature and harmful effects of homosexuality as compelled by their religion.

In your Senate questionnaire you note that you won the Family Research Council Golden Gavel Award in 2001 for your decision striking down that policy. The Family Research Council is a leading conservative group that opposes gay rights.

In order for a policy protecting gay students from harassment to pass constitutional scrutiny, must it have an exception for harassment motivated by religious belief?

Judge ALITO. Well, let me say what was at issue in the *Saxe* case because that's the context in which I dealt with issues like this. The *Saxe* case involved a very broad antiharassment policy that had been adopted by a school district, and it prohibited the expression of—it not only prohibited the expression of political viewpoints, but it went so far as to say that just about anything that any student would say about another student that would be offensive to that student, including comments on the way the student dressed, or the things that they like to do, would be a violation of the antiharassment policy. And under the First Amendment, unlike in most other areas of the law, statutes can be challenged on overbreadth grounds, and that was the ground on which the statute was struck down in the *Saxe* case, that it was overly broad, that it prohibited a great deal of speech that was constitutionally protected.

The Supreme Court decided back in the *Tinker* case that students don't lose all of their First Amendment rights to freedom of expression when they enter the school grounds, and Justice Brennan's opinion in that case set out the test that is to be applied there, the schools have greater ability to regulate student speech than Government has to regulate adult speech in general, but the authority of school officials to regulate political speech by students—in *Tinker* it was the wearing of an arm band to protest the war in Vietnam—is not unlimited, and there has to be a threat of disturbance on the school grounds or a violation of the constitutional rights of another student. And so any policy that regulated student expression, political expression in a school, would have to satisfy Justice Brennan's *Tinker* standard.

Senator FEINGOLD. Thank you, Judge. Does Congress have the authority to enact legislation that would protect gay students from harassment in schools that receive Federal funding?

Judge ALITO. That would fall within the *South Dakota* v. *Dole* standard, and the question would be whether the condition that's attached to the receipt of the Federal funds is germane to the purpose of the funding, and that's a standard that gives Congress a very broad authority.

Senator FEINGOLD. So that Congress does have the authority in general. The question would be the scope of it.

Judge ALITO. Congress has the authority to attach all sorts of conditions to the receipt of Federal money. It has to be clear so that the States understand what they're getting into, that if you take this money there are conditions that go with it, but provided that that clear statement requirement is satisfied and provided that the condition is germane to the purpose of the funding, then Congress can attach conditions, and it could do so in this area.

Senator FEINGOLD. Judge, let me switch to an ethics issue that is not Vanguard. As you know, after your testimony concludes today, a number of outside witnesses are coming to testify about your nomination, including seven current and former judges from your court. As far as I know, this is the first time that sitting Federal judges have testified on behalf of a Supreme Court nominee. I am a little troubled by it. I hope to have some opportunity to question the judges about this, but I think it may raise something of an ethical issue for you. If you are confirmed to the Supreme Court, how would you analyze a possible recusal motion if an appeal on a case from one of those sitting judges testifying on your behalf were to come before you? Will you have to recuse yourself from any case where one of these judges was involved in the decision?

Judge ALITO. That's not a question that I've given any thought to before this minute, Senator, so I don't know that I could answer it, and I would want to answer any recusal question very carefully.

Senator FEINGOLD. Perhaps you could give me an answer after you have had a chance to think about it.

Judge ALITO. I'd certainly be happy to do that.

Senator FEINGOLD. Appreciate that.

Mr. Chairman, I think that is sufficient. Thank you very much.

Chairman SPECTER. Thank you very much, Senator Feingold.

We are on course to finish you before lunchtime, Judge Alito. We have more potential questions from the Republican side, and we have two more from the Democratic side.

Senator DeWine, do you have any questions?

Senator DEWINE. Mr. Chairman, I will reserve my time.

Chairman SPECTER. Senator DeWine reserves his time.

Senator Schumer, you are recognized for up to 25 minutes.

Senator SCHUMER. Thank you, Mr. Chairman.

Chairman SPECTER. With our conversation that you are going to ask new questions.

Senator SCHUMER. That is what I want to ask but—

[Laughter.]

Senator LEAHY. It is a new day.

Senator SCHUMER. I think some of my old questions, ones I have asked before, should bother you. They bother me.

But in any case, I do have a few other issues that I do want to talk to you about. The first is just a general question on Presidential power. Let's just assume that it was found that the President's right to wiretap people, the way we are discussing it now in terms of the recent NSA revelations, was found constitutional. Would there be a different standard if, say, the President—does that necessarily allow the President to then go ahead and go into people's homes here in America, American citizens, without a warrant? Does the one necessarily lead to the other?

Judge ALITO. I would have to understand the—I would have to see the ground for holding the wiretapping or the electronic surveillance constitutional before seeing whether it would apply in the case of other searches and seizures.

Senator SCHUMER. But let's assume it is constitutional.

Judge ALITO. I'd have to know what the arguments were made about it and on what ground it was found to be constitutional.

Senator SCHUMER. So it could follow, but might not; is that what you would say?

Judge ALITO. It very well might not. I would have to know the constitutional ground for the decision relating to the wiretapping, and I have no idea what that would be. It might well not extend to things like physical searches of homes.

Senator SCHUMER. Is there a difference? Is there a constitutional difference between a wiretap and an actual physical search of the home on Fourth Amendment grounds? Is there any that you know in cases—

Judge ALITO. There are differences, yes, there certainly are.

Senator SCHUMER. Thank you.

Judge ALITO. Wiretapping is subject to—general criminal wiretapping is subject to all the rules that are set out in Title III, which are thought to be based in large part on Fourth Amendment requirements. And the warrant requirement is very strong in the area of electronic surveillance. When you're talking about other types of searches, the searches can take place in a variety of places for a variety of reasons.

Senator SCHUMER. But if it can be done under the inherent power that the President has for the one, why could it not be done for the other? I am not asking about the statute.

Judge ALITO. There's also a Fourth Amendment issue. Any search—

Senator SCHUMER. In both cases.

Judge ALITO. In both cases, and the Fourth Amendment could play out very differently in those two contexts.

Senator SCHUMER. Now I would like to go back to some of the line of questioning that Senator Durbin explored yesterday when he mentioned the crushing hand of fate, Bruce Springsteen.

Judge Alito, I assume you believe that you will be able to be fair in every case that comes before you on the Supreme Court.

Judge ALITO. I have no reason to think I will not be. I certainly will.

Senator SCHUMER. And you do not believe that you prejudged any legal of constitutional issue?

Judge ALITO. I don't believe that I have.

Senator SCHUMER. And you will take care to apply the rules of law and procedure equally and evenhandedly, no matter who the parties are, prosecution or defense?

Judge ALITO. I certainly will, yes, Senator.

Senator SCHUMER. Employer or employee.

Judge ALITO. I will apply the laws evenhandedly to everyone.

Senator SCHUMER. And I take it you it you believe that you have done just that on the Third Circuit while you were there?

Judge ALITO. I believe I have.

Senator SCHUMER. Yesterday Senator Durbin asked about *Pirolli* v. *World Flavors*, and you remember that case. You discussed it with Senator Durbin. And the case involves the claims of a mentally retarded man who brought suit against his employer for violent and persistent sexual harassment by his coworkers, am I right?

Judge ALITO. Those were the claims.

Senator SCHUMER. And the majority allowed the case to proceed, finding that the Court had "discretion to consider issues not raised in the brief." And they did so to give the plaintiff his day in court. You exercised your discretion to vote against giving him his day in court because his lawyer failed to raise the argument in the brief. As you told Senator Durbin, "There is a very important principle involved in appellate practice"—these are your words—"I think it goes with the idea of judicial self-restraint, and that requires parties raise issues in the trial court, and that if they don't raise the issue in the trial court, then absent some extraordinary circumstances, they shouldn't be able to raise the issue on appeal." and that was the principle there. Those are your words, right?

Judge ALITO. I believe they are, yes.

Senator SCHUMER. Now I would like to go to two other cases that you had when you were on the Third Circuit. The first one is *Smith* v. *Horn*, where a similar issue arose. That was a criminal case involving a habeas corpus petition brought by a criminal defendant, right?

Judge ALITO. Yes, it was.

Senator SCHUMER. And it turns out that in that case as well, just like *Pirolli*, one of the parties had failed to raise a relevant argument in its brief, right?

Judge ALITO. Well, *Smith* v. *Horn* was really not comparable to *Pirolli* for a very important reason. *Smith* v. *Horn* was a habeas case, and so what is involved there is not simply a dispute between private parties, and of course, disputes between private parties are very important, and individual rights can be involved.

Senator SCHUMER. No, I understand it is a Government case. Let me just make—

Judge ALITO. There's more to it than the Senator—

Senator SCHUMER. I am going to let you answer it. I just want to make the point here so everybody can—the majority in *Smith* v. *Horn* to say—this time it was the Government that failed to raise the issue in the district court brief. This time you were prepared to excuse that failure. This time you felt it was appropriate to consider the issue on your own, and I am at a loss to understand the difference. I am going to give you a chance to explain, but I want to read what the majority in *Smith* v. *Horn* had to say about your indulgence of the Government for failing to bring up an issue, just as the retarded person did with *Pirolli*.

They said, "Where the State has never raised the issue at all in any court, raising the issue ourselves puts us in the untenable position of ferreting out possible defenses upon which the State has never sought to rely. When we do so, we come dangerously close to acting as advocates for the State, rather than as impartial magistrates."

So as far as I can see, the legal principle and procedural rule in each case was precisely the same, the only difference being that the first was a sexual harassment plaintiff who left out an argument, and in the second, it was the Government who did. In the first case you said to that retarded individual, "Sorry, you're out of luck." In the second case you said to the Government, "I'll make your argument for you." and that does not seem evenhanded to me. Can you explain the difference?

Judge ALITO. Yes, Senator. As I was attempting to explain a couple minutes ago, there is an important principle called the Principle of Comity that is involved in habeas cases, and it goes to a critical part of our concept of federalism, and it is something that Congress itself has very strongly recognized in the habeas corpus statute. What I'm talking about there is the doctrine of procedural default, which is very closely related to the doctrine of exhaustion. They go hand in hand. And what Congress has said in the Antiterrorism and Effective Death Penalty Act of 1996 is that on the issue of exhaustion, the court has to consider that even if the parties don't raise it.

Senator SCHUMER. Now, that applies to the Government as well as to the defendant?

Judge ALITO. Absolutely. The issue of exhaustion must be considered by the Federal habeas court, even if the State prosecutor does not raise the issue of exhaustion. And why did Congress say that? Congress said that because there's something more involved here than a dispute between the State prosecutor and the habeas petitioner. There is respect for the Federal system of Government involved. There is respect for the State court system involved.

Senator SCHUMER. But the majority did not agree with you in that situation, did they?

Judge ALITO. The majority, but what I'm saying, Senator, is that the underlying principle of comity makes this case makes *Smith* v. *Horn* quite different from a dispute between private parties.

And the Supreme Court has said that it is appropriate in certain circumstances for a court to consider procedural default sua sponte, and that's what I thought we should do there. And my position on—

Senator SCHUMER. Let me ask you—I understand your explanation. I am not sure I agree with it, but let me go on to another one. This is *Dillinger*. In this case it was with a corporation. The case is *Dillinger* v. *Caterpillar*. And it is also a case where a party did not raise an issue at trial, will not have the same explanation as the habeas case, obviously. They did not raise the issue at trial or on appeal. This time a large company didn't, Caterpillar. And the majority held that it was waived and it sided with the plaintiff, who was seriously injured in the accident, right?

Judge ALITO. I don't have a recollection of all of the facts—

Senator SCHUMER. OK. Well, let me tell you. Maybe this will refresh your recollection. The majority wrote that it was not appropriate to exercise its discretion—again, it was the majority—to excuse the defendant company's waiver when the consequence of the decision would be to deprive a seriously injured plaintiff of a trial in conformity with applicable law. That is the majority.

You dissented, with the result, had you prevailed, that the accident victim's case would have been over. The majority described your approach as follows. Quote, "There is an insurmountable procedural difficulty with Judge Alito's position. Caterpillar never advanced this argument at trial, an oversight that Judge Alito excuses on a ground that a district court decision may be affirmed on an alternative ground, though not advanced at trial."

So in the *Dillinger* case, you also thought it was appropriate to use your discretion to excuse Caterpillar, isn't that right?

Judge ALITO. Well, I'd have to refresh my recollection about exactly what was involved in the case. There is—

Senator SCHUMER. Can you explain the difference between the two for us, why in one case it was OK and why in another case it wasn't?

Judge ALITO. Senator, I'd have to refresh my recollection about *Dillinger*—

Senator SCHUMER. So you don't—

Judge ALITO.—but what you've just mentioned calls—relates to the principle that it is appropriate for an appellate court to affirm a decision of a lower court on an alternative ground when the basis for that is apparent from the record of the case. So if the facts that are—if it's a purely legal issue, for example, and you're talking about whether you're going to affirm or whether you're going to reverse—

Senator SCHUMER. Was that the case in *Dillinger*?

Judge ALITO. Without refreshing my recollection, I wouldn't be able to tell you—

Senator SCHUMER. All right.

Judge ALITO. But what you read—

Senator SCHUMER. I would posit to you that, again, it was an example of your seeming to have more sympathy for a certain type

of plaintiff than another, but what I would like to do, Mr. Chairman, is just ask permission that Judge Alito could respond to the difference, which he hasn't been able to do here because he doesn't recall the details of the case, in writing in the next few days.

Chairman SPECTER. Is that acceptable to you, Judge Alito?

Judge ALITO. Certainly, Senator, yes.

Senator SCHUMER. Because he can then go look at the case and explain to us why he thought it was different.

Chairman SPECTER. With Judge Alito's agreement, that will be the procedure.

Senator SCHUMER. Thank you. Next, strict construction. President Bush has stated his beliefs that judges should be strict constructionists, rigidly adhere to the letter of the Constitution. He has described you as a strict constructionist who favors judicial restraint. So I would just like to explore one particular issue with you.

First, as you said before, there are certain very straightforward questions that are easy to interpret. It says in Article I, Section 3, no person shall be a Senator who will not have attained the age of 30 years. That was a section you mentioned at our individual meeting, and there is no way that it could be constitutional, I suppose, for a 27-year-old to become a Senator, correct? That is easy. That is strict construction, easy.

Judge ALITO. I can't think of a reason why that would not be the case.

Senator SCHUMER. Good. Me, either, lucky for them.

[Laughter.]

Senator SCHUMER. Next, another one. No person except a natural-born citizen or a citizen of the United States at the time of the adoption of this Constitution shall be eligible to the office of President. So there is no way, without a constitutional amendment, that, say—I know Senator Hatch has a bill—that, say, Arnold Schwarzenegger could become President under the current circumstances. That is easy.

Judge ALITO. Well, I don't want to express a view about the constitutionality of Senator Hatch's bill.

Senator SCHUMER. No, it is a constitutional amendment.

Judge ALITO. A constitutional amendment.

Senator SCHUMER. I am just asking you very simply, you would need a—

Judge ALITO. No one but a natural-born citizen can be the President of the United States.

Senator SCHUMER. OK. Now I want to ask you about the 14th Amendment, which sets forth the definition of citizenship. It states, in relevant part, all persons born or naturalized in the United States and subject to the jurisdiction therefore are citizens of the United States. All persons means all persons. That is pretty easy. Do you agree this is a fairly clear and straightforward provision of the Constitution?

Judge ALITO. There are legal—there are active legal disputes about the meaning of that provision at this time.

Senator SCHUMER. Right. But given the clear language, could Congress pass a statute, not a constitutional amendment, denying citizenship to a person born in the United States?

Judge ALITO. And I know that there are proposals to do that. I know that it is an issue that is in play. If it were to come before me, then I would have to go through the whole judicial process of decisionmaking—

Senator SCHUMER. Is there any way that you can see, just off the top of your head here, that that kind of statute would be constitutional?

Judge ALITO. Well, Senator, on issues that can come before me in litigation, I need to apply the same standard that previous nominees have applied, and that is no hints and no previews. And they may be—they may turn out to be easy issues. They may turn out to be hard issues. But I can't opine on them here off the cuff. I would have to go through the process of—

Senator SCHUMER. Just make the argument. You don't even have to tell us how you would decide. What imaginable argument could there be for a statute that Congress could deny the citizenship to those born in the United States, say, on the grounds that their parents were illegal aliens? Is there any constitutional argument that you can see off the top of your head?

Judge ALITO. Well, Senator, I don't want to say anything that—could I answer the question, Senator. I don't want to say anything that anybody will characterize as an argument that I am making on one side of this question or on the other side of the question. I know that an argument is being made by people who favor this kind of legislation based on the language, under the jurisdiction of the United States, and I don't know whether that will turn out to—I don't know whether it will come before me. I don't know whether, when it's analyzed, it will turn out to be a compelling argument or a frivolous argument or something in between and I wouldn't express an opinion on it.

Senator SCHUMER. Judge, I simply asked you to give us an interpretation of one of the most direct and clear provisions in the United States Constitution, and if you can't give us an answer on a very, it seems to me, clear-cut question like that, I find, and I think many of us find, make it difficult to make an assessment of how to vote on your nomination because—

Judge ALITO. Senator, my answer is that it is inappropriate for a sitting judge or for a nominee to a judicial position to offer opinions on constitutional questions that are percolating at that time and may well come before that judge or that nominee. It may turn out to be a very simple question. It may turn out to be a complicated question. Without studying the question, I don't know and I wouldn't—and even if I had an initial impression, I wouldn't voice it here. I would have to go through the whole judicial decisionmaking process before reaching a conclusion that I would be willing to express.

Senator SCHUMER. I want to move on now to the Commerce Clause and *Rybar*. As you know, after you ruled on *Rybar*, *Gonzales* v. *Raich* was decided and Justice Stevens wrote for the majority the following. "Our understanding of the reach of the Commerce Clause, as well as Congress's assertion of authority thereunder, has evolved over time." Do you agree with that statement? Has our understanding of the scope of that clause evolved over time, and is it appropriate for our understanding to evolve?

Judge ALITO. I think our understanding of the reach of the Commerce Clause has evolved as the commercial activity of the country has developed. Commerce in the United States at the time of the adoption of the Constitution was entirely different from commerce in the United States today.

Senator SCHUMER. I think most people would agree with that, maybe—

Judge ALITO. As a matter of looking at the development of case law, certainly the case law has developed. The pre-New Deal case law was fundamentally different from the post-New Deal case law, with which I don't have any quarrel.

Senator SCHUMER. Right. But here, I am going to read you two views on the Commerce Clause. One, Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activity that have a substantial effect on interstate commerce. Where Congress has the authority to enact a regulation of interstate commerce, it possesses every power needed to make that regulation effective.

Then there is another view. Under the Commerce Clause, Congress may regulate interstate commerce, not activities that substantially affect interstate commerce. Those are pretty diametrical.

I am not asking for an absolute here, but which one is closer to your view of the Commerce Clause?

Judge ALITO. Well, the second view is contrary to Supreme Court precedent. It is contrary to even *Lopez* and *Morrison*, which says that Congress may regulate activities that substantially affect interstate commerce.

Senator SCHUMER. Right, and the first actually was Justice Scalia's concurrence in *Raich*, and the second, even though it may be contrary to precedent—we have talked about precedent before—was actually Justice Thomas's dissent in *Raich*, so it is obviously a view that has some currency on the Court. I am glad to see you favor the first one.

Now, I asked you a question when we met. I asked you, as you know, because we talked about it, I was very troubled by your decision in *Rybar* as—and Mr. Chairman, I just don't want to—could I get permission for an additional five minutes? That is all I will need.

Chairman SPECTER. Yes.

Senator SCHUMER. Thank you, Mr. Chairman.

Chairman SPECTER. I couldn't be very forceful about it, but yes.

Senator SCHUMER. Thank you. I will take it any way you give it. [Laughter.]

Senator SCHUMER. I asked you in *Rybar* when we had met if you would have decided the case differently after *Raich*, which is quite different than *Rybar*, and at that point you said you wanted to think about it and I told you I would ask you here. So I guess you have thought about it now. So my question is, does the recent Supreme Court decision in *Raich*, joined by Justice Scalia, whose opinion you said was closer to your view than the other, affect your thinking? More specifically, had *Raich* been decided before you got *Rybar*, do you think you would have decided it differently?

Judge ALITO. Well, Senator, I don't recall making a promise that I would reach a definitive conclusion—

Senator SCHUMER. I asked you to think about it. You said you would. That is all.

Judge ALITO. And I have thought about it, but what I can say is that I certainly would have thought about *Rybar* differently had I had *Raich* available at that time. My effort in *Rybar* was to follow Supreme Court precedent. At the time, *Lopez* was the latest expression of the Supreme Court's view of this question, and if the chronology had been different and I had the benefit of *Raich*, I would have taken that into account.

Senator SCHUMER. OK. Now, just one other thing on the Commerce Clause. So what you are saying is that there is a possibility—we won't put a percentage on it—that *Raich* might have changed the outcome of your ruling or your dissent in *Rybar*?

Judge ALITO. Well, it certainly would have changed my thinking and my analysis. I would have had to take it into account.

Senator SCHUMER. We will take what we can get.

Next, as a U.S. Attorney, you frequently crossed paths with State agencies, particularly law enforcement agencies, and at that point, as I remember—I was a Member of Congress very active in anti-crime legislation—there were all kinds of fights about whether there should be an increased Federal role in crime fighting. You must have dealt with some of those statutes. There was carjacking and trigger-lock type offenses. You must have presided over some prosecutions of local corruption based on an expansive Federal law theory. Mail fraud was being expanded at that time. These enforcement priorities tended to be conservative. I agreed with them, but they tended to be conservative priorities.

So did your tenure as U.S. Attorney affect your thinking on these kinds of situations in terms of the State, the need for Federal involvement when the State can't do it?

And it brings up, and then I will let you speak about this for a minute, in the odometer Act—I can't remember the exact name of it, but the legislation that was bill S. 475 that Senator Feinstein mentioned, you urged disapproval. But it seems to me if that legislation was disapproved, it would have been very difficult for the Federal Government to regulate odometers because cars that were transferred from one State to the other wouldn't have the same uniform system in terms of their title, and it seems to me, at least, in this world which is becoming smaller and smaller that some of the federalism theory, that the States should have primacy in regulation, just don't make sense.

It didn't make sense to me in your decision in *Rybar*, as we have discussed. Ninety percent of the guns used in crimes in New York come from out of State. There is no way New York State could stop them unless they inspected each car that came across the George Washington Bridge. Similarly, here. Without this Federal statute, there is no way the Federal Government could regulate odometers. It would be ridiculous to ask General Motors to have 50 different standards for 50 different States. And similarly as U.S. Attorney, there were areas where it was better for, particularly in our interconnected world, for the Federal Government to prevail.

And yet here you were saying—you were working for the administration, but they ultimately rejected your view—that State primacy is such—you even said in this memo, after all, it is the

States, not the Federal Government, that are charged with protecting the health, safety, and welfare of citizens. That is a pretty broad statement. I would take it you had exceptions to it, of course—Medicare, U.S. Attorneys. You wouldn't have had a job if that was an absolute statement back then.

But just tell us a little bit, for a couple of minutes, about your view of the balance between State and Federal powers, particularly in light of the changing circumstances we face.

Judge ALITO. Well, I think your mentioning those two things, the memo that I wrote when I was in OLC or that I signed when I was in OLC and my service as U.S. Attorney brings out an important point. I was playing different roles. I had different responsibilities in those two jobs. When I was in OLC, I think what I was expressing in that memo was the federalism policies of the Reagan administration, which as I mentioned earlier, involved going beyond simply insisting on compliance with constitutional standards. It also involved implementing a policy that certain things should be done at the State and local level, even if the Federal Government could do that.

As U.S. Attorney, it was my job to use the legal resources that were available to address the crime problems of the district for which I was U.S. Attorney and I approached that on a basis of cooperating with State and local law enforcement and my approach was that we should do, the Federal prosecutors should do and the Federal investigative agencies should do the things that they were best suited to do and that it should be a practical division of responsibility. And in many instances as U.S. Attorney, we were using far-reaching Federal powers. We brought a Hobbs Act prosecution and were stunned when the district court initially threw it out on Commerce Clause grounds, because that was virtually unheard of.

Senator SCHUMER. All I am trying to get at here, there is a practical dimension here that I think fits within the Constitution, and you are agreeing with that.

Judge ALITO. Absolutely, and I—

Senator SCHUMER. I just have to conclude, but go ahead.

Judge ALITO. Senator, that is fine.

Senator SCHUMER. Good. Quit while we are ahead on that one.

Let me just, in conclusion, Judge, thank you. It has been a long 3 days, obviously. As your testimony in these hearings comes to a close, I just have to tell you that I remain very troubled, not by anything in your personal history so much as by your judicial views.

You arrived before us this week with a record. It is a record that contains evidence that you believe the Constitution does not protect a woman's right to choose. It is a record that suggests you believe in an executive branch so powerful that it would trump other branches of government. It is a record that makes you appear all too willing to curtail the ability of Congress to look out for the little guy and a record in which you all too often seem to reach for the legal theory that allows you to side with the large and powerful when average Americans touched by this crushing hand of fate need the most help.

Unfortunately, by refusing to confront our questions directly and by giving us responses that really don't illuminate how you really think as opposed to real answers, many of us have no choice but to conclude that you still embrace those views, completely or in large part, and would continue in a similar fashion on the Supreme Court. So while the process is not yet over, we have written questions, we have some witnesses, the evidence before us makes it very hard to vote yes on your nomination.

On the first day of hearings, I said that while you give the appearance of being a meticulous legal navigator, in the end, you almost always choose the rightward course. I am sorry to say that I haven't heard anything this week very substantive to dissuade me from that opinion, but I thank you for being here and going through these hearings.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Schumer.

Senator Sessions, do you have any questions?

Senator SESSIONS. Just a few. I would just respond to Senator Schumer and Senator Kennedy and would note that that is not what the ABA has concluded. They have interviewed 300 of your colleagues, judges and lawyers who have practiced before you and against you, and they rate you the highest possible rating. They don't see you as an extremist, out of the mainstream, or otherwise.

And I also want to thank your family for their patience in going through all of this and listening to those of us on this side as we expostulate on all sorts of things. I see your sister back there, in her own right a nationally known attorney, Rosemary. It is good to see you here. I understand you were debate partners in high school. It must have been an interesting household to have two prominent lawyers growing up, so I will ask you how that was and who was the best debater.

[Laughter.]

Judge ALITO. I will take the Fifth Amendment on the second part of the question—

[Laughter.]

Judge ALITO.—but it structured our arguments, so instead of arguing about things at home, we would argue about the issues that we were debating.

My wife insists that we actually argued a debate in front of her class. We didn't know each other at all at the time and didn't meet, actually, for many, many years later, but we did have a debate at her high school, which was about 20 miles away, and she insists she remembers seeing us debating in front of her French class.

Senator SESSIONS. It must have been an interesting thing. Apparently, your colleagues in school there were impressed. They predicted you would serve on the Supreme Court one day, and I think that is going to turn out to be a good prediction.

I would point out, Judge Alito, that you have been asked a lot about separation of powers, FISA Act, and those kind of things. This Congress has not clarified its position yet. As a judge, if some of these issues were to come before you involving congressional power or something, you would expect the Congress to have formulated its position first, would you not?

Judge ALITO. Well, that would certainly be very helpful. These are very—these are momentous issues and they're difficult issues and they are—they have just come to the surface in the last few weeks and I couldn't begin to say how I would decide any of these issues without going through the whole judicial decisionmaking process. I think it would be the height of irresponsibility for me to try to do that.

Senator SESSIONS. I would agree, and the Chairman is going to be having hearings within a few weeks here to discuss many of these issues and it is something that every Senator will be engaged in, whether they desire to or not, and we will have to think these important issues through. I don't think they are ripe yet for decision, that is for sure.

I would also note that with regard to Justice Jackson's position on the President and his war making powers and the question of when there is a higher position and a lower ebb position, Chief Justice Rehnquist discussed that idea in *Dames and Moore* v. *Reagan* and, in fact, pointed out that that doesn't completely answer the question. Those answers are not black and white and there is a spectrum running from explicit congressional authorization to implicit or to explicit congressional prohibition. So there are many factors that must be considered, would you not agree, as you analyze those matters?

Judge ALITO. Yes, you have to know the specifics of the situation.

Senator SESSIONS. On the question of jurisdiction of the Supreme Court and whether Congress has the power to contain it in some way, it does appear there is language in the Constitution that indicates that. As you said yesterday, it is there.

My question to you is do you believe that the three branches of Government owe it to our country and to our constituents to stay within our bounds and to avoid a constitutional confrontation, a constitutional crisis? Isn't it better if the courts restrain themselves, Congress would restrain itself and not to go forward to an ultimate confrontation of those issues?

Judge ALITO. It certainly is. The issue of the ability of Congress to take away the Supreme Court's jurisdiction over a particular subject of cases is not something that I have previously addressed in writings, unlike a lot of previous nominees who had addressed that, and therefore I think felt that they were freer to discuss that when they came before the Committee.

That is not something that I have ever addressed in any writing, nor is it something that I have studied, other than to read a few—you know, read some of the authorities who have addressed the question. I did mention that I had given a speech expressing the idea that I thought that it was not a good policy idea.

I could understand the—I understand the motivation, but I don't think that it is good as a matter of policy to proceed in that fashion. And I don't know what the argument would be as I sit here in favor of taking away jurisdiction over an entire class of cases. That would raise some serious constitutional questions.

Senator SESSIONS. I would just say to you I think we ought not to confront that question if we can avoid it, and that is why I have not joined in legislation, some of which has been filed in this Congress, to take jurisdiction away. But I do believe that is some

power that has been given to the Congress and hopefully will not have to be utilized. Hopefully, that sword will never be drawn because the Court will show restraint and remain within the constitutional powers that they have.

With regard to the unitary Executive, there are just three branches of Government in our Constitution. That is correct, is it not?

Judge ALITO. That is all I see in it.

[Laughter.]

Senator SESSIONS. Well, does every agency and department have to be within one or the other?

Judge ALITO. I think they do. That doesn't say that they can't be structured in ways that differ from each other, depending on their function. And that doesn't address the separate issues of appointment or removal or whether—well, let me just leave it there, with appointment and removal. But I think that the Constitution sets up three branches and everything has to be within one of those branches.

Senator SESSIONS. One of the things that I learned as United States Attorney is these agencies think they are independent entities. They think they are almost like nations. When they get together—you probably had this experience—they sign memorandums of understanding.

Wouldn't you agree they sometimes look awfully like treaties?

Judge ALITO. They do look—yes, they do look like treaties between Federal law enforcement agencies and State law enforcement agencies.

Senator SESSIONS. But, of course, the Federal Government is one. They can't take two positions in a lawsuit. That is for certain.

With regard to interstate commerce, there is a limit to that, to the power of the Government, I believe. In the Hobbs Act and the Racketeering Act that Senator Schumer mentioned, doesn't it say within those Acts that the extortion of the pattern of racketeering has to affect interstate commerce and that is an element that the prosecutor must prove before a conviction can be obtained?

Judge ALITO. Yes, that is right, and the Federal criminal statutes that I am familiar with almost without exception have jurisdictional elements in them. That is the traditional way of casting them. There are a few areas where that is not feasible, such as drugs, but in most of the—most of the statutes have jurisdictional elements right in them.

Senator SESSIONS. And that is basically the *Lopez* holding, was it not? And in your opinion in *Rybar*, you specifically said all that Congress needed to do was to put in an interstate commerce nexus that would be proved to the jury, which I agree with you; having prosecuted hundreds of drug cases, it has not ever been a problem in those cases to prove.

That would have solved the problem, isn't that correct?

Judge ALITO. That is right. In firearms cases, that is just not a problem.

Senator SESSIONS. Well, I think you have testified extremely well here. You have been most forthcoming. I disagree with the recent comment that you haven't been forthcoming. I would say—and I think Senator Biden indicated that we have not had a witness

more forthcoming, more willing to discuss the issues than you have.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Sessions.

I thought we were going to get to that light at the end of the tunnel before one. It looks like we are going to be a little later than that, but we don't want to take a break now. So to the extent we could move ahead rapidly, it would be appreciated.

Senator Durbin, you had originally asked for ten minutes, but I understand you want more time. How much would you like?

Senator DURBIN. Senator, I will do it as close to ten minutes as I can. I might need a few extra. I want to reach the end of that same tunnel.

Chairman SPECTER. All right. Let's set the clock at ten, with flexibility to exceed that.

Senator DURBIN. Thank you very much.

Thank you, Judge Alito. Thanks to your family for putting up with this endurance test, and I appreciate your patience throughout.

First, let me address the issue of court-stripping that was mentioned by my friend from the State of Alabama. I really hope that Congress will never draw that sword. We heard about it during the Schiavo case. If we are going to have a truly independent judiciary, the thought that Congress will take away from the courts issues which we disagree with would really jeopardize it. And just editorializing, I hope we don't reach that point.

After you leave today, there will be a panel of your colleagues on the bench from the Third Circuit. Was this your idea that they come and testify?

Judge ALITO. No, it was not.

Senator DURBIN. Were you asked if it was a good idea?

Judge ALITO. No, I was not.

Senator DURBIN. OK. I understand it has never happened before and that is why I asked you that question. I don't know who came up with this notion, but it does raise some interesting questions which we have shared on a bipartisan basis about that testimony. But since you weren't involved in that decisionmaking, I will drop it at that.

Then there will come some public witnesses and one of those witnesses will raise a contrast between two decisions you made, and I am going to give you a chance now to respond to that charge or that observation that will be made. Fourth Amendment cases. One we have talked about a lot, *Doe* v. *Groody*, another we have talked about, I think, tangentially which involves *Leveto*. I hope I am pronouncing that correctly.

Judge ALITO. *Leveto*, or I am not sure what the pronunciation is, yes.

Senator DURBIN. You know which case I am concerned with?

Judge ALITO. Yes, I do.

Senator DURBIN. In the *Leveto* case, a veterinarian and his wife, subject to Internal Revenue Service agents coming at 6:30 in the morning, detaining him, patting him down in an Internal Revenue Service investigation, holding him for 6 hours in his office. Then they went to his home, found his wife in her nightgown, patted her

down, held her incommunicado for a period of time. And they brought a civil suit and said the Government went too far; they didn't have the authority to do those things, to pat us down and search.

And your conclusion, writing the majority opinion, was, yes, they did go too far. There was a question about immunity which I won't touch on, but at least from the Fourth Amendment point of view you said that the Government went too far.

Now, of course, the notorious case that has come up time and again of *Doe* v. *Groody*. In that case, there is a search of premises and a John Doe search warrant looking for someone who might have been involved in drug-dealing. An affidavit attached to the warrant says that it could also involve persons on the premises who may be hiding drugs, but the affidavit is not part of the search warrant. It is maybe incorporated in general terms. The majority of the court says that it was not incorporated, Judge Chertoff writing for the majority. Particularly egregious is the fact that a mother and her 10-year-old daughter were strip-searched pursuant to that search warrant. And in that case, you concluded that that was warranted, that was an acceptable search.

So the witness who comes before us is going to say, Judge, how can you do this? You have a veterinarian here and his wife, an IRS search. In their case, you said they went too far when they patted them down and searched them. The next case involving a 10-year-old girl in a strip search—you say they didn't go too far.

How would you compare the two and draw the distinction between them?

Judge ALITO. Well, the *Leveto* case involved the issue of how long they could detain people who were present on the premises while they executed the search of the premises. And they detailed these people for a very long period. I don't remember—

Senator DURBIN. Six hours, or more.

Judge ALITO. It might even have been longer. It was a very long period of time and there was no warrant for their arrest. There was no claim that there was a justification to seize them, other than the fact that they were present on the premises at the time when the search was being executed.

The *Doe* v. *Groody* case involved the question of the interpretation of the warrant, and the standard that is to be applied there is, the Supreme Court has told us, a practical, common-sense instruction. It is not—the warrant is not to be interpreted like a sophisticated commercial instrument that is drafted by parties.

The facts were—you mentioned many of them—that the affidavit prepared by the police officer said we have probable cause to search anybody who is found on the premises because we know that—we have probable cause to believe that this drug dealer will hide drugs on the people on the premises.

And they presented that to the magistrate and the magistrate issued the warrant, attached the affidavit to the warrant and said the warrant is incorporated for—and I guess I left out the important fact that the officers—they said we have probable cause to search anybody on the premises and that is what we want; we want authorization to search anybody on the premises.

And the magistrate granted the warrant and attached the affidavit to the warrant, and said the affidavit is incorporated for the purpose of probable cause, which meant that the magistrate found that there was probable cause to search anybody on the premises. But in the portion of the warrant where it said person to be searched, it only mentioned this—

Senator DURBIN. John Doe.

Judge ALITO. The John Doe, and using—now if this were a bond, I think you would conclude the only person you can search is John Doe. But it is a warrant, and my view was that viewing this from a practical standpoint, when the magistrate says, yes, you are right, there is probable cause to search anybody on the premises, that is what he is saying. Those are the people he is saying can be searched.

But even if one didn't agree with that, you would go on to the qualified immunity question and say could a reasonable police officer who says I have got probable cause to search anybody who is on the premises and that is what I want, and you go to the magistrate and he magistrate says I agree with you on probable cause and here is your warrant—could they reasonably think that the magistrate is saying, yes, search anybody on the premises?

Senator DURBIN. So did it go into your thinking, this whole question of the dignity of the individual, that we are, in fact, dealing with a mother and a 10-year-old daughter who were subjected to the most intrusive search? Was that part of your thinking in terms of coming down in the minority position and saying it was all right to go ahead with the search? Did you consider that calculation?

Judge ALITO. I was concerned about the fact that a minor had been searched. And I mentioned that in my opinion and that is something that is very unfortunate. But the issue in the case was not whether there is some sort of rule that minors can't be searched. That is not part of Fourth Amendment law, as I understand it, and there would be a very bad consequence if that were the rule because where would drug dealers hide their drugs? Minors would then become—they would become the repository of the drugs and the firearms.

Senator DURBIN. Or the issuing authority may be more specific in the warrant which, as I understand it, is what the Fourth Amendment is all about.

Judge ALITO. Well, the warrant here certainly could have been drafted better, and a lot of—

Senator DURBIN. I think that is what the majority said.

Judge ALITO. It is, but we have to take into account that these are police officers operating under time pressure. And the Supreme Court has told us that we are not to read these warrants like they are complicated commercial documents. We are trying to get at the practicalities of the situation.

Senator DURBIN. I only have a few minutes and I will try my best to end it, but I don't think I can do it in two.

In the Seventh Circuit, in Chicago, Judge Richard Posner is a very prolific writer about many things. He recently made an observation which I think really is a challenge to all of us on the Judiciary Committee. We currently have a situation involving immigra-

tion cases, particularly those involving asylum and deportation, that we have to look at very seriously.

There was an effort to clear the backlog when Attorney General Ashcroft was in charge, and some procedures were changed to streamline the process. And a lot of these cases were just churned out very quickly, with very little evidence as to why decisions were being made. Judge Posner made that point recently, publicly stating, if I might quote him, "The adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." he said.

Now, you have been involved in some of these cases, about nine split decisions, as we calculate here. There has been a dramatic increase in the number of these cases coming to the Federal appeals courts. In one particular case here, the *Saidou Dia* case, which involved the deportation of a man back to Guinea, where he refused to serve in the military. His wife was then confronted in his home country at their home. When they couldn't find him, they beat her, raped her, and burned down his home. And this was a man who said, "I don't want to go back because I think it could be a dangerous circumstance for me."

In this case, you dissented and said, "Return him to Guinea." You didn't feel that there was a strong enough case to grant him asylum in the United States and to stay.

The reason I raise it is we looked at your record in cases where there was a split decision, and we discovered that you ruled for the Government in eight out of nine cases and in seven of those eight cases yours was the minority position.

So my question to you is: Do you appreciate the observation made by Judge Posner about the terrible state of affairs when it comes to the immigration judges and the decisions they are sending for you to review? And why did you in those contested cases consistently rule on the Government side?

Judge ALITO. Well, Senator, I think I have ruled in favor of asylum seekers in a number of cases now and—

Senator DURBIN. There are usually no dissents in those cases.

Judge ALITO. Well, I know that I've ruled in favor of asylum seekers in quite a number of cases. I don't have the list on the tip of my tongue.

In the *Dia* case that you mentioned, the facts that you recited were not the facts that were found by the immigration judge. Those were the facts that the asylum seeker alleged, and the whole issue in the case was whether there was sufficient evidence to support the contrary finding of the immigration judge.

I agree with Judge Posner that the way these cases are handled leaves an enormous amount to be desired. I have been troubled by this; my court has been troubled by this. But my situation as a court of appeals judge before whom these cases come is created by the legal framework that Congress has created. And Congress has given us a very limited role in reviewing factual findings by immigration judges. What Congress has said is that we have to accept factual findings by the immigration judge unless no reasonable fact finder could come to a contrary conclusion. And that's a tough standard.

And I have tried to adhere faithfully to that standard in all the cases that come before me, even if I felt that I might have reached a different conclusion on the record.

Senator DURBIN. Judge, wouldn't you concede there are basically two standards that are being debated here? One is that no reasonable adjudicator would have come to a different conclusion. The other talks about substantial evidence. And you have followed that second standard, the substantial evidence case in *Liu* v. *Ashcroft* and *Zhang* v. *Gonzales*.

My point I want to get to—and this will be the last thing I ask you—is if we know the system is broken, if we know that it doesn't give basic fairness and justice, do you not feel at your level that you have to be more sensitive to the fact that there are people's lives at stake here and that you have to take care when they are asking for asylum and protection in the United States not to let this broken system work to their detriment?

Judge ALITO. We do have to keep in mind just what's at stake, and I do that. I know that a lot is at stake in these cases, and I read the record to see if there is support for the arguments that are made by these petitioners. But I have no way of supplementing the record. And there are serious problems. One of the most serious problems, I think, is that the witnesses, the asylum seekers generally testify in another language. Sometimes it's a language that is not well represented in the population of the United States, so it may be difficult to get a translator. And the quality of the transcripts is often very poor, which makes it very difficult to understand what was going on before the immigration judge.

Now, there have been cases where we've said the transcript here is so bad that we can't make a decision on this, and we will send it back.

But there's the additional problem that the immigration judges are forced to make credibility determinations based on viewing someone who comes from a different culture, where mannerisms, gestures, facial expressions may mean something different than they do in our culture, and I'm aware of that. But these are bigger problems. These are problems for Congress to address. They're not problems that I can address in the context of deciding these particular cases.

Senator DURBIN. Thank you. I agree, and I thank you very much. And I finished in under 15 minutes, Mr. Chairman.

Chairman SPECTER. Well, thank you very much, Senator Durbin. That is appreciated.

Senator Graham? No comments. Wonderful.

Chairman SPECTER. Senator Cornyn?

Senator Cornyn?

Senator CORNYN. I yield back my time.

Chairman SPECTER. Doubly wonderful.

We are going to be going into executive session when we finish, which will be just in a few moments, and we have attempted to notify all Senators, those not here, through staff. The purpose is to discuss in private any questions which arise as to—any questions anybody may have in mind as to Judge Alito. It doesn't suggest anything of substance, but we have adopted this practice since Justice Breyer's proceeding and do it as a matter of routine so that if

there is something, by going into executive session we do not signal that there is something. And going into executive session does not mean, if there is something, that there is nothing, but it is routine. As I explained it, I am not quite sure why we do it, but we do it.

[Laughter.]

Chairman SPECTER. It doesn't take long if you do it before lunch.

[Laughter.]

Chairman SPECTER. There has been some suggestion we do it after lunch, and let me tell you, it would be a long session. But we are going to do it before lunch, and we are going to do it in the Committee hearing room, which has been swept—another unnecessary item because there is nothing to say in there. But that is our procedure.

Now I yield to our distinguished Ranking Member, Senator Leahy.

Senator LEAHY. Thank you. Just briefly, Mr. Chairman, and you have been so courteous on this, I hate to even take this time. But in saying this, I want to make sure Judge Alito is here.

When we started this, I actually started with the same subject I started with then-Judge Roberts, now Chief Justice. It is on the question of Presidential power, and whether he appreciates the role of the Supreme Court as a check and balance. As you know, I voted for him, and that is a leap of faith because nobody makes commitments on exactly how they are going to vote in one case or another.

In this case, it has been pointed out you are to replace Justice Sandra Day O'Connor. Actually, initially Chief Justice Roberts was nominated for that. Then Harriet Miers was nominated. The President was forced by concerns within his own party to withdraw her, then nominated you very quickly after you had been—well, you had been interviewed once at the beginning of his term, but then you were interviewed again by Vice President Cheney and Karl Rove, Scooter Libby, I think a few others. And that is why I worry. I just wanted to make sure in my own mind that you would stand as a check and balance, for this President or any President.

I know your concerns you expressed in the year 2000. You criticized the independent counsel law. So many times in the questions I have raised this issue, because I was afraid you would not act as a check and balance. We have a Government that is getting more and more powerful, in the electronic age especially powerful. We see illegal spying on Americans by Americans.

All of us agree the President is not above the law any more than you are or I am. But it takes more than that, especially if we are giving the President the power unilaterally to redefine the law, an issue that is going eventually to come before you.

So those are my concerns. I wanted you to know what my concerns are. They go beyond the other issues raised by Senator Specter or other Senators, though those are legitimate issues. But those are mine, and I wanted to say that to you personally.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Leahy.

We were about to excuse you from any further participation in these proceedings, Judge Alito. I have been handed statistics which show that you have been questioned for about 18 hours, the number of questions approximating some 700, and some differences of

opinion as to the comprehensiveness of your responses. But Senators are entitled to their own views, and you will be hearing more when we conclude the hearings and later go into executive session for the Committee to vote and further on floor debate. But you have certainly demonstrated remarkable patience—I think everybody would agree with that—and remarkable stamina and a very loyal family, led by your wife. And we thank you for your public service, and you may be assured that the Committee on both sides and all of the balance of our 100 Senators will give very, very careful consideration to the President's nomination of you for the Supreme Court.

We will recess now and we will resume at—it is uncertain how long our session will be, so we will resume at 2:30 and we will begin with a report from the American Bar Association, and then we will move to witnesses from the Court of Appeals for the Third Circuit.

Senator LEAHY. Right now we are going to the closed—

Chairman SPECTER. But now we are going to the Committee hearing room, Dirksen 226, for an executive session.

[Whereupon, at 1:10 p.m., the Committee was recessed, to reconvene at 2:30 p.m., this same day.]

Chairman SPECTER. The Judiciary Committee will now proceed with the confirmation hearing on Judge Samuel Alito for the Supreme Court of the United States.

After our morning session, the Committee met in executive session and reviewed confidential data on the background of Judge Alito, and it was all found to be in order.

We are now proceeding with the witnesses. The tradition of the outside witnesses, the independent witnesses, our tradition is to hear first from the American Bar Association and their evaluation of the judicial nominee.

We have structured this portion of our hearing differently from what had been done prior to last year, and that is, where the majority took most of the outside witnesses. The tradition has been to have 30 witnesses, and the majority party had taken 18, and the minority party 12, and it seemed that it would be more appropriate to have an even split, 15 and 15, and that is the practice we are following. And of course, the ABA representatives are not witnesses called by either Democrats or Republicans. We have really done our best to proceed in a nonpolitical way in the selection of a Supreme Court Justice. There can be different evaluations as to how successful we are in that, but that has been our effort.

We have limited testimony to 5 minutes for outside witnesses. The next witness already nods in agreement. He was here not too long ago for Chief Justice Roberts. And we have established the 5-minute rule because we have 31 witnesses, and the Senate is not in session, and all the members of the Committee have other commitments. It is projected that we will finish today, but we will have to keep on schedule.

We turn now to the American Bar Association panel, and we welcome Mr. Steve Tober, Ms. Marna Tucker, and Mr. John Payton. In accordance with the practice, the testimony will be given by Mr. Tober, who is the Chairman of the American Bar Association Standing Committee on the Federal Judiciary. He is an attorney

with a law firm bearing his name, experienced in civil litigation, professional negligence and domestic relations; undergraduate and law degree from Syracuse University; on the board of the Law Review; deeply involved in New Hampshire and New England legal communities, former chairman of the Committee to Redraft New Hampshire's Rule on Professional Conduct.

We know the laborious job involved, Mr. Tober, which you are about to describe, in reaching an evaluation of a Supreme Court nominee, and the importance of your judgment, so we thank you and Mr. Payton and Ms. Tucker for your public service.

Now, Mr. Tober, the floor is yours.

STATEMENT OF STEPHEN L. TOBER, ESQ., CHAIRMAN, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON THE FEDERAL JUDICIARY, PORTSMOUTH, NEW HAMPSHIRE; ACCOMPANIED BY MARNA TUCKER, ESQ., D.C. CIRCUIT REPRESENTATIVE, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON THE FEDERAL JUDICIARY, WASHINGTON, D.C.; AND JOHN PAYTON, ESQ., FEDERAL CIRCUIT REPRESENTATIVE, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON THE FEDERAL JUDICIARY, WASHINGTON, D.C.

Mr. TOBER. Thank you, Your Honor. Thank you, Mr. Chairman, members of the Committee. My name is Stephen L. Tober of Portsmouth, New Hampshire, and it is my privilege to chair the American Bar Association Standing Committee on the Federal Judiciary.

I am indeed joined today by Marna Tucker, our D.C. Circuit Representative, and by John Payton, our Federal Circuit Representative.

For well over 50 years the ABA Standing Committee has provided a unique and comprehensive examination of the professional qualifications of candidates for the Federal bench. It is composed of 15 distinguished lawyers who represent every judicial circuit in the United States, and who annually volunteer hundreds of hours of public service.

Our committee conducts a thorough, nonpartisan, nonideological peer review, using well-established standards that measure a nominee's integrity, professional competence and judicial temperament.

With respect to a nomination to the United States Supreme Court, the Standing Committee's investigation is based upon the premise that such a nominee must possess exceptional professional qualifications. The significance, range and complexity of issues that will be confronted on that Court demands no less. As such, our investigation of a Supreme Court nominee is more extensive and is procedurally different from others in two principal ways.

First, all circuit members on the Standing Committee reach out to a wide range of individuals within their respective circuits who are most likely to have information regarding the nominee's professional qualifications. And second, reading groups of scholars and distinguished practitioners are formed to review the nominee's legal writings and advise the Standing Committee. The reading groups assist in evaluating the nominee's analytical skills, knowledge of the law, application of the facts to the law, and the ability to communicate effectively.

In the case of Judge Alito, circuit members combined to contact well over 2,000 individuals throughout this Nation. Those contacts cut across virtually every demographic consideration, and it included judges, lawyers and members of the general community. Thereafter, circuit members interviewed more than 300 people who knew, had worked with, or had substantial knowledge of the nominee. All interviews regarding the nominee were fully confidential to assure the most candid of assessments.

Judge Alito has created a substantial written record over his years of public service. Our three reading groups worked collaboratively to read and evaluate nearly 350 of his published opinions, several dozen of his unpublished opinions, a number of his Supreme Court oral argument transcripts and corresponding briefs, and other articles and legal memos.

The academic reading groups were composed of distinguished faculty from the Syracuse University College of Law and from the Georgetown University Law Center. The practitioners group was composed of nationally recognized lawyers intimately familiar with demands of appellate practice at the highest level.

Finally, as we do in any Standing Committee investigation, a personal interview was conducted with this nominee. Judge Alito met with the three of us on December 12th, and he provided us a full opportunity to review matters with him in detail.

After the comprehensive investigation was completed, the findings were assembled into a detailed confidential report. Each member of the Standing Committee reviewed that final report thoroughly, and individually evaluated that nominee using three rating categories: well qualified, qualified and not qualified. Needless to say, to merit an evaluation of well qualified, the nominee must possess professional qualifications and achievements of the highest standing.

During our investigation questions were raised concerning the nominee's recusal practice, and also concerning some aspects of his judicial temperament. We have carefully reviewed and resolved those questions to our satisfaction, as we have detailed in our accompanying correspondence to your Committee, which, Mr. Chairman, we ask to be made part of this record.

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

Mr. TOBER. We are ultimately persuaded that Judge Alito has, throughout his 15 years on the Federal bench, established a record of both proper judicial conduct and evenhanded application in seeking to do what is fundamentally fair.

As such, on the basis of its comprehensive investigation, and with one recusal, the Standing Committee unanimously concluded that Judge Samuel A. Alito, Jr. is well qualified to serve as Associate Justice on the United States Supreme Court. His integrity, his professional competence and his judicial temperament are indeed found to be of the highest standard.

Mr. Chairman, let me say once again what we noted here back in September. The goal of the ABA Standing Committee has always been and remains in concert with the goal of your Committee, to assure a qualified and independent judiciary for the American

people. With that, thank you for the opportunity to present these remarks.

[The prepared statement of Mr. Tober appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Tober, for your work and for ending right on the button, 5 minutes to a tee.

Mr. TOBER. I worked on that, sir.

[Laughter.]

Chairman SPECTER. That quality of yours would recommend you for Supreme Court argument, where Chief Justice Rehnquist stopped the speaker in mid-sentence, and the word from Judge Becker, who will testify later, he was looking for an opportunity—he stopped me in mid-sentence one day—and he was looking for an opportunity to stop a speaker in the middle of the word "if," I did not give him that chance.

[Laughter.]

Chairman SPECTER. Before proceeding to questions, I want to yield to Senator Leahy, to see if he has any opening comments that he wants to make.

Senator LEAHY. I do not, Mr. Chairman. Thank you, though.

Chairman SPECTER. We have 5-minute rounds for each of the members of the Committee.

Mr. Tober, picking up on your testimony that you found Judge Alito to have evenhanded application of the law, how would you amplify that with respect to what kind of materials you have looked at, and what your evaluation was, and what led you to that conclusion?

Mr. TOBER. Be happy to, Mr. Chairman. The conclusion was reached in large measure in interviews with, as I said, well over 300 individuals around this country, over 130 of whom were Federal judges. Many were State judges. Many were colleagues, co-counsel, opposing counsel, who almost uniformly talked in terms of his even-handedness, of his open-mindedness, of his willingness to be fair. He is called "a judge's judge" more than once in those interviews.

When we interviewed him we had questions that would have been on that issue, and we discussed that issue with him to get his own personal perspective on it, and we were satisfied with what we heard at that time.

And perhaps it's best reflected in his writings, which again, I indicated the body of that work was read by our three reading groups collaboratively, and the conclusion that was reached, if you will, the overarching conclusion that was reached, is that this is a judge who brings pragmatic skills to his decisionmaking. We discussed that with him in that interview that we had on December 12th. He tried to do what he thinks is right with respect to the application of the law that is before him. He took us through how he analyzes that approach, up to the point that when he is just about ready to release his decision, he looks back once again at the law to make sure he has not misapprehended something in the first instance, and second, to make sure that the outcome is fair. That to me suggests—

Chairman SPECTER. You say he came back to you twice?

Mr. TOBER. I am sorry?

Chairman SPECTER. Was your testimony that he came back to you? What did you mean when he came back and took another look.

Mr. TOBER. He would look at his draft opinion, Mr. Chairman, before it would be issued, and he would look back at the law that he was applying in that opinion and the outcome that was occurring in that opinion, just to justify in his mind one more time that the outcome would be fair.

Chairman SPECTER. Did your group study all of his opinions?

Mr. TOBER. The reading groups read 350 of his published opinions, scores of his unpublished opinions and other materials, yes.

Chairman SPECTER. And did they make any analysis of—an issue has been raised as to whether Judge Alito unduly favored the powerful or the Government. Did your ABA analysis reach that issue?

Mr. TOBER. That issue was one that we looked at, and we discussed it in our letter of evaluation, and I gave some examples of some of the disparate results that we were told about. One of the reading groups reported to us that they could not reach a full conclusion on whether or not it was some attempt to favor one outcome for a group of litigants over another. And while there were a couple of members in a couple other reading groups that may have said the same thing in so many words, there were a significant number of other individuals in the reading groups who said they couldn't find any such evidence of that. It was inconclusive with respect to the reading groups.

What was of interest in the reading group reports to us was a comment that was echoed by others, which is that in looking for a sense of partiality in the opinions, the conclusion that was left very often was one of pragmatism, that—

Chairman SPECTER. Let me interrupt you, because my time is almost up, to ask you to clarify what was inconclusive in your studies.

Mr. TOBER. It was inconclusive whether or not there were certain categories of parties who might have come out at the wrong end of Judge Alito's opinions.

Chairman SPECTER. Did some of those readers find that he was impartial and some find the contrary?

Mr. TOBER. My understanding is it was inconclusive. We did not receive any clarion call at one point that he was representing or suggesting to have a bias against any particular group of litigants before him.

Chairman SPECTER. A considerable amount of attention has been paid in these hearings to the recusal issue of Vanguard. Would you comment on what your committee found there?

Mr. TOBER. I am going to defer to Mr. Payton, who took the lead on the Vanguard-related issues, if that is OK with the Chairman.

Chairman SPECTER. Mr. Payton?

Mr. PAYTON. We certainly looked into all of the recusal issues. We asked Judge Alito in some detail about how the Vanguard and the other recusal issues came about. But let me put this in some context which I think will be helpful.

In the materials that Judge Alito submitted to this Committee, he attached a list of all of the cases from which he had been recused over his 15-year tenure, and that is 40 pages long, with

about 30 to 35 cases per page. It is well over a thousand cases from which he was recused.

Among those cases that he was recused from were cases involving Vanguard in 1992, cases involving his sister's law firm throughout the tenure, cases involving the U.S. Attorney's Office throughout the tenure, cases involving the other entities that he had identified in his representation to this Committee back in 1990.

A few cases, in fact, slipped through, and that has been the subject of our inquiries and some of the testimony before this Committee. We asked him how that came about. He explained how he thought it came about, but I think it is fair to say he was not certain how they slipped through, whether it was through the screen, whether it was because they were *pro se* cases.

In the end, he did acknowledge that it was his responsibility that a mistake and error had been made, those cases should have been caught, and he should have not heard those cases. We listened quite carefully to all of that, and in the context in which we understood how this came about, we accepted his explanation that he simply had made a mistake. These cases should not have slipped through the screen, just like the other thousand or so cases were captured by the screen in the process, but they did. They shouldn't have. And we think that did not reflect in any significant degree on his integrity.

Let me tell you something else we did that goes to both of your questions, Mr. Chairman. We also interviewed an incredibly broad array of judges—virtually all of the members of the Third Circuit, virtually all of the district judges that were in New Jersey and were in Philadelphia. We interviewed a number of the other judges in the Third Circuit who were on the district court who had contact with Judge Alito. And what we learned from them almost unanimously was that he is held in incredibly high regard with respect to the issues that this committee, the ABA's committee, looks at: his integrity, his judicial competence, and his judicial temperament. And on the issue of the recusals, everyone—everyone—thought that he has the highest integrity and that these few cases that slipped through do not diminish his integrity.

Chairman SPECTER. Thank you, Mr. Payton.

The red light went on during the course of your testimony, so I will terminate and yield to my colleague, Senator Leahy.

Senator LEAHY. Just to followup on that, on Vanguard, the only reason I even mention this is that the initial explanation from Judge Alito and the White House after his nomination was a computer glitch had precipitated the *Vanguard* case. But then he answered some questions from Senator Feingold by saying that in the *Monga* case it wasn't a computer glitch that caused his failure to submit Vanguard to the clerk of the court. Then he said when it came before him, he was not focused. Since your report was filed, we have learned that Judge Alito did not have Vanguard on his recusal list as far back as 1993, notwithstanding the fact that in 1990 he had given a sworn statement to the Committee that he would recuse.

Some of that information came after your report. Would it change anything in the conclusion?

Mr. PAYTON. I think that it is—like I said, from the interview with him, I am not sure we figured out what caused these cases to slip through. I am not sure Judge Alito knew the precise answer to that. But he did acknowledge that it was a mistake.

On what was on his standing recusal list, I don't know what was on his standing recusal list, but I just note in the materials that were submitted to this committee, there is a 1992 entry of an entity that has the name Vanguard in it—it is Vanguard—that says, "Recusal because on standing recusal list."

I don't know what happened in 1993. I don't know if things went on and went off. Something went wrong here, and these cases came before him, and they shouldn't have. But they are a very small number in a huge universe of cases from which he was recused.

Mr. TOBER. Senator, may I add to that very briefly.

Senator LEAHY. Sure.

Mr. TOBER. We did not find in the vast number of our interviews and the review with the nominee and any other extrinsic information we could look at any pattern of intentional effort to try and have Judge Alito impose himself in cases in which he did not belong. We are persuaded that some errors were made, some mistakes were made, and they total up to a small handful.

In the course of the numbers that he has been sitting on—and I believe Senator Hatch suggested yesterday some 4,000 or 5,000 cases have been adjudicated involving Judge Alito—we took that into context, particularly in light of the comments from individuals who know him and work with him, with respect to the ethics he brings to the position.

Senator LEAHY. You understand the reason this became an issue here is because it was based on a sworn statement that he recuse.

You also looked into his open-mindedness, his commitment to equal justice. I am just asking, in doing that—because I have never served on one of these committees that you are on. There have been a number of studies of the judge's record—Knight-Ridder, the Washington Post, Cass Sunstein and others—and they have concluded that he had much more likelihood of siding against discrimination plaintiffs than other circuit judges. Knight-Ridder reviewed 311 of his published opinions and found that he seldom sided with a criminal defendant, a foreign national facing deportation, an employee alleging discrimination, or a consumer suing Big Business. And his record stood out significantly from others in the circuit.

Did this question come in on the issue of whether he was compassionate?

Mr. TOBER. The answer is yes, we looked at that. Our reading groups looked at it for us. We discussed it with the nominee in our interview on December 12th. We are not immune from the media stories that have been available. I suggest everybody on my committee has been watching the last 3 days very carefully. We are where we started with that issue, and that is, the over 300 people we spoke with who know this person as a judge, as an individual, are convinced that he has an open mind, that he does not bring any bias to his decisionmaking.

Senator LEAHY. And, last, on the issue of CAP, nobody is suggesting a bias on his part, but what bothers me, when you are doing a job application in 1985—we know Judge Alito is a very

careful person, and I mean that as a compliment. On a carefully put together job application, he proudly proclaims his membership in CAP, a group that was very much dedicated to keeping minorities and women out of Princeton, one that would probably look unkindly toward either Judge Alito's Italian ancestors or my Italian ancestors. Was this just pandering to the Meese and the Reagan administration, or was this just a total screw-up?

Mr. TOBER. May I defer to Ms. Tucker with that?

Senator LEAHY. Sure.

Ms. TUCKER. We looked at that question, Senator. We were very concerned about that listing, knowing that membership in that organization would put him perhaps on an extreme that we would be uncomfortable with. His answers to our committee were very similar, if not identical, to the answers to your Committee.

He did not recall when he became a member or even what he did, but he didn't recall ever attending any meetings or reading any publications. He did recall that he joined the organization because of the university's attempt to remove ROTC—

Senator LEAHY. But that is not really my question. Was there any question of why—why was he so proud of this that he would put it in a 1985 job opplication—when everybody—everybody—knew what kind of an organization it was, where Senator Bill Frist had condemned it and Senator Bill Bradley had. Did you ask why he proudly put that on his application?

Ms. TUCKER. We asked him why he put that on there. We didn't ask him why he proudly put that on there. But he stated that he recalled he was a member. We specifically asked him if this was to—since it was a job application, was he pandering, and he said it would be improper to not tell the truth on an application, that he was a member of that organization. But there were only two organization that he listed, as I recall, on that application: one was the Federalist Society, the other was the Concerned Alumni for Princeton. He did not have a long list of activities at that time.

But I should say, in fairness, we were very concerned about the membership of that and what happened, and all of the people we spoke to on the courts, women and minorities, people who he had worked with, people who had sat on panels with him side by side in issuing judicial opinions, almost universally said that they saw no bigotry, no prejudice. They thought he was a fair man. And they felt that if he did put that—they were shocked when they heard that that was listed on his application. And they said, "That is not the Sam Alito we know." And we heard that time and time again.

Senator LEAHY. Thank you very much.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Mr. Tober. Thank you, Ms. Tucker. Thank you, Mr. Payton.

Senator Hatch?

Senator HATCH. I will reserve my time. Thank you.

Chairman SPECTER. Thank you.

Senator Kennedy?

Senator KENNEDY. Thank you very much.

Did you know, Mr. Tober, that the Vanguard *Ventron*, which is the case of 1992, actually involved the carpenters? It names the carpenters which were on the Alito list for recusal, and—Mr.

Payton, maybe this should be directed to you—and that most of the people that have looked through there in detail feel that the reason that that was actually recused is because of the carpenters. I think it is spelled carpenteers—yes, c-a-r-p-e-n—carpenter, and that is the reason it was under the name of the Vanguard. You are familiar with that?

Mr. PAYTON. Yes. I simply thought that it was unclear whether or not what would have caused that to be kicked off because of the standing recusal list was any hit with Vanguard or something else. It is unclear. You cannot tell from what is there.

Senator KENNEDY. Did the committee know, when it inquired of the nominee, that Judge Alito had made a promise to the Committee under oath that he was going to recuse himself from Vanguard?

Mr. PAYTON. Yes, and we asked him about that.

Senator KENNEDY. And did he indicate what—well, what was his response?

Mr. PAYTON. His response was that it was a mistake for those cases to have slipped through. That was not just a question about what the code said, but also what his representation to this Committee encompassed, that it was a mistake.

Senator KENNEDY. Was the mistake, as you understand it, is because he did not, for one reason or another, neglected to put the Vanguard on his recusal list?

Mr. PAYTON. No, I do not think I could say it that concretely. The mistake was that it got through. Why it got through, I think it was not completely clear to us, and I am not sure it was clear to Judge Alito. It got through.

Senator KENNEDY. It was not on his 1993, 1994, 1995, 1996 list, and the 1993 said no changes were made from 1992. So there is just 1 year, year and a half. We do not have the record on it, and I am just wondering, in your inquiry and review of that case, since that is the principal source of, as I understand it, of revenue. I mean it has had sizable increases in the revenue from the time he took that oath till the more recent years. So that is one of the factors on it. I was just interested, when he said it was a mistake, whether you made a determination, detection, because we have not been able to find that it was ever put on. Quite frankly, at least as a member of the Committee, we have heard a number of reasons for it. We have heard computer glitch. We have heard that it was an interim pledge and a commitment. We have heard that it was a *pro se* case and, therefore, the computers do not exist in the Third Circuit the way they do in law firms here in Washington, D.C. I am just trying to find out what was told to you.

To be very honest about it, if it had been said it was a mistake in the very beginning, I do not even think this issue would have taken more than 30 seconds of the Committee's time, but since we have had so many different reasons for it, which we have been trying to ascertain exactly what had happened, and particularly since it was a pledge to the Committee and it was a sworn statement to the Committee, that we are wondering what the Bar Association, in its interview—

Mr. PAYTON. I do not know the answer to your question. I do not believe that what you just said about what was on the list in 1993–

94 was known then. I was unaware of that, and I am not sure Judge Alito knew that. But in our discussion with him, we actually cut right through that and simply wanted him to tell us if he agreed this was a mistake. Did you just miss it? "Yes, I just missed it. It was a mistake." The why then sort of became less significant.

Senator KENNEDY. Well, of course, Mr. Payton, he did. He took, during that same period of time, he took a name off the list, so he must have been familiar with it. He took the U.S. Attorney's name off the list. We went through this. I would be glad to make available to you—you indicated that you had gone through the hearings on this, and I welcome the opportunity just to make available to you the same material, and to get your response.

Mr. TOBER. Senator, we indicated in our letter of explanation, as we always do, that we continue to monitor these proceedings, and we will be happy to revisit anything the Committee wishes us to look at.

Senator KENNEDY. I want to join in thanking you for the service of the Bar Association. This is a very challenging and in many sense, a thankless job. But I think the country is much better off. So it judiciary. I thank you for your service.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Hatch has stated an interest in regaining some of his reserve time.

Senator HATCH. Just shortly. We appreciate the efforts that you make. We appreciate what the Bar Association is doing, and we appreciate what you have done in this particular case as well.

Frankly, he did state right off the bat, early in his testimony, that he had made a mistake with regard to the Vanguard matter. On the other hand, are you aware that not only did he recuse himself once he realized he had made a mistake, but he asked the succeeding panel to retry the case. Are you aware of that?

Mr. TOBER. Yes.

Mr. PAYTON. Yes.

Senator HATCH. Was that an appropriate thing to do?

Mr. PAYTON. He asked that the Chief Judge identify a new panel, and I think that was the appropriate thing to do.

Senator HATCH. That is what an honest, decent judge would do, is it not?

Mr. TOBER. Sure, of course.

Senator HATCH. You are all aware of this 28 USC, the U.S. Code statute on this, am I correct?

Mr. TOBER. Correct.

Senator HATCH. I mean that statute defines a financial interest for the courts. It says, "Financial interest means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that ownership in a mutual or a common investment fund that holds securities is not a "financial interest" in such securities, unless the judge participates in the management of the fund." Are you aware of that?

Mr. PAYTON. Yes.

Senator HATCH. Now, did he participate in the management of the fund?

The answer is no. Then if he did not participate in the management of the fund, would he have had, under normal circumstances, to recuse himself?

Mr. PAYTON. I think the normal circumstances is amplified by the representation to this Committee, which he acknowledged, independent of the obligation that you are talking about, would have caused him to not want these cases to come before him.

Senator HATCH. Right. But he made it clear that once he did realize that there was a mistake, even though he did not, according to this U.S. Code which is the basis, did not have to recuse himself, he did so because he had said in his statement that he would.

Mr. PAYTON. Yes, sir.

Senator HATCH. And you knew that. And so, I take it, you do not find any real fault in the way he handled the Vanguard matter?

Mr. TOBER. That is so.

Mr. PAYTON. That is correct.

Senator HATCH. That is correct?

Mr. PAYTON. That is correct.

Senator HATCH. Thank you so much.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much for your service. Have you heard anything in these hearings that would cause you any concern or reason to change any of your views?

Mr. TOBER. Well, the hearings are still going and I am still listening. But to the moment, Senator, I have been looking for any kind of material or discordant statement that would have been inconsistent with anything that we have learned or heard either through our interviews or our meeting with the nominee, and to the moment I am still comfortable that we understood the judicial and legal profile of Judge Alito when we reached our rating.

Senator FEINSTEIN. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Feinstein.

Senator Kyl?

Senator KYL. Mr. Chairman, I do not have any questions, but I would like to thank the panel and the Bar Association for its, I wonder, how many hours of work put into verifying the qualifications of nominees, not just for the Supreme Court, but the other nominations, and particularly, Mr. Payton, your explanation of the matters that you testified to here. Thank you very, very much.

Chairman SPECTER. Senator DeWine?

Senator DEWINE. No questions, Mr. Chairman.

Chairman SPECTER. Senator Sessions?

Senator SESSIONS. Mr. Tober, you have 15 members of your committee that goes out, and they divide up the work and interview 300 individuals; is that what you did?

Mr. TOBER. As it turned out, Senator, the Chair just gets into a lot of marshaling, and the Third Circuit representative had to recuse herself because she had argued a case before a panel that Judge Alito had served on before he had been nominated, and the decision had yet to come down, so she, by our standards, removed herself. So I had 13 people out in the field, interviewing well over 300 people, contacting over 2,000 people, putting together their

own written reports, marshaling the information from every corner and putting it in what turned out to be an 11-pound report. And when I first received it, as I told Ms. Tucker, I did not know whether to read it or send out birth announcements.

Senator SESSIONS. We are glad you do not have to do background work on Senators.

[Laughter.]

Mr. TOBER. We are pleased it is done for the moment.

Senator SESSIONS. One of the things, you know, some of us have complained about the ABA ratings, but there is so much value to it, it strikes me, because is it not true that sometimes when you are interviewing a lawyer that has been before the judge, or lost a case, a lawyer who has litigated against him, they will tell you things they may not come forward and say publicly, and that you can get a good—you feel like you get a better perspective on a nominee's professional qualifications than you can get from reading the newspaper perhaps?

Mr. TOBER. Thank you for that question. Let me try and answer it. The answer is yes. We have had the experience since 1948, when we started reporting our ratings to this Committee, of being able to get comprehensive confidential information from people who know the nominee directly in the trenches, whether it be a judge, a lawyer or other people in the community, and we are able to ask them with respect to integrity, professional competence and judicial temperament, with the full and complete understanding that there will be no attribution, there will be no embarrassment, that if it is important we need to know, and people indeed give us that kind of information. So, yes, it is a remarkable process, and if I have a moment, I would like to say it is a remarkable group of people that I have had the privilege to work with.

Senator SESSIONS. And, Mr. Payton, you used the phrase that they held him in incredibly high regard. I think you are a premier litigator, you have argued before the Supreme Court. I am sure you used those words carefully.

Mr. PAYTON. I did.

Senator SESSIONS. I thank you for your service, and I think it has provided valuable insight to the Committee because you see these things out there, and it is important for the American people to know what do the people who really know and work with this judge think about him, and we value your comments.

Mr. PAYTON. Thank you.

Chairman SPECTER. Thank you, Senator Sessions.

Senator Graham?

Senator GRAHAM. Thank you, Mr. Chairman.

I would just like to echo what my colleagues have said about the service you are providing not only to the Committee, but I think the country, because most people in the country are not lawyers. That is probably a good thing.

The idea of who you are getting as a person is important, and the homework you have done gives us a good picture of this particular man. But his judicial experience, compared to other people that you have reviewed, seems to me that being on the court for 15 years, you had a lot to look at.

Mr. TOBER. Well, we do not compare one nominee to another, Senator, as I am sure you can appreciate. But I will take the direct question, and indeed, I believe we said in our letter of evaluation that he has created an enormous record of public service, and his writings speak top that, and that is indeed what we have reviewed.

Senator GRAHAM. Thank you. About your rating, you know, we are all very pleased to the outcome here, but democracy is about a process, not an outcome. The rule of law is about a process, not an outcome. There may be an occasion where you will render a writing I will not agree with, and that is just the way it goes. But I think the process where you are involved really helps us a lot. I think it helps the country, and I appreciate the time you have taken from your families, from your business to do it.

Now, what may take normal people 30 seconds to figure out may take the Senate 3 days—

[Laughter.]

Senator GRAHAM.—but we are going to ask one simple question about Vanguard. With this much material to have dealt with, and as many cases as he has heard, the first question for me about Judge Alito is, who am I getting here? Is an innocent mistake OK? I hope so because I make them all the time. What would I not want? I would not want someone who is into self-dealing. I would not want someone who skirts the ethical rules and plays as close to the line as they could. Would it be a fair statement that Judge Alito never plays close to the line, he tries to do it the best he can, to take the highest approach to ethics?

Mr. PAYTON. I think that from what his colleagues who know him very well would say, is that they hold him in the highest regard with respect to his integrity, and I think that encompasses what you just said.

Senator GRAHAM. Thank you very much. One last thought about Vanguard. What is in it for him to intentionally hear the case knowing that he should not? I have never found anybody that could give me a reason why this judge would make an intentional decision to avoid recusal when he should. Have you found a reason?

Mr. PAYTON. I actually am unaware of anyone who has claimed that he intentionally did this. It was a mistake.

Senator GRAHAM. And there is no benefit one could find for him intentionally doing it, based on the nature of the case.

Mr. PAYTON. I am not aware of one.

Senator GRAHAM. Thank you all.

Mr. TOBER. Senator, if I could just add, I believe it was Professor Rotunda who submitted a report to this Committee, and I think there was a line in there that caught my attention. He said "Reasonable people can make reasonable mistakes." And I think that captures what we thought we found, and when we spoke to Judge Alito about it, we were convinced that indeed that happened.

Senator GRAHAM. Again, thank you for your service.

Chairman SPECTER. Thank you, Senator Graham.

Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman.

I just have a brief question because we have heard a lot about the ABA rating, which is something that is prized and important.

Your sheet here says it describes three qualities: integrity, professional competence, judicial temperament. Is that right?

Mr. TOBER. That is correct.

Senator SCHUMER. So it would not at all get into what somebody's judicial philosophy would be, is that correct?

Mr. TOBER. That is also correct.

Senator SCHUMER. And so if somebody were very far right or very far left, as long as they had integrity, professional competence or judicial temperament, you would give them—that is what you would rate them on?

Mr. TOBER. Senator, we do not do politics. What we do is integrity, professional competence and judicial temperament. They are objective standards and that is what we bring to this Committee.

Senator SCHUMER. And if one standard was, however one defined it, if somebody was out of the mainstream, again, your rating would not give us any inclination whether that was part of it?

Mr. TOBER. If the suggestion was that they were out of the mainstream politically, That is correct. If they are out of the mainstream in terms of their judicial temperament, we might have a different thought.

Senator SCHUMER. Thank you.

Chairman SPECTER. Thank you very much, Mr. Tober, Ms. Tucker, Mr. Payton. We very much appreciate your service and your being here today.

Mr. TOBER. Thank you.

Chairman SPECTER. We next call the next panel—Judge Becker, Judge Scirica, Judge Barry, Judge Aldisert. Judge Garth will be coming to us electronically, but he appears on the screen. Welcome, Judge Garth. And Judge Gibbons and Judge Lewis.

Pardon me. Senator Coburn, do you have questions of the ABA?

Senator COBURN. No, Mr. Chairman.

Senator SESSIONS. AMA, he would like to ask.

Chairman SPECTER. I begin by welcoming the judges. By way of a brief introduction, I think it is worthy of comment how this panel came to be invited. Judge Becker was in my offices because since August of 2003 he has been performing mediation services on asbestos reform legislation, more than 40 meetings in a very, very tough legislative approach. And he was in my office last December, at a time when I was being interviewed by Kathy Kiley, of USA Today.

And I introduced Judge Becker to Ms. Kiley, who asked him about Judge Alito. And without objection, I would like to make a part of the record the article which Ms. Kiley wrote for USA Today, dated December 14, 2005, which contains Judge Becker's comments about Judge Alito.

After that, I discussed with Judge Becker the possibility of his being a witness for Judge Alito. And after some discussions, Judge Becker checked out the various considerations and said he would be willing to do so if invited by the Committee. And then Judge Becker talked to the other judges who are here today, who also stated a willingness to appear, if invited by the Committee, and I then sent them formal letters of invitation.

Now, to the judges. Judge Becker is a graduate of the University of Pennsylvania, 1954; Yale Law School, 1957; appointed by Presi-

dent Reagan to the district court in 1970 and to the Court of Appeals for the Third Circuit in 1981. He has really been performing services as the 101st Senator, and by way of full disclosure I have known Judge Becker since the fall of 1950, when he was a freshman at the University of Pennsylvania and I was a senior, and we have been good friends ever since.

Judge Becker, thank you for your service to the United States in so many capacities.

Judge BECKER. Thank you, Mr. Chairman.

Chairman SPECTER. We have a procedure for five minutes. I don't intend to bang the gavel on any of you judges, and not because you are judges, but because my gavel is almost broken.

Judge Becker.

STATEMENT OF EDWARD R. BECKER, SENIOR JUDGE, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, PHILADELPHIA, PENNSYLVANIA

Judge BECKER. Mr. Chairman, Senator Leahy and other members of the Committee, Sam Alito became my colleague when he joined our court in 1990. Since that time, we have sat on over a thousand cases together, and I have therefore come to know him well as a judge and as a human being.

Many do not fully understand the intensity of the intellectual and personal relationship among appellate judges. We always sit together in panels of three and, in the course of deciding and writing up cases, engage in the most rigorous dialog with each other. The great violinist Isaac Stern, describing an afternoon of chamber music, once opined that after such a session, one knows his fellow quartet members better than a man knows his wife after 30 years of marriage.

Now, this analogy, hyperbole aside, vividly describes the intense relationship among appellate judges. I therefore believe myself to be a good judge of the four matters that I think are the central focus of this Committee as it decides whether to consent to this nomination—Sam Alito's temperament, his integrity, his intellect and his approach to the law.

First, temperament. Sam Alito is a wonderful human being. He is gentle, considerate, unfailingly polite, decent, kind, patient and generous. He is modest and self-effacing. He shuns praise. When he had completed his tenth year of service on our court, Sam declined my offer extended as chief judge—I was then the chief judge of the court—to arrange the usual party to observe 10-year anniversaries. Sam was uncomfortable at the prospect of encomiums to his service.

Sam has never succumbed to the lure of big-city lights. He has a sense of place, which for him is not nearby New York City, but New Jersey, which to him has always been home.

Finally, there is an aspect of appellate judging that no one gets to see, no one but the judges themselves—how they behave in conference after oral argument, at which point the case is decided, and which I submit is the most critically important phase of the appellate judicial process.

In hundreds of conferences, I have never once heard Sam raise his voice, express anger or sarcasm, or even try to proselytize. Rather, he expresses his views in measured and tempered tones.

Second, integrity. Sam Alito is the soul of honor. I have never seen a chink in the armor of his integrity, which I view as total. That opinion is not undermined by the furor over the Vanguard issue, by which I remain baffled. My wife holds Vanguard mutual shares which I report on my financial disclosure form. However, I do not identify Vanguard on my recusal list because I am satisfied that my wife possesses no ownership interest in the Vanguard Management Company, which is what controls the recusal determination. She has never received a proxy statement, an opportunity to vote for directors, or any indicia of ownership, other than her aliquot share and the fund to the extent of her investment. I believe that the view of Dean Rotunda which is in your record explains why Judge Alito was not required under the law to recuse himself in the suit against Vanguard.

Third, intellect. Judge Alito's intellect is of a very high order. He is brilliant, he is highly analytical, and meticulous and careful in his comments and his written work. He is a wonderful partner in dialog. He will think of things his colleagues have missed. He is not doctrinaire, but rather is open to differing views and will often change his mind in light of the views of a colleague. Contrary to some reports, Sam does not dissent often. According to our court statistics, in the last 6 years he has dissented only 16 times, a little over two cases per year. That is the same number that I have dissented, and fewer than a number of our colleagues.

In my view, Sam Alito has the intellect to sit on the Supreme Court. I know all of its members. I know them reasonably well, and in my view he will be a strong and independent Justice, his own man. Finally, Sam's intellect is not abstract, but practical. He does not mistake the obscure for the profound.

Fourth, approach to the law. As I address this topic, I am acutely aware of the deep concern of the members of the Committee about this subject. I am also aware that my role here is to testify to fact, not to opinion, and hence I will express neither normative or predictive judgments.

The Sam Alito that I have sat with for 15 years is not an ideologue. He is not a movement person. He is a real judge deciding each case on the facts and the law, not on his personal views, whatever they may be. He scrupulously adheres to precedent. I have never seen him exhibit a bias against any class of litigation or litigants.

He was a career prosecutor, but in the numerous criminal cases on which we have sat together, if the evidence was insufficient or the search was flawed, he would vote to overturn the conviction. And if the record did not support summary judgment against the plaintiff in an employment discrimination or civil rights case, he would vote to reverse. His credo has always been fairness.

Now, I know that there has been controversy about certain ideological views expressed in some 20-year-old memos. Whatever these views may be, his judging does not reflect them. I think that the public does not understand what happens when you become a judge. When you take that judicial oath, you become a different

person. You decide cases not to reach the result that you would like, but based on what the facts and the law command. What you decide as a judge are not general principles, but the case in front of you. You do it as narrowly as possible. That is what Sam always does, with great respect for precedent. Sam Alito has been faithful to that judicial oath.

Now, my final point relates to another facet of his approach to the law, and the best calipers that I could find to measure his approach to the law was to compare it with my own. I have been a Federal judge for 35 years, one week and one day. My opinions would fill many book shelves, but I think that I am fairly viewed as a mainstream or centrist judge.

A computer survey run by our court librarian received 1,050 opinions in cases on which Sam Alito and I sat together. In these cases, we disagreed 27 times, which is probably about the same number that I would have disagreed with most other colleagues. Some cases turned on a reading of the record, others on how rigorously or flexibly we interpreted the reach of a statutory or constitutional provision or a State court's jurisprudence, or applied our usually deferential standard of review. But in every case on which we differed, Sam's position was closely reasoned and supportable either by the record or by his interpretation of the law, or both.

The short of it, members of the Committee, is that Sam Alito is a superb judge in terms of temperament, integrity and intellect, and he has exhibited a careful, temperate, case-by-case approach to the law.

Thank you for the opportunity to address you.

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

Chairman SPECTER. Thank you very much, Judge Becker. We now turn to Chief Judge Anthony Scirica, who, like Judge Becker, has known Judge Alito on the Third Circuit for the 15 years of Judge Alito's service there. Judge Scirica became Chief Judge in May of 2003, succeeding Chief Judge Edward Becker.

Judge Scirica has a bachelor's degree from Wesleyan, 1962; Michigan Law School, 1965; appointed to the district court by President Reagan in 1984, and to the circuit court also by President Reagan in 1987.

Thank you very much for coming in, Judge Scirica, and we look forward to your testimony.

STATEMENT OF ANTHONY J. SCIRICA, CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, PHILADELPHIA, PENNSYLVANIA

Judge SCIRICA. Mr. Chairman, thank you very much. For the last 15 years, I have worked with Judge Alito. For 15 years, we have decided thousands of cases while serving on the same court of appeals. On most cases, we have agreed, but not always. Judges don't always agree on every case.

As the Chief Justice remarked last summer, much like a baseball umpire, a judge calls balls and strikes. If the pitch is down the middle or way outside, the call is straightforward, but many pitches are on the corners and then the calls are difficult. These

cases require hard thought, and these are the cases where a judge earns his or her keep.

In 15 years on the court of appeals, Judge Alito has more than earned his keep. He is a thoughtful, careful, principled judge who is guided by a deep and abiding respect for the rule of law. He is intellectually honest, he is fair, he is ethical. He has the intellect, the integrity, the compassion and the judicial temperament that are the hallmarks of an outstanding judge.

On three separate occasions, I spoke with the representative of the American Bar Association during its evaluation process. My views and those of my colleagues on the court were sought by the American Bar Association because we have a unique perspective on Judge Alito, a perspective that no one else has. Anyone can read and interpret his opinions, but we know Judge Alito from almost daily contact over a period of years. We have sat together in the same conference room. We have discussed the cases, we have decided them, and we have exchanged legal memoranda.

Judge Alito approaches each case with an open mind and determines the proper application of the relevant law to the facts at hand. He has a deep respect for precedent. His reasoning is scrupulous and meticulous. He does not reach out to decide issues that are not presented in the case. His personal views, whatever they might be, do not jeopardize the independence of his legal reasoning or his capacity to approach each issue with an open mind. Like a good judge, he considers and deliberates before drawing a conclusion.

I have never seen signs of a pre-determined outcome or view, nor have I seen him express impatience with litigants or with colleagues with whom he may ultimately disagree. He is attentive and respectful of all views, and is keenly aware that judicial decisions are not academic exercises, but have far-reaching consequences on people's lives.

We admire him as a person. Despite his extraordinary talents and accomplishments, Judge Alito is modest and unassuming. His thoughtful and inquiring mind, so evident in his opinions, is equally evident in his personal relationships. He is concerned and interested in the lives of those around him. He has an impeccable work ethic, but he takes the time to be a thoughtful friend to his colleagues.

He treats everyone on our court and everyone on our court staff with respect, with dignity, and with compassion. He is committed to his country and to his profession, but he is equally committed to his family, his friends and his community. He is an admirable judge and an admirable person.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Judge Scirica.

We turn now to Third Circuit Judge Maryanne Trump Barry, a graduate of Mount Holyoke, 1958, Columbia University in 1962, with a master's and a law degree from Hofstra, 1974. Judge Barry was in the U.S. Attorney's Office before Judge Alito was there, appointed to the District Court in 1983 by President Reagan and to the Circuit Court in 1999 by President Clinton. She has worked with Judge Alito for the past 6 years as colleagues on the Third Circuit.

Thank you for joining us, Judge Barry, and we look forward to your testimony.

STATEMENT OF MARYANNE TRUMP BARRY, JUDGE, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, PHILADELPHIA, PENNSYLVANIA

Judge BARRY. Thank you, Mr. Chairman. Good afternoon. Good afternoon, members of the Committee. It is my privilege to appear before you and it is a particular privilege to speak on behalf of my friend and colleague, Judge Samuel Alito.

Now, I warn you, I may be a little free and call him "Sam" on occasion because Judge Alito and I go back almost 30 years, to 1977. In 1977, Judge Alito came to the United States Attorney's Office in the District of New Jersey following his clerkship with Judge Leonard Garth, who was and remains a giant on our court. Sam was assigned—see, I did it—to the Appeals Division and I was the chief of that division, although in those days, I didn't have very much more experience than he did. Now, I have said Appeals Division. That sounds very much more substantial than it was for what it was, the three Assistant United States Attorneys working very, very hard at a very, very responsible job.

We handled all the criminal appeals of those defendants who were convicted at trial. It was our job to master the record, to analyze the issues, to read the relevant cases, to write a persuasive brief on behalf of the United States, and, if necessary, to argue the case on the floor of the Court of Appeals. Nobody did it better than Sam Alito. And if there were any doubt on that score, the best evidence is the fact that after just 4 years as an Assistant United States Attorney, he went directly to the Office of the Solicitor General. Only the best are able to do that.

For the next 6 years, Judge Alito distinguished himself with public service in Washington, D.C., and then he returned to the District of New Jersey in 1987 as the United States Attorney. Important cases were brought on his watch, organized crime cases, drug trafficking cases, public corruption cases. I know, because I was there, and as a district court judge at that time, having been appointed by President Reagan, I handled some of his more important cases.

Now, I mentioned the cases that were handled on his watch for another reason. The tone of the United States Attorney's Office comes from the top. The standard of excellence is set at the top. Samuel Alito set a standard of excellence that was contagious, his commitment to doing the right thing, never playing fast and loose with the record, never taking a short cut, his emphasis on first-rate work, his fundamental decency. The Assistant United States Attorneys who worked for him were proud to do so. They admired him completely.

Now, of course, in 1990, Judge Alito became Judge Alito, and you have heard the most glowing things said about Sam as a colleague on our court. I embrace every glowing statement.

Let me just conclude with this. Judge Alito is a man of remarkable intellectual gifts. He is a man with impeccable legal credentials. He is a fair-minded man, a modest man, a humble man, and he reveres the rule of law. If confirmed, Judge Samuel A. Alito, Jr.

will serve as a marvelous and distinguished Associate Justice of the Supreme Court of the United States. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Judge Barry.

We turn now to Judge Ruggero Aldisert. He has a bachelor's degree from the University of Pittsburgh in 1942 and a law degree from the same institution in 1947, with intervening service in the Marine Corps. He served on the Court of Common Pleas of Allegheny County from 1961 to 1968, at which point he was appointed to the Third Circuit by President Lyndon Johnson. Judge Aldisert and I were reminiscing about my predecessor, Judge—Senator—he used to be a judge—Senator Joe Clark, whose seat I now occupy. He was Chief Judge from 1984 to 1986 and took senior status in 1986. He has been an adjunct professor at the University of Pittsburgh and has served with Judge Alito on the Third Circuit for the past 15 years.

Thank you for coming all the way from California, Judge Aldisert, to be with us today and we look forward to your testimony.

STATEMENT OF RUGGERO J. ALDISERT, SENIOR JUDGE, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, PHILADELPHIA, PENNSYLVANIA

Judge ALDISERT. Thank you, sir. Mr. Chairman and members of the Committee, I thank you for this invitation to offer my views on my colleague, but before proceeding into my formal statement, I want the record to show that there was a discussion this morning about ages of judges. Well, I am an old man.

[Laughter.]

Judge ALDISERT. And I will tell you how old I am. There is a certain distinguished United States Senator sitting up there who I swore in as a lawyer in the city of Pittsburgh over 40 years ago, and that is Orrin Hatch.

[Laughter.]

Judge ALDISERT. And I will also say that I presided over the first jury trial that he ever tried, and he won the case.

Senator LEAHY. Oh, that is sweet.

[Laughter.]

Senator HATCH. I am glad you said that, Judge. They don't believe that I did.

Senator LEAHY. I never knew you won one.

[Laughter.]

Chairman SPECTER. They have always gotten along very well together, Senator Leahy and Senator Hatch.

Judge ALDISERT. When I first testified before this Committee in 1968, I was seeking confirmation in my own nomination to the Federal Circuit Court. I speak now as the most senior judge on the Third Circuit, and I begin my brief testimony with some personal background.

In May 1960, I campaigned with John F. Kennedy in the critical Presidential primaries of West Virginia. The next year, I ran for judge, as was indicated, and I was on the Democratic ticket, and I served 8 years as a State trial judge. As the Chairman indicated, Senator Joseph Clark of Pennsylvania was my chief sponsor when

President Lyndon Johnson nominated me to the Court of Appeals, and Senator Robert F. Kennedy from New York was one of my key supporters.

Now, why do I say this? I make this as a point that political loyalties become irrelevant when I became a judge. The same has been true in the case of Judge Alito, who served honorably in two Republican administrations before he was appointed to our court. Judicial independence is simply incompatible with political loyalties, and Judge Alito's judicial record on our court bears witness to this fundamental truth.

I have been a judge for 45 of my 86 years, and based on my experience, I can represent to this Committee that Judge Alito has to be included among the first rank of the 44 judges with whom I have served on the Third Circuit, and including another 50 judges on five other courts of appeals on which I have sat since taking senior status.

Moreover, I have been a longtime student of the judicial process. I have written four books on the subject and more than 30 law review articles, and this study required me to study the current work of 22 Justices of the U.S. Supreme Court, and I have read hundreds of opinions of appellate judges of every Federal circuit, every State, and every political stripe. The great Cardozo taught us long ago, the judge even when he is free is not wholly free. He is not to innovate at pleasure. This means that the crucial values of predictability, reliance, and fundamental fairness must be honored, and as his judicial record makes plain, Judge Alito has taken this teaching to heart. He believes that legal outcomes will follow the law as dictated by the facts of the particular case, whether the facts involve commercial interests, government regulation, or intimate relationships.

According to these criteria, Mr. Chairman, Judge Alito is already a great judge. We who have heard his probing questions during oral arguments, we who have been privy to his wise and insightful comments in our private decisional conferences, we who have observed at first hand his impartial approach to decisionmaking and his thoughtful judicial temperament and know his carefully crafted opinions, we who are his colleagues are convinced that he will also be a great Justice.

If Judge Alito is confirmed, as I believe wholeheartedly he deserves to be, he will succeed a Justice who has gained a reputation as a practical Justice, whose resistance to ideologically driven solutions has positioned her as a swing vote on the Court. And as has been heard several times in this hearing, Justice O'Connor in 1995 described her approach to judging. What she said then is even more important today, and I quote: "It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis...The only way for judges to mediate these conflicting impulses is to do what they should do anyway: stay close to the record in each case that appears before them and make their judgments based on that alone." And knowing Sam Alito as I do, I am struck by how accurately these words also describe the way in which he has performed his work as a United States circuit judge. That is why, with utmost enthusiasm, I recommend that he be confirmed as an Associate Justice on the Supreme Court.

Thank you, Mr. Chairman.

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

Chairman SPECTER. Thank you very much, Judge Aldisert.

We now turn to Judge Leonard Garth, who is coming to us—you see him on the television screen, coming to us from California. Judge Garth is a graduate of Columbia, 1942, served in the United States Army, Lieutenant, from 1943 to 1945, and then from the Harvard Law School where he graduated in 1952. In 1969, he was appointed to the district court by President Nixon and then to the circuit court by President Nixon in 1973, a lecturer at Rutgers Law School and the Seton Law Hall School; has known Judge Alito since Judge Alito clerked for Judge Garth back in 1976 and 1977 and has served with him on the Third Circuit for the 15 years of Judge Alito's tenure there.

Judge Garth, we very much appreciate your being with us, and we look forward to your testimony.

STATEMENT OF LEONARD I. GARTH, SENIOR JUDGE, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, CHICAGO, ILLINOIS

Judge GARTH. Thank you, Senator Specter, Senator Leahy, and the honorable members of the Senate Judiciary Committee, and, of course, my own family of judges who have preceded me in speaking to you today.

I, too, am privileged to appear before you today, albeit by videoconferencing rather than in person. I cannot be with you in person because I recently had some major spinal surgery, and I find it extremely difficult and painful to travel.

As Senator Specter has indicated, I have served as a Federal judge for some 36 years: as a district court judge in New Jersey, and since August 1973 as a member of the Third Circuit Court of Appeals.

Now, I do want to interject and say that in that respect, perhaps Judge Aldisert is older than I am, but not by many days. And I am almost as old as he is, but not quite as handsome as Judge Barry of my court.

[Laughter.]

Judge GARTH. I hope you will forgive that aside, but I want to ask you for something else to forgive me. I have heard all of my colleagues speak so eloquently and, I will use the term that Judge Barry used, glowingly about Judge Alito. But I have known him just a little bit longer and in a different capacity over the course of his career.

Following his graduation from law school, he served as one of my two law clerks in 1976 and 1977. And as you have heard, since 1990 he has served as my colleague on the court of appeals. During the interim years, because of the relationship that we developed during his clerkship and the fact that both he and I are New Jersey residents, we remained close to one another. Hence, I think I can speak knowledgeably about Sam's qualifications, his talents, his discretion, his honesty, his fairness, and his integrity. These are qualities that Judge Alito possesses now and has possessed since the very beginning of his legal career.

Let me first tell you about Sam's clerkship with me. As you may know, a law clerk is a judge's legal advisor and a sounding board, if I may use that term. But he or she often becomes much more than that—a member of the judge's extended family. And as a result, a judge gets to know his law clerk in a particularly personal way. I knew Sam in this personal way at the very beginning of his career as a lawyer. For that reason, I think I have a unique perspective to share with you about him.

I chose Sam to be my law clerk in 1976 from among the literally hundreds of applicants who sent their resumes to me and the other judges of our court that year. Sam was still a law student when I interviewed him, but he struck me in that encounter as fiercely intelligent, deeply motivated, and extremely capable.

I did not know at that time that Sam was the son of Samuel Alito, Sr. That is a gentleman who had impressed me very, very much as a witness in a New Jersey redistricting case that I heard about 1972. Once I made the connection, however, I fully understood why Sam was so impressive and why he regarded—and regards today—his father as a role model.

During his tenure with me, Sam bore out all my initial impressions of his excellence—impressions which had led me to engage him. He was a brilliant and exceptional assistant to me. He enabled me to test judicial theories and to fashion appropriate judgments in each case that came before our court.

I have had some 85 law clerks assisting me in chambers over the course of my career on the bench. They have all been extremely well qualified in all ways to serve a court of appeals judge. Sam Alito stands out even among that very elite group.

During the year that he was my law clerk, Sam and I frequently took an afternoon walk near the courthouse in Newark and discussed the cases while we walked. I can tell you that the recommendations and arguments that Sam made about those cases were, as my colleagues have pointed out, always reasoned, principled, and supported by precedent. I developed then a deep respect for Sam's analytical ability, his legal acumen, his judgment, his institutional values, and, yes, even his sense of humor, which, if he is confirmed, as I hope he might, will probably compete with that of other Justices.

Few of the cases that come before our court are "slam dunk" cases. Most involved difficult questions on which reasonable people can disagree. And, generally, Sam and I reached agreement after discussing these cases, but more than once we did not. Even in those latter cases, the ones on which we disagreed, I understood and respected the positions that Sam advanced and the contours of his analyses.

Our afternoon walks invariably ended at a neighborhood store—T.M. Ward Company—where we purchased peanuts and coffee. I note parenthetically that Ward's has since honored Sam by naming a special blend of coffee that he favors "Judge Alito's Bold Justice Blend." I think there are a few of us that have that distinction.

After he left my chambers, Sam continued on in public service, as you have heard. In a letter to the then Deputy Assistant Attorney General Arnold Burns, I endorsed Sam's candidacy for United

States Attorney for the District of New Jersey, and I want to just read you what I wrote. This was a long, long time ago:

I can certify to Mr. Alito's integrity, ability, discretion, and honesty. Above and beyond those qualities, however, I believe his talents as a lawyer are exceptional. I am sure that his tenure in government service since he has left my chambers has reflected the fact that he is a thorough, meticulous, intelligent, and resourceful attorney and that his judgments are mature and responsible. Indeed, he was one of the finest law clerks I have had the privilege to engage. And if I were to rate him on the basis of 1 to 10–10 being the highest rating—he would, without question, receive a 10-plus rating.

I stressed these same attributes when I endorsed Sam for membership on our court several years later. He has more than lived up to my rating and the qualities that I attributed to him in the 15 years since he joined the court and became my colleague.

Sam is an intellectually gifted and morally principled judge. We have not always agreed on the outcome of every case, as I have just recently stated. Just this fall, for example, Sam dissented from a majority opinion that I wrote in an Employee Retirement Income Security Act—ERISA—case. In that case, Sam and I disagreed about how two provisions of the statute interact. I and the other majority judge were attracted in large part to the reasoning of the Second Circuit. Judge Alito, on the other hand, was attracted by the reasoning of the Seventh Circuit. Even in the cases on which we disagree, however, I always respect Sam's opinion, just as I did during our afternoon walks when he was my law clerk.

Sam is also a prudent judge. Make no mistake: he is no revolutionary. He is a sound jurist, always respectful of the institution and the precepts that led to decisions in the cases under review.

I have heard concerns expressed about whether Judge Alito can be fair and evenhanded. Let me assure you from my extensive experiences with him and with my knowledge of him, going back, as I have stated, over 30 years—that he will always vote in accordance with the Constitution and laws as enacted by Congress. His fairness, his judicial demeanor and actions, and his commitment to the law, all of those qualities which my colleagues and I agree he has, do not permit him to be influenced by individual preferences or any personal predilections.

As you may know, when the judges of our court meet in conference—and I think Judge Becker referred to this in his remarks—we are the only individuals in chambers. No law clerks, no assistants, no administrative personnel, or indeed anyone else attend these conferences. I can tell you with confidence that at no time during the 15 years that Judge Alito has served with me and with our colleagues on the court, and the countless number of times that we have sat today in private conference after hearing oral argument, has he ever expressed anything that could be described as an agenda, nor has he ever expressed any personal predilections about a case or an issue or a principle that would affect his decisions.

He has a deep and abiding respect for the role of *stare decisis* and established law. I appreciate, of course, that the Supreme Court can retreat from its earlier decisions, but it does so rarely

and only in very special circumstances, and I am convinced that if Judge Alito is confirmed as an Associate Justice of the Supreme Court, he will continue to honor *stare decisis* as he did as a law clerk and as he has done as a member of our court. He will sit among those jurists whose qualities of fairness and of principles are the loadstar of the judiciary. In my opinion, Sam is as well qualified as the most qualified Justices currently sitting on the Supreme Court.

A word about Sam's demeanor is in order. Sam is and always has been reserved, soft-spoken, and thoughtful. He is also modest, and I would even say self-effacing, and these are the characteristics I think of when I think of Sam's personality. It is rare to find humility such as his in someone of such extraordinary ability.

Over the 30 years I have known Sam, I have seen him grow professionally into the reserved, mature, independent, and apolitical jurist that graces our court today. I regard him as the most qualified member of our court to be considered as an Associate Justice of the Supreme Court. I know that just as Judge Alito has brought and brings grace and luster to the Third Circuit, so too will he bring grace and luster to the U.S. Supreme Court if he is confirmed.

Thank you, members of the Senate Judiciary.

Chairman SPECTER. Thank you very much, Judge Garth, coming from, I have just been advised, from Phoenix, Arizona. Thank you.

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

Chairman SPECTER. Our next witness is Judge John Gibbons, a graduate of Holy Cross in 1947 with a bachelor's, Harvard Law School in 1950. He was nominated to the Third Circuit by President Nixon in 1970, Chief Judge from 1987 to 1990, at which time he resigned to become a professor of law at Seton Hall University. He now is in the practice of law. He has known Judge Alito for more than 20 years, when Judge Alito was a U.S. Attorney and tried cases before Judge Gibbons.

Thank you very much for being with us today, Judge Gibbons, and we look forward to your testimony.

STATEMENT OF JOHN J. GIBBONS, JUDGE (RETIRED), U.S. COURT OF APPEALS, AND DIRECTOR, GIBBONS, DEL DEO, DOLAN, GRIFFINGER AND VECCHIONE, NEWARK, NEW JERSEY

Judge GIBBONS. Mr. Chairman and members of the Judiciary Committee, as you all probably know, or as Senator Specter has just said, I was a member of that court of appeals where Judge Alito is now a member for 20 years, and indeed, it was my retirement from that court 16 years ago that created the vacancy which Judge Alito filled on the court of appeals.

Since his appointment, lawyers in the firm of which I am a member have been regular litigators in the courts of the Third Circuit, not only on behalf of clients who pay us handsomely for such representation, but also frequently for the firm's Gibbons Fellowship Program on behalf of nonpaying clients whose cases have presented those courts with challenging human rights issues. The Gibbons Fellowship Program is certainly a significant part of our practice,

as amply demonstrated by the fact that since 1990, Gibbons Fellows lawsuits have resulted in 115 reported judicial decisions.

This Committee should appreciate that the Court of Appeals for the Third Circuit has been for the 50-plus years that I have followed or participated in its work a centrist legal institution. An important reason why that is so is that many years ago, the court adopted the requirement that all opinions intended for publication must, prior to filing, be circulated by the opinion writer not only to the members of the three-judge panel, but also to the other active judges on the court. The purpose of this internal operating rule was to permit each active judge not only to comment upon the opinion writer's treatment of Third Circuit and Supreme Court precedent, but also to vote to take the case en banc for rehearing by the full court if the judge thought that the opinion was outside the bounds of settled precedents. Thus, the level of interaction among the Third Circuit appellate judges has, for a half-century, been unusually high.

This Committee should also appreciate that appointment to an appellate court where one has life tenure is a transforming experience. I remember a former judicial colleague saying to me once after several years on the bench, "John, what other job in the world is there in which you can look in the mirror while you are shaving and say to yourself, all I have to do today is the right thing according to the law?" A good judge puts aside interests of former clients, interests of organizations they have belonged to, and interests of the political organization that may have been instrumental in one's appointment. I personally experienced that transformation and I witnessed it repeatedly in the judicial colleagues who joined the court after I did.

These two points, the unusual internal cohesion of the Third Circuit Court of Appeals and the transformative experience of serving on a court protected by life tenure, suggests to me that the Committee members, in determining whether or not to vote in favor of confirming Judge Alito, should concentrate not on what he thought or said as a recent Princeton graduate or as a young lawyer seeking advancement as an employee of the Department of Justice, but principally, if not exclusively, on his record as an Article III appellate judge.

If you look, as you should, at that 15-year record as a whole, you cannot in good conscience conclude that Judge Alito will bring to the Supreme Court any attitude other than the one held by the colleague I mentioned who thought important thoughts about judging every morning while he was shaving. He has consistently followed the practice of carefully considering both Supreme Court and Third Circuit precedents. Very few of the opinions he has written for a unanimous panel or for a panel majority have deemed his colleagues among the active judges to vote to take the case en banc. The cases in which he participated that produced dissenting opinions by him, or from him, all, it seems to me, were close cases in which either the law or the evidentiary record were such that equally conscientious judges could quite reasonably disagree about the outcome.

Take, for example, cases presenting challenges to State regulations of abortion, certainly a hot-button topic for many people who

are opposing Judge Alito's confirmation. I found four such cases in which he participated. In three of them, he decided against State regulations that might have put a burden on a woman's choice for an abortion. In the fourth case, about which a lot has been said, *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, Judge Alito dissented from a majority opinion, holding unconstitutional the Pennsylvania spousal consent provision for an abortion. And it is that dissent which the opponents of his confirmation talk about most frequently. They seem to urge that on the basis of that dissent, Judge Alito is so far out of the mainstream of constitutional law that his confirmation will endanger the constitutional protection of civil rights practically across the board.

In your consideration of that dissent, I suggest that you should take into account these points. First, at the time the circuit considered the Pennsylvania spousal consent statute, the Supreme Court had not yet decided whether States could impose such a requirement, and second, the court of appeals majority invalidated the statute. Had the Supreme Court simply denied certiorari, that invalidation would have remained in place. Instead, at least four Justices voted to grant certiorari. If the issue of the statute's constitutionality was so overwhelmingly clear, why was certiorari granted to endorse the Third Circuit's majority position? Clearly, *Planned Parenthood* v. *Casey* was, at the time the court of appeals acted, a case over which conscientious judges could reasonably disagree. Otherwise, the Supreme Court would simply have denied certiorari.

Nothing in the Supreme Court's case law dealing with abortion relieves the appellate judges and intermediate appellate courts from the duty of making a conscientious effort to fit the case before them within that case law, and the four abortion cases in which he participated show that that is exactly what Judge Alito has done.

Another opinion that has caught the attention of those clamoring for Judge Alito's scalp is his dissent in *United States* v. *Rybar*, in which he would have held that the Supreme Court decision in *Lopez* prohibited Congress from regulating mere possession of machine guns. A majority opinion upheld this statute. Unlike *Casey*, the Supreme Court didn't review that case. Thus, the question of the reach of *Lopez* was left open, and when the issue reached the Ninth Circuit in the *United States* v. *Stewart* in 2003, it adopted Judge Alito's dissenting position. Some opponents of his confirmation have relied on that dissent in suggesting that Judge Alito is perhaps a captive of the right-wing gun lobby. This Committee, after actually reading *Lopez* and *Rybar* and the Ninth Circuit case, I suggest, cannot in good conscience find the dissent to be anything more than a good faith effort to somewhat unenthusiastically apply the perhaps unfortunate Supreme Court precedent of *Lopez*. Indeed, in his *Rybar* dissenting opinion, Judge Alito suggested how Congress could cure the *Lopez* violation.

The extent to which opponents of Judge Alito's confirmation largely ignore his overall 15-year record as a judge suggests, at least to me, that the real target for many of the somewhat vitriolic comments on the nomination is less him than the executive branch administration that nominated him. The Committee members should not think for a moment that I support Judge Alito's nomination because I am a dedicated defender of that administration. On

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-

demic 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 seguey 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-

eral's Office, he returned in 1987 as United States Attorney. Shortly after his arrival, he began selecting the supervisory staff who would assist him during his tenure, and after reviewing my work in the Appeals Division, he asked me to serve as Chief of Appeals. This was particularly meaningful to me for two reasons: First, Judge Alito's estimable reputation as an appellate and Supreme Court advocate had preceded him, and the importance that he placed on the appellate process was well known. Second, in 1987, it was still unusual for women to be elevated to positions of authority in either Government or private offices, and I was gratified to see Judge Alito's appointments were based on merit, not gender.

As a member of the supervisor staff, I met frequently with Judge Alito, sometimes alone but usually with other division chiefs, to discuss ongoing significant criminal prosecutions, appeals, and investigative initiatives. During these meetings he openly invited the thoughts and input of everyone, asking subtle questions to guide the discussion to areas where he had concerns. Although it was clear that in the end he would make up his own mind, it was equally clear that there was no danger in advocating a position that he might ultimately reject. His goal was to get as much information as possible so his decisions could be firmly grounded in a comprehensive understanding of the law and the facts.

Consistent with this approach, his stewardship of the office was grounded in quiet confidence; his decisions and actions were measured and thoughtful—never impulsive or purely reactive. Although it is possible for U.S. Attorneys to use their offices as showcases for themselves and their further aspirations, that is, to enjoy and employ the limelight, this was never Judge Alito's way. It was always the work, not the image, that came first.

It is a well-known motto of Federal prosecutors—one most often heard on those occasions when they suffer a defeat—that "the United States wins when justice is done." Under the leadership of Samuel Alito—and I should say "Judge Alito"—that was more than a catch-phrase. It was office policy. Judge Alito expected the assistants in his office to work hard to achieve and preserve convictions where the evidence supported guilt, but he also demanded that they remain ever mindful of the very great power that they wielded as Federal prosecutors and the need to use that power with appropriate discretion. Based on my experience in that office, I am confident that Judge Alito would approach the power of being on the Supreme Court with an equal if not heightened sense of responsibility and care.

As I noted earlier, I am present a criminal defense attorney, and I am also a lifelong Democrat. As such, I might be expected to have concerns about Judge Alito's nomination. However, in supporting his nomination, I am actually representative of a large number of former colleagues of Judge Alito of all political stripes who support his nomination because they know firsthand what kind of man he is. Those of us who know him know that he is not an ideologue and that he does not use his position to pursue personal agendas. We have seen his profound respect for the law and precedent and his unfailing respect for all participants in the criminal justice system, prosecutor, defense counsel, and defendants alike. We know him to be a man of unquestionable ability and integrity, one who ap-

proaches each case in an open-minded way, seeking to apply the law fairly.

The appointment of Sandra Day O'Connor to the Supreme Court in 1981 was an event of special importance to me. At the time I thought that the most significant fact was that she was a woman, the first woman on the Court, and, of course, that was truly ground-breaking. But in time I have come to appreciate that, more than her gender, it is her extraordinary mixture of character and intellect that has most profited our country. As a person of both great character and great intellect, Samuel Alito would be a worthy successor to Justice O'Connor, and I hope that he will be speedily confirmed.

Thank you very much.

[The prepared statement of Ms. Axelrod appears as a submission for the record.]

Chairman SPECTER. Thank you, Ms. Axelrod.

Our next witness is Professor Michael Gerhardt, distinguished professor of constitutional law at North Carolina School of Law. Professor Gerhardt is the author of a number of books on constitutional law, served as special consultant to the White House on the nomination of Justice Stephen Breyer. He received his bachelor's degree from Yale in 1978, master's from the London School of Economics, and law degree from the University of Chicago in 1982.

Thank you for joining us, Professor Gerhardt, and the floor is yours for 5 minutes.

STATEMENT OF MICHAEL J. GERHARDT, SAMUEL ASHE DISTINGUISHED PROFESSOR OF CONSTITUTIONAL LAW, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL LAW SCHOOL, CHAPEL HILL, NORTH CAROLINA

Mr. GERHARDT. Thank you very much, Mr. Chairman, Senator Leahy, and other distinguished members of the Committee.

For almost 20 years, I have had the honor of teaching constitutional law. For almost as long, I have studied the process of Supreme Court selection in some detail and have had the privilege and opportunity to write about it at some length. And I come to you today with the hope that whatever expertise I have developed in that process may be of some use to you.

In this statement, I want to just make three brief observations as extensions of my written statement, which you already have.

First, the Constitution allows every Senator to make a decision about a Supreme Court nomination based on whatever factors he or she considers to be pertinent, including judicial philosophy. The Constitution, I believe, does not require absolute deference to a President when it comes to making Supreme Court nominations, nor, for that matter, does it require hostility. The Constitution allows you, I think, to do what you see fit. It allows you to engage in a robust dialog about the qualifications for service on the Supreme Court.

With that in mind, I just want to give you one brief example of what I am talking about what the Constitution allows just to illustrate, I think, the robustness of the process that we shouldn't be ashamed of but, in fact, should be prepared to embrace.

Much has been said about the fact that Judge Alito has had the most judicial experience of any nomination made to the Supreme Court in almost 70 years, but nobody mentions who that other nominee was. The other nominee that preceded him was Benjamin Cardozo, and Cardozo, as we probably all know, was not President Hoover's first choice. It wasn't even President Hoover's second choice. In fact, he was the choice of the Senate. And the Senators came to the President and said, in effect—in fact, members of this Committee came to the President and said, in effect, that this is the person we want, here are the criteria we think are important. President Hoover was not obliged in any way, shape, or form to accept that, but he did. And I simply make that observation to underscore the fact that there is an opportunity for exchange between the Presidency and the Senate with respect to a Supreme Court nomination, and we should be prepared and as open as possible in talking about the qualifications for service. And, again, if each of you believes to some extent judicial philosophy is appropriate, it is important to say so and to act accordingly.

Second, you know better than I the important function of this Committee as a gatekeeper. You are in the position, at least the initial position, of being able to sort of filter out the views and personnel you don't want to see reflected on the Supreme Court, or you are in the position of determining what views and personnel you do want to have on the Supreme Court. The Supreme Court is largely a function of choices made by the President and the Senate. The Senate and the President help to make the Supreme Court what it is. And I think that that dual partnership is something we ought to keep in mind because in making determinations and judgments about a Supreme Court nomination, the Senate has an extremely important role to play. And the more vigorously you perform that role, I think the more credit it does to you, and the more we can be assured that whatever choice gets made about the people that serve on the Court, we can have confidence that they can be there, that they can trust the—that they are worthy of the trust you have given them to exercise the awesome power of judicial review over the constitutionality of not just your actions, but the actions of other branches.

Third, I must confess—and I regret this—an error in my written statement. I discuss in this written statement the importance of assessing whether or not Judge Alito was a bottom-up or top-down judge. A bottom-up judge is somebody who decides incrementally, one at a time, and has a great deal of respect for precedent. A top-down judge is somebody who tends to infer principles directly from the Constitution and then impose them from the top down. And in the course of trying to figure out whether Judge Alito was bottom-up or top-down, I made a mistake in not identifying Justice Harlan as one of the Justices he most admires. I just want to sort of correct that error. The reverence for Justice Harlan is almost universal. He is certainly one of the Justices I most admire.

But the admiration for Justice Harlan does raise a question, and the question is this: How, if at all, does Judge Alito's reverence for Justice Harlan make him the same kind of judge or a different kind of judge than other Justices who also have admired Justice

Harlan, including Justice Kennedy and Justice Souter? Is he the same kind of judge as they are, or is he a different kind of judge?

Reverence for Justice Harlan is obviously pertinent, it is important, but it may only tell us so much. And I think it is useful and very important for you not to shy away from asking the tough questions. You have asked the tough questions. I think it does you credit. I think that is what this process is all about, and I am privileged to be a part of it.

Thank you.

[The prepared statement of Mr. Gerhardt appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Gerhardt.

Our next witness is Commissioner Peter Kirsanow, U.S. Commission on Civil Rights, Partner with the law firm of Benesch Friedlander. He is also on the board of directors of the Center for New Black Leadership, and on the advisory board for the National Center for Public Policy Research. His bachelor's degree is from Cornell, law degree from Cleveland State with honors.

Commissioner Kirsanow has reviewed Judge Alito's civil rights record and will testify as to his conclusions in that area.

STATEMENT OF PETER N. KIRSANOW, U.S. COMMISSION ON CIVIL RIGHTS, AND PARTNER, BENESCH FRIEDLANDER COPLAN & ARONOFF, LLP, CLEVELAND, OHIO

Mr. KIRSANOW. Thank you, Mr. Chairman, Senator Leahy, members of the Committee.

The U.S. Commission on Civil Rights was established pursuant to the 1957 Civil Rights Act, among other things, to act as a national clearinghouse for matters pertaining to discrimination and denials of equal protection. And in furtherance of the clearinghouse responsibility and with the help of my assistant, I have reviewed the civil rights cases in which Judge Alito has participated on the Third Circuit, as well as his record as an advocate before the Supreme Court in the context of prevailing civil rights jurisprudence.

Our examination reveals that Judge Alito's approach to civil rights is consistent with the generally accepted textual interpretation of the relevant constitutional and statutory provisions, as well as governing precedent. His civil rights opinions evince appreciable degrees of judicial precision, modesty, restraint and discipline, and in short, his civil rights record is exemplary, legally sound, intellectually honest and with an appreciation and understanding of the historical bases undergirding our civil rights laws.

Our examination also reveals that several aspects of Judge Alito's civil rights record have been mischaracterized, some of the criticisms misplaced. Just three brief examples.

First, some have contended that Judge Alito has a regressive or anti-civil rights view of affirmative action, one that is to the right of Justice O'Connor. This contention is based on three affirmative action cases in which Judge Alito participated on brief, while he was with the Solicitor General's Office in the Reagan administration. These three cases are *Wygant* v. *Jackson Board of Education, Sheet Metal Workers* v. *EEOC*, and *Firefighters* v. *Cleveland*, all of which involved expansive racial preferences as remedies for discrimination. Notwithstanding the fact that positions espoused as

an advocate are poor proxies for interpretive doctrine, there is nothing in the record to suggest that Judge Alito would somehow restrict remedies currently available under *United Steelworkers* v. *Weber*, or *Johnson* v. *Transportation Agency* any more so than Justice O'Connor would.

Judge Alito essentially argued that rigid quotas are unlawful, and opposition to quotas and expansive racial preferences do not evince a hostility to affirmative action, let alone civil rights in general.

Second, some critics have said that Judge Alito's decision or dissent in *Bray* v. *Marriott* is evidence of his supposed tendency to impose "almost impossible evidentiary burdens on Title VII plaintiffs." But a review of *Bray* shows that Judge Alito's dissent actually steadfastly adheres to Third Circuit precedent, and carefully applies the law to the facts, as the majority opinion seems to dilute the commonplace standard of proof in a Title VII case reducing or converting the burden of production on the part of a defendant into a burden of proof.

The third contention unsupported by our examination is that Judge Alito's civil rights record is out of the mainstream. Judge Alito participated in 121 Third Circuit panels that decided cases that may be termed in the traditional sense civil rights cases. Now, one would expect that if someone were out of the mainstream, that by definition he would rarely agree with his colleagues on the Third Circuit, and moreover, you would expect that he would almost never agree with his Democratic colleagues and would vote overwhelmingly with his Republican colleagues. But an examination of Judge Alito's extensive record on the Third Circuit shows that his co-panelists on civil rights cases actually agreed with his written opinions and votes 94 percent of the time, and that is whether or not those panelists were Republican or Democrat, and in fact, produced unanimous decisions 90 percent of the time. Moreover, judges appointed by Democratic Presidents actually agreed with Judge Alito's civil rights positions at a slightly higher rate than his Republican colleagues by a margin of 96 percent to 92 percent. In fact, judges appointed by Democratic Presidents Johnson, Carter and Clinton agreed with Judge Alito's civil rights position at the same or slightly higher rate than judges appointed by President Reagan or either President Bush.

Obviously, in order to fairly assess Judge Alito's civil rights cases, you have to look at the actual facts and applicable law in each case, but it cannot be credibly stated that Judge Alito is hostile to civil rights, out of the mainstream, or extreme, without leveling the same charges against every other judge on the court, whether Republican or Democrat.

I respectfully submit that Judge Alito's 24-year record on matters pertaining to civil rights demonstrates a firm and unwavering commitment to equal protection under the law, and he has a comprehensive and precise understanding of our civil rights laws that will make him an outstanding addition to the Supreme Court.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Kirsanow appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Commissioner Kirsanow.

Our next witness is Professor Samuel Issacharoff, Reiss Professor of Constitutional Law at New York University School of Law, an author of several books focusing on voting rights and civil procedure. He had taught at the Texas Law School. Bachelor's degree from Binghampton University in 1973 and law degree from Yale in 1983.

Thank you for joining us, Professor, and we look forward to your testimony.

STATEMENT OF SAMUEL ISSACHAROFF, REISS PROFESSOR OF CONSTITUTIONAL LAW, NEW YORK UNIVERSITY, NEW YORK, NEW YORK

Mr. ISSACHAROFF. Thank you, Mr. Chairman, Senator Leahy, members of the Committee. I want to direct my remarks to the question of the reapportionment cases and the significance of the Court's role in overseeing the basic fairness and integrity of our political process.

I raise this issue because the reapportionment cases stand for something beyond simply the doctrine of one person/one vote. They also stand for the role that the Court has to play in making sure that the political process does not turn in on itself and does not close out those who are not able to effectively marshal their votes, their power, their support under the rules that govern the political process.

It is significant because no Justice of the Supreme Court over the past 35 years has hesitated to assume the responsibility so well articulated by the Supreme Court in the famous *Carolene Products* footnote. Justice Stone, in 1938, on behalf of the Court, recognized a special need for exacting judicial review in the case of laws, and these were his words, "that restrict those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." The reapportionment cases of the 1960s, the cases that appear to have so deeply concerned Judge Alito as a young man, were the realization of the *Carolene Products* insight.

In the 40 years that have passed since the reapportionment cases, the Supreme Court has bravely entered into the political thicket. Sometimes the Court's role is simply what appears to be routine, such as access to the ballot and the polling place, sometimes it is the truly extraordinary as with *Bush* v. *Gore*. The result of these interventions, although obviously not without controversy, is a political system that is more open and more participatory that at any time in our history.

It is difficult to imagine in this day and age any serious objection to the rights identified in these cases. In *Reynolds* v. *Sims*, for example, Chief Justice Warren wrote that "Full and effective participation by all citizens in State Government requires that each citizen have an equally effective voice in the election of members of his State legislature."

But it is also well to recall the facts presented in these cases. The willful failure to reapportion had transformed American legislative districts into grossly unrepresentative institutions in which voters of the growing cities and suburbs found themselves unable

to participate effectively in a political process controlled by rural minorities.

In Alabama, the site of *Reynolds* v. *Sims*, one county had 41 times as many representatives per person as another. That pattern was repeated across the country. In California, to pick just one, Los Angeles County had one State Senator, as did another county with one one-hundredth of its population.

While the basic principle of one person/one vote may now be so deeply embedded in our culture as to seemingly defy any controversy, its implementation was another matter, and I think that is what is significant about these cases. Those whose votes were discounted to the point of irrelevance were repeatedly frustrated by entrenched political power. The intervention of the Supreme Court was indispensable, indeed, it was the single most successful remedial effort by the Supreme Court in our history. It changed and made fundamentally more democratic the legislative process, and it made the legislative process one that was deserving of judicial deference.

When I teach these cases today to students, however, and even when I was a law student in the early 1980s, the idea of one person/one vote appears so elemental, so in keeping with the most rudimentary sense of democracy and legitimacy, that students cannot even fathom that a society, a democratic society could be organized on any other basis.

I do not know how a young college student in 1970 might have reacted, particularly when presented with the formidable writings of Alexander Bickel. Bickel captured well the tension between a commitment to popular sovereignty and the overriding commands of the Constitution, and it is well to remember that although we turn our attention here to the Court, it is obviously the Congress that is a significant and major institution expanding our democratic horizons, as with the Voting Rights Act of 1965.

Nonetheless, I would suggest that the fact that the reapportionment cases should appear on a job application in the 1980s is at least a curiosity. Perhaps it was through recounting of an intellectual path, but perhaps an indication of a continuing view that courts have no business in checking the abuses of political power. If it is the latter, it should be deeply troubling to this Committee and to the Senate, for the issue of the day is not the intellectual trajectory of a thoughtful college student, but the implications for the vital role the Supreme Court plays in our democratic life.

Critical issues in the organization of our democracy remain unsettled and are going to appear as they do before the Court. Our system of redistricting has run amuck, the competitive lifeblood drained by self-perpetuating insiders. This may prove to be the same sort of structural obstacle to democratic reform as had to be dislodged by reapportionment decisions of 40 years ago.

The answer may not be simple, but the role of the Court is absolutely critical. So too with campaign finance. So too with even the mechanics of our electoral system. In all of these areas there is reason to doubt that incumbent officials are able to fix the political process that elected them. As Justice Scalia has wisely cautioned, "the first instinct of political power is the retention of power." While not without controversy or difficulty, our collective experi-

ence over the past 40 years confirms that the Nation is much the better for the robust attention of the Court to the health of our democracy.

I would suggest to this Committee and to the Senate that before confirming any nominee to the Supreme Court, the Senate of the United States should be able to conclude with confidence that regardless how a nominee may vote on any given case, he or she will assume the full responsibility of protecting the integrity of our democratic processes.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Issacharoff appears as a submission for the record.]

Chairman SPECTER. Thank you, Professor.

Our next witness is Mr. Carter Phillips, one of the premier appellate lawyers in the country. He has handled some 47 cases before the Supreme Court of the United States, some of those as Assistant to Former Solicitor General Rex Lee. He is a graduate of Northwestern School of Law, a clerk for Chief Justice Warren Burger, and rated as one of the 100 best lawyers in America by the National Law Journal.

At your hourly, Mr. Phillips, thank you for joining us, and how much does 5 minutes cost?

Mr. PHILLIPS. Well, I will not answer that question, but I will tell you that the law firm has taken a hit today.

[Laughter.]

STATEMENT OF CARTER G. PHILLIPS, MANAGING PARTNER, SIDLEY AUSTIN, LLP, WASHINGTON, D.C.

Mr. PHILLIPS. Thank you, Mr. Chairman and members of the Committee.

Oftentimes it strikes me that baseball metaphors tend to be used at these hearings, and it at least impresses me that perhaps a tennis metaphor is more appropriate at this point based on the testimony of Judge Alito in the last two and a half days and the extraordinary eloquent testimony of the Third Circuit judges in the last hour or so, it would strike me that we ought to be at the point of game, set and match, because it seems to me that there can be no serious question about either the qualifications on ability or ethics or any other standard that this Committee would want to use in reviewing the qualifications of Judge Alito to become a Supreme Court Justice.

You have my written testimony. I am not inclined to repeat it at this point. One thing I have learned as an appellate advocate is if you think you are ahead on points, you would do well to sit down and shut up. So all I am going to do is simply recount for you my own experiences with Judge Alito when we were in the Solicitor General's Office, not because I think they add all of that much, but I do think they debunk the notion that somehow Judge Alito has long been an ideologue of any sort.

The judge and I met when we both interviewed with Judge McCree, who was Jimmy Carter's, President Carter's Solicitor General. We were interviewing for a job as Assistants of the Solicitor General. We had applied for that position prior to the election. Neither of us knew which direction that election was going to come

out. We were seeking that position not because we had any kind of an agenda to fill, but solely because each of us hoped to get a very prestigious position.

Now, as it happened in that first meeting, Judge Alito and I ended up being seated together by ourselves when all the other members of the Solicitor General's Office went off to another table and we had what I think is fairly described as at least a little bit of an uncomfortable conversation because we had assumed that we were competing for exactly the same job and had a very interesting exchange of views about our backgrounds and our experiences, he being an existing Assistant U.S. Attorney with an extraordinary amount of experience as an appellate lawyer, I being a former law clerk and, at that time, an assistant professor of law. But we built a great friendship based on that conversation and the fact that we both ended up in the Solicitor General's Office. Well, what struck me is that whether or not the Solicitor General had been Wade McCree or whether, as it turned out, the Solicitor General was Rex Lee, our service to the United States would have been precisely the same.

And the only thing I would say in that regard is that during the three-plus years that I have served with Judge Alito in that office, I had an opportunity to talk with him almost every day, and in that capacity, I learned an enormous amount from him about both his compassion and his intellect and his open-mindedness and his enthusiasm to assist all of the lawyers in that office. He was a great lawyer. He was a tremendous oral advocate. He went on, obviously, to a very distinguished career. While I have my own opinions on what he has accomplished on the Third Circuit, it seems to me I cannot add to the eloquence of what has already been said by the judges of that court and I would simply urge this Committee to confirm him as a Justice. Thank you.

Chairman SPECTER. Thank you very much, Mr. Phillips.

[The prepared statement of Mr. Phillips appears as a submission for the record.]

Chairman SPECTER. Professor Goodwin Liu is an expert in constitutional law, civil rights, and the Supreme Court at the University of California, Boalt Hall. He is a graduate of Stanford with his bachelor's degree, and master's from Oxford and law degree from Yale Law School in 1998. He served as a law clerk for Supreme Court Justice Ruth Bader Ginsburg during the October 2000 term.

Thank you for coming in today, Professor Liu, and we look forward to your testimony.

STATEMENT OF GOODWIN LIU, ASSISTANT PROFESSOR OF LAW, BOALT HALL SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA, BERKELEY, BERKELEY, CALIFORNIA

Mr. LIU. Thank you, Mr. Chairman. I am very honored to be here today.

I agree with all of my fellow panelists that Samuel Alito has a very talented legal mind. I have read over 50 of his opinions. They are very sharp, analytical, intellectually honest. But if intellect alone were enough, then these hearings would be unnecessary. We care about the judicial philosophy of the nominee, and so to pre-

pare for these hearings, I studied Judge Alito's opinions on individual rights versus government power.

His record is enormous, and Mr. Chairman, as you have said, cherry-picking cases is not very informative. Neither is it very informative to look at the entire run of all cases. What is informative, I think, is a look at the closest, most contested cases, cases where judges on a panel disagreed. These are the cases most like the ones at the Supreme Court. The law is less clear and judges have to show their stripes.

I don't think Judge Alito is an ideologue, but I think it is important to see what the record says. So I looked at several areas where government wields great power: immigration, the Fourth Amendment, criminal prosecution. In these areas, Judge Alito sat on 52 panels that divided between the individual and the government. He voted for the individual only four times, three times joining an en banc majority, one time writing in dissent. In the other 48 cases, he sided with the government. This includes all 13 cases on the Fourth Amendment, all eight cases involving erroneous jury instructions, all four cases involving the death penalty. On 13 occasions, his vote for the government was a dissent from an opinion written or joined by a Republican colleague.

Most of the counter-examples cited in these hearings are not terribly illuminating. The constitutional violations are clear. The holdings were unanimous. In the contested cases, Judge Alito agreed with the government over 90 percent of the time, far more often than other appellate judges in similar cases, even those appointed by Republican Presidents.

Now, these figures are not dispositive. Every case is different, and I am sure Judge Alito got it right many times. But let me give three examples that show his instinct, I think, to defer to government power.

The first is a memo he wrote in 1984 as Assistant to the Solicitor General analyzing a case where police saw a burglary suspect running across the back yard. The suspect reached a fence and an officer called out, "Police, halt." When the suspect tried to climb the fence, the officer shot him in the back of the head, killing him. The suspect, Edward Garner, was an eighth grader with a stolen purse and ten dollars on his body. He was not armed and the officer did not think he was. The sole reason for his killing was to prevent his escape.

Judge Alito's memo, speaking for no one but himself, said, "I think the shooting can be justified as reasonable within the meaning of the Fourth Amendment." In a remarkable passage, he argued that using deadly force to stop a fleeing suspect rests on, and I quote, "the general principle that the state is justified in using whatever force is necessary to enforce its laws." In 1985, the Supreme Court rejected this view.

Second, in a 2004 case, the FBI installed a secret video camera in a suspect's hotel room. This was done without a warrant on the ground that the FBI turned on the camera only when the target allowed an undercover informant into the room. Judge Alito accepted this logic, even though the camera remained in the room day and night. The dissent called the surveillance Orwellian, limited only by the government's self-imposed restraint. Judge Alito

seemed not to grasp that the concept of a warrant puts a judge between the citizen and the police precisely because our privacy is too precious to entrust to law enforcement alone. The NSA program of warrantless eavesdropping is also being defended by assurances of executive self-restraint.

Finally, in 1997, there was a capital case where two Reagan appointees, both former prosecutors, found a misleading jury instruction unconstitutional. Judge Alito said the instruction was ambiguous and inadvisable, but adequate to convict the defendant of first degree murder. He also said the court should not have heard the claim at all because defense lawyers did not argue it in prior appeals. But the State never raised this argument to the inmate's claim. Judge Alito raised it himself. The court chided him for nearly crossing the line between a judge and an advocate.

Civil liberties are sometimes seen as obstacles to law enforcement. But as Justice Frankfurter once said, the safeguards of liberty are often forged in cases involving not very nice people.

Mr. Chairman, liberty is not safe in an America where police can shoot and kill an unarmed boy to stop him from escaping with a stolen purse, where judges occasionally aid prosecutions by raising arguments that the State itself did not raise, and where the FBI can install a camera where you sleep on the promise that they won't turn it on unless they have to.

Mr. Chairman, this isn't the America we know and it isn't the America we aspire to be. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Professor Liu.

[The prepared statement of Mr. Liu appears as a submission for the record.]

Chairman SPECTER. Mr. Phillips, how would you evaluate the comments Professor Liu has made?

Mr. PHILLIPS. Well, with respect to the memorandum to the Solicitor General, I think the notion that that is an individual opinion is not a very apt description of at least what I viewed my role when I was an Assistant to the Solicitor General. What we did in that context, and in this particular case, what he was doing, was proposing that an amicus brief be filed on behalf of the United States in support of the State of Tennessee's position. In that process, I mean, it may be that that sentence, and I don't have the context of it to understand it completely, but at that stage, all he is doing is proposing that a brief be filed. It would be interesting to see what the ultimate brief said and whether or not it staked out a position quite as aggressive. But because that is part of the deliberative process that goes on, it is the same deliberative process that goes on with respect to the courts.

I mean, I don't disagree that it makes sense to look at the most contentious cases as a legitimate way to examine that, but again, I don't think you can take—and I do think this is a classic instance of cherry-picking—I don't think you can take out one or two specific examples and say this somehow reflects anything about the body of work of a judge who has been on the bench for 15 years and in the face of the testimony we just heard from colleagues of his who spent literally more than decades with him and whose view is that he comes to each case with an open mind and thoroughly analyzes each one and performs this in a bottom-up, not a top-down process.

Chairman SPECTER. Ms. Axelrod, you know Judge Alito extensively. How would you respond to Professor Liu's testimony?

Ms. AXELROD. Well, I had the same reaction concerning the first case that was mentioned, when he was in a role as an advocate and was trying to come up with the different perspectives that you would bring to a case as an advocate for the government, where your job is to figure out whether or not you are going to be supporting the result below. He was doing his job and he was doing it appropriately.

And the other cases, I think you have to look at the cases more closely than you can in basically a soundbite during a few-minute presentation. You have to look at the arguments that were made on both sides. You have to look at what the standard of review was. You need to see the facts. I am sure that the professor analyzed these cases ably, but I would not be persuaded simply by a short summary of them that the reasoning was unfounded, even if I disagreed with it, which I very well might have, without seeing more.

Chairman SPECTER. Commissioner Kirsanow, what is your evaluation of Judge Alito's record as it applies to civil rights issues with African-Americans?

Mr. KIRSANOW. Well, as I indicated before, it is exemplary. We took a look at several hundred cases, 121 specifically, and we drew a very broad net to encompass the broadest definition of civil rights possible, but we also drew a more narrow net for the more traditional civil rights cases, the Title VII cases where it is more likely that you are going to find an African-American plaintiff.

And what we saw there is, and I referred to *Bray* v. *Marriott*, I think it is emblematic of the kind of approach Judge Alito has. He is very precise. Earlier on, I heard testimony with respect to is he in favor of the little guy or the big guy, and I think I would hearken back to Judge Alito's opening, where he says that no one is either above the law or below the law. I don't think that he is outcome-driven. He is looking at upholding the law, whether or not that redounds to the benefit of the big guy or the little guy, and I think that is the classic example of someone who hues closely to the most profound protections of civil rights.

Chairman SPECTER. Professor Issacharoff, is there any doubt in your mind that Judge Alito will uphold the one man/one vote rule?

Mr. ISSACHAROFF. I don't think there is any doubt that he would uphold one person/one vote as an abstract matter. I think that the broader question that is raised by his earlier comments, and I heard nothing in these hearings that really addressed this, is a deeper one about the role of the court in checking the abuses of incumbent power. So while I don't in any way question that he has, as much as all the rest of us have, internalized the one person/one vote principle, my reservation would be on the willingness to use judicial power to check malfunctions in the political process.

Chairman SPECTER. Professor Gerhardt, you say that the Senate ought to be an active participant in the selection of Supreme Court Justices. To what extent do you think that, with a heavy campaign on the judicial issue, the President has latitude to pick judges as he wants on the political spectrum, and how could the Senate really effectuate your idea?

Mr. GERHARDT. I think the idea I am describing is the system that we have got. I don't mean to suggest a different kind of system, Senator. The President may do exactly as you suggest, pick somebody based on whatever criteria he likes. I am just suggesting that I think it is perfectly consistent with the structure and history of our Constitution for Senators then to provide an independent judgment of his criteria and to assess them on whatever other criteria they think are appropriate.

Chairman SPECTER. The red light went on during your answer—

Mr. GERHARDT. Sorry.

Chairman SPECTER. Senator Leahy?

Senator LEAHY. I think he is referring to himself, Professor. Good to see you again.

I just want to followup on Professor Issacharoff, and I was pleased to meet your son, Lucas, here earlier. That way, his name is in the transcript.

Mr. ISSACHAROFF. Thank you, Senator.

[Laughter.]

Senator LEAHY. We have talked about the 1985 job application of then Sam Alito for a job in Ed Meese's Justice Department. He stated he developed an interest in constitutional law motivated in large part—in large part—by disagreement with the Warren Court decisions, particularly in the area of reapportionment. Now, in the questions he was asked here, he retreated from that unqualified disagreement and said that it was based on certain details of later Warren Court decisions, like the 1969 case, *Kirkpatrick* v. *Preisler*.

Mr. ISSACHAROFF. Yes.

Senator LEAHY. Doesn't it seem incredible that he was telling Mr. Meese in 1985 that in 1969, as a young college student, he was so incensed by the *Kirkpatrick* case, it motivated to study constitutional law?

Mr. ISSACHAROFF. I think the *Kirkpatrick* case had some impact in the Alito household because of the particular role that his father played. But his statement refers to an intellectual excitement based on the writings of Professor Bickel of Yale. Professor Bickel was not concerned with the implementation of one person/one vote. Professor Bickel was concerned, as was Justice Harlan at the time, that the Court should have no business in this area whatsoever, that whatever the political process did, whatever the malfunctions of politics might be, the courts simply were not to be engaged in that process.

That is the idea that was animating Professor Bickel, and one has to assume was animating the young Sam Alito.

Senator LEAHY. And, of course, Justice Harlan was one of his heroes. Had we followed that idea of Harlan's dissent, and others, we wouldn't have had reapportionment around this country, would we?

Mr. ISSACHAROFF. There were—

Senator LEAHY. Unless reapportionment was done politically by those who would reapportion themselves out of office.

Mr. ISSACHAROFF. The history of the United States was that for the 20th century, until we got these cases in the 1960s, incumbent officials simply did not reapportion. They had a constitutional duty, including this body, in the 1920s, the Congress, the Senate of the United States, decided not to reapportion. The Congress simply

said why should we reapportion ourselves out of business, we will just refuse, even though we have a constitutional obligation.

The lesson was that when power decides to close in on itself and pull the ladders up behind it, the courts have to be there. Professor Bickel was deeply disturbed by this, and when I read in 1985 that somebody is saying that, "That is what brought me to constitutional law." it opens questions. I don't have an answer, but certainly I do find it puzzling.

Senator LEAHY. Thank you.

Professor Liu, listening to the two cases you described, the 10-year-old boy shot in the back by an officer who didn't believe he was armed, and in any event, he wasn't coming at the officer, he was leaving, the TV in the hotel room, the bedroom, these things really bother me. And you now have the emerging story that the President may have violated—actually, the Congressional Research Service believes he has—and ordered others to violate the criminal provisions of the Foreign Intelligence Surveillance Act by spying on Americans. Do you think from what you have seen here today that we should take great comfort that a potential Justice Alito would stand up to the President on those kind of issues?

Mr. LIU. Well, Senator—

Senator LEAHY. And I look at how deferential he has been to law enforcement, and I served in law enforcement, as did our Chairman. I have a very soft, warm part in my heart for law enforcement. The only thing in my personal office that has my name on it is my shield from when I was in law enforcement. But doesn't this bother you?

Mr. LIU. Well, Senator Leahy, it does, and I won't venture any predictions as to how he would perform as a Justice. But I would say that what he urged the Committee to do was to believe that he would behave as a Justice as he has behaved as a Third Circuit judge.

Let me say one thing about the memo. This memo that he wrote in 1984 is about 13, 14 pages long. The first 10 pages of the memorandum contain his own personal individual analysis of this case. I urge all members of the Committee to read it if only to discover that he uses the first person throughout the first 10 pages of the memo. Only in the last three pages does he discuss whether or not the United States Government should file an amicus brief on the side of the State of Tennessee. And what is ironic about the last three pages is that he observes that all Federal agencies prohibit precisely this kind of use of deadly force, and that is one of the reasons why he urged against amicus participation in this case, because the U.S. Government would be put into a difficult position to show that it really meant the rule that he would have urged.

Senator LEAHY. Thank you, and, Professor Gerhardt, I am going to send you a letter. I had another question for you, but I found very instructive your quick history lesson, as I have when you have given longer ones. Thank you, sir.

Thank you, Mr. Chairman, and I apologize. I am going to have to leave at this point for a while, but I know you have everything under control.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Kyl?

Senator KYL. Mr. Chairman, let me just thank the witnesses for being here. I just am moved to make one comment, though. I cannot dispute the analysis of individual items here, but I think in law we are all familiar with the best evidence rule. And the best evidence of how Judge Alito would serve on the United States Supreme Court, it seems to me, is not something that might have motivated him to be interested in the law 30-some years ago or something that he even wrote as a young lawyer working in the administration but, rather, his 15 years on the bench, Number one and, second, how his colleagues have viewed his character as well as his judicial performance.

We have had almost 3 days to query him about all manner of issues, and I think to try to, to use the phrase, "cherrypick" a particular comment that was made in a much different kind of context and read into that something more powerful than all of the other best evidence that we have is a real stretch. I will just put it that way.

I, nonetheless, appreciate the effort that all of you have made to be here to enlighten us in these hearings, and I thank you for your testimony.

Chairman SPECTER. Thank you very much, Senator Kyl.

Senator Kennedy?

Senator KENNEDY. Thank you, Mr. Chairman.

I was reminded of an extraordinary observation the other day, and that was that Robert Bork and Ruth Bader Ginsburg agreed 91 percent of the time. It was the 9 percent when they differed which was the major difference. That is something that I think sometimes we lose track of here when we are looking at overall statistics, overall figures. It is the dissents. And it is the close dissents, as Professor Liu has pointed out they are really important on these enormously sensitive issues involving race, involving the disabled, involving women, that so much of a judge's philosophy comes out.

I am interested, Professor, just if you would talk a little bit about the jury selection cases. We have considered the two that Judge Alito was most involved in, one which is pretty boilerplate, I understand, the *Brinson* v. *Vaughn* case, and then the dramatic *Riley* v. *Taylor* case, which is just extraordinary and I think enormously distressful to many. I would be interested if you would just talk about both and give us your assessment.

Mr. LIU. Sure. Well, *Riley* v. *Taylor* has been discussed in these hearings. That was a case that concerned a challenge to racial discrimination in jury selection in the Dover County court. It was shown that over the course of four murder trials within the same year, including the defendants in the case, the prosecution had struck every black potential juror to serve on a capital jury. And the case was originally decided, actually, with Judge Alito in the majority, but it was then en banc'd, and Judge Sloviter ended up with a majority opinion, basically finding that this pattern, in addition to other evidence in the record, showed racial discrimination in the jury.

Judge Alito dissented from that view, and I think the sentence, I think, that is most disturbing is his comparison of that pattern to the right- or left-handedness of Presidents. And he went further

to say that, absent a careful multiple regression analysis—I can barely say it—we can't infer from the statistical pattern any racial discrimination.

Now, the *Brinson* v. *Vaughn* case came along 3 or 4 years later. That was, I believe, a 2005 case in which there was a pattern of 13, I believe, out of 14 black jurors being struck. And Judge Alito wrote a unanimous opinion finding racial discrimination in that case.

What is interesting about that case is that he relies on a prior case of the Third Circuit called *Holloway* v. *Horn*, which relies in turn on *Riley* v. *Taylor*.

Senator KENNEDY. Could you, just in the very short time, in looking through the opinions in these dissents, in areas where Judge Alito took away the effect of a decision of a trial court to have a jury trial, the number of cases that he took away from the trial court, and the number of cases that he took after there had been a jury trial, on appeal where he ruled against the individual on that, effectively overriding or overruling the trial court, a number in both of those areas some rather significant cases. We haven't got a lot of time here, but I think you get what I am driving at in terms of the respect for the trial court and the jury verdict, whether you feel from your own kind of analysis the appropriate kind of respect and tradition for that.

Mr. LIU. Well, I think one area in which there is, to my mind at least, a somewhat disconcerting pattern is in the Fourth Amendment context. You know, much has been said about, for example, the *Doe* v. *Groody* case. What I find puzzling about that case is it is not that there is nothing to Judge Alito's position. I think if you read—

Senator KENNEDY. This is the strip searching of the child.

Mr. LIU. That is right. His opinion actually is, like all of his opinions, incredibly well reasoned, very thoughtful. It is not at all disparaging to the girl or her mother, who was found to be illegally searched. What is interesting to me is that in that case, there is the availability of two competing interpretive principles. One is read the four corners of the warrant for what it says. The other is supplement the four corners of the warrant with underlying material that is questionable, at least, in terms of whether or not it is incorporated.

Given the important dignity at interest in *Doe* v. *Groody*, it just strikes me as puzzling why he would have chosen the second interpretive device rather than the first. And the second one is the one that took the case out of the jury's hands to determine whether or not the search was or was not reasonable.

Senator KENNEDY. This is the one where Judge Chertoff took exception to Judge Alito.

Thank you very much. My time is up.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Sessions?

Senator SESSIONS. Well, on the *Doe* case, Mr. Phillips, *Doe* v. *Groody*, this was a question involving a lawsuit—you, as a Solicitor General, you have had to defend law officers for personal damages, they are being sued. At best, there was an appearance, was it not,

that this affidavit was, in fact, made a part of the warrant because the magistrate judge intended it so and said it?

Mr. PHILLIPS. Senator Sessions, that, I mean, that is, at least in my mind, the complete answer to the Professor's argument, which is this is not—this doesn't have anything to do with two different analytical approaches. It has to do with how do you apply qualified immunity and what deference do you owe to the individual officer who is in a very precarious position, making decisions on the fly. I think if you read the opinion, it is quite, as he said, scholarly, thoughtful, analytical, almost apologetic with respect to the consequences to the individuals involved, but still recognizing at the end of the day that qualified immunity is designed to provide precisely the kind of gate-keeping function that the court exercised there in order to take those kinds of issues away from the jury because that is the only way you can protect the greater societal interests that are implicated.

Senator SESSIONS. So he did a search warrant on a house where dope dealers were there and he followed the instructions of the magistrate. They conducted a search of the young girl in a private chamber by a woman officer without removing all of her clothes, just pulling down her outer garments and a blouse up, apparently, and from the indications of the magistrate, that was permitted. And so the question was, was he acting within the line of scope of his employment and was this officer subject to personal suit for money damages, isn't that correct?

Mr. PHILLIPS. That is absolutely right, Senator.

Senator SESSIONS. Well, I am telling you, police officers have a hard enough time understanding these laws of search and seizure. They are very complicated, and the judges throw out searches all the time when they are not proper. But to sue the officer who is trying to do the right thing, I think Judge Chertoff was in error and I would like to see him back on here. I served as U.S. Attorney with him and I will ask him about that case.

[Laughter.]

Senator SESSIONS. I think Judge Alito was correct. Maybe he was not, but I think he had a good basis for that decision and I am concerned about it.

Mr. Liu, with regard to the *Kithcart* case in your written opinion here, you quote a dissenting opinion from Judge McKee that said that—this is where you criticize Judge Alito for holding that there was not a basis for arresting a black individual who was in a black sports car after some armed robberies that occurred, and so that was the message apparently that went out, and the officers stopped a car and arrested this individual who was black in a black sports car, and the Judge said, that is not enough. That is basically racial profiling, and he left open, as I understand it, the question of whether or not the stop was legitimate. And this judge, correct me if I am wrong, and maybe some of you prosecutors would jump in, but Judge McKee you quote favorably here. He said, "Just as the record fails to establish that Officer Nelson had probable cause to arrest any black male who happened to drive by in a sports car, it also fails to establish reasonable suspicion to justify stopping any and all such cars that happen to contain a black male."

Now, isn't that quite a difference of proof standard between the authority of an officer to arrest someone and the authority of an officer to do an investigative stop? Isn't that clearly a different standard, and wasn't Judge Alito correct to suggest that there is a different standard for the investigative stop than it is to arrest someone?

Mr. LIU. I think that is true, Senator Sessions. There is definitely a difference of standards. One is a reasonable suspicion standard. The other is a probable cause standard.

In this case, I want to be absolutely clear in my testimony. I am not criticizing Judge Alito for his result. I am saying he is correct, but Judge McKee is saying that he didn't go far enough.

Senator SESSIONS. All right. But I—

Mr. LIU. Judge McKee is dissenting to the other side of Judge Alito by saying that by the same logic that racial profiling prohibits the probable cause finding, it also prohibits the reasonable suspicion finding.

Senator SESSIONS. In that, I think the law is clearly to the contrary. I think officers who have that kind of information can at least stop a vehicle. At least, there is certainly far more authority to do that than it is and the standards are different, pretty clearly.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Sessions.

Senator Biden?

Senator BIDEN. Professor Gerhardt, I am just curious. Was that the case you cited about the Hoover administration, was that when Senator Boren went down and said to—it is a good answer, I think—to the Chairman—Senator Boren went down, and when he was given a list of ten people, he looked at the list of the President and he said, "It is a great list, Mr. President, but you have it upside down." and that is how you get the message, because when Presidents actually consult, you do have an impact.

Let me ask you, Professor Gerhardt, and I understand if you don't want to answer it, but where do you think on the spectrum of the present Court, if Judge Alito is confirmed, he will end up?

Mr. GERHARDT. It is—

Senator BIDEN. I know that that is guessing, but what is your best judgment?

Mr. GERHARDT. It is a great question, Senator, and obviously, I think it is one of the central questions in this hearing. I can tell you this much. I know how the President answers that. The President said he wanted to nominate somebody in the mold of Justice Scalia and Justice Thomas, and I think one of the questions in these hearings has been the extent to which, for instance, Judge Alito is going to be perhaps more like those Justices, or perhaps like some other Justices, Justice O'Connor or Justice Harlan, as he suggested.

And so if he is going to fit that mold, then obviously the balance shifts in a number of important cases in a certain direction. But if he is not, then, of course, it is going to be harder to predict.

I might venture at least this much. I think that if he is truly going to be a bottom-up judge, as he suggests, then I think the shift is not going to be that great. In other words, the shift would be more modest. That is the critical thing. The critical thing about

being a bottom-up judge is that that is the essence of modesty. There is very little margin of error when you are a judge and you are a bottom-up judge. But if you turn out to be a top-down judge, there is a greater potential for margin of error, and so if he does turn out to be more like Justice Thomas and Justice Scalia, there is a greater possibility for error.

Senator BIDEN. Well, there would be an awful lot of disappointed folks in Washington and the Nation if he turns out to be like Justice O'Connor. A lot of people will be very upset who are supporting him now.

Let me ask, if I may, anyone who would like to respond on the panel. One of my greatest concerns is, and I must tell you, I have a diminishing regard for the efficacy of hearings on judicial nominees in terms of getting at the truth. I am not in any way implying—

Mr. ISSACHAROFF. Based on the panel?

[Laughter.]

Senator BIDEN. Yes.

[Laughter.]

Senator BIDEN. No, no. I am not in any way implying—across the board, Democratic nominees, Republican nominees. It goes to this issue, in my view, of do the people have a right to know what they are about to put on the bench. And the part that concerned me the most, I must tell you, is the Judge's comments on, or failure to comment on, in at least my view, a clear understanding of what he means by the unitary Executive. It seems very different from what others think unitary Executive means, and scholars that I am aware of, and his discussion about, or failure to respond to what is now a very much animated debate about whether or not the President can wage war without the consent of or authority from the Congress and whether or not, as the administration argues, the War Powers Clause only gives the Congress the power to declare war if it wants to when the President doesn't want to go to war, which is the most extreme reading I have heard other than one occasion in the Bush I administration.

So does anyone here have any doubt that there is a need for the President, absent imminent danger, to get the consent of the Congress before he were to invade Iraq or Syria tomorrow, or does the President have the authority tomorrow, based on his judgment, to invade Iraq and Syria? Does anybody want to venture an opinion on that?

Mr. ISSACHAROFF. I think, Senator Biden, that is the lesson of the steel seizure case, including Judge Alito's invocation of Justice Jackson's opinion in that case, is that the President acts at tremendous constitutional peril when he acts contrary to the express wishes of Congress and acts at significant constitutional peril when he acts absent congressional authority unless there is true military exigency of the moment. I think that that is fairly well established. That has been the history of the relationship between Congress and the Executive. It has been a difficult history, and the question of how much authorization Congress has given is a repeated issue before the courts and has been since the Civil War cases. But I don't think that there is any doubt on this question constitutionally.

Senator BIDEN. Thank you, Mr. Chairman. My time is up.

Chairman SPECTER. Thank you, Senator Biden.

Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman. I guess I would just have to express some reservations at trying to predict how Judge Alito is going to rule on the bench. I can think of famous examples where President George Herbert Walker Bush thought David Souter was going to be of a particular frame of mind or approach on the bench. I guess Richard Nixon probably had some ideas about Harry Blackmun and President Eisenhower had some ideas about Earl Warren. Judicial independence means something, and what it hopefully means is exactly what the Framers intended in terms of providing the flexibility, the freedom, the independence. They have life tenure. We can't cut their salary. Who knows? This is, I guess, a debate only lawyers can love. It is important, but I just don't know how we can answer the question comprehensively.

Professor Issacharoff, it is good to see you again. Of course, I got to know you during your tenure at the University of Texas Law School before you came up north to NYU. There have been some questions about Judge Alito's statements, about his concerns about the Warren Court decisions on reapportionment, and you alluded to that in your testimony. The fact is, our nation has a checkered history, doesn't it, in terms of enfranchising people, making sure that everyone's vote counts roughly the same? Back, I guess, at the beginning of our nation, people had to have property before they could vote. We know that some people couldn't vote at all, African-Americans, and we fought a Civil War and amended the Constitution on that. We know that even today, the Texas congressional redistricting case is pending before the U.S. Supreme Court.

This remains a subject of a lot of interest and a lot of controversy, but I just want to make sure that we are not guilty, those of us on this side of the dais, about overstating or reading too much, I should say, into what Judge Alito has said. He said in college, he was motivated by a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment.

Let us talk about reapportionment, which is, I know, one of your passions and expertise. It wasn't until 1962 when the Supreme Court decided that those issues were justiciable in the first place, wasn't it, in *Baker* v. *Carr*?

Mr. ISSACHAROFF. That is correct, Senator.

Senator CORNYN. And then the principle of one person/one vote was decided in *Reynolds* v. *Sims* in 1964, I believe. Is that the right time?

Mr. ISSACHAROFF. Yes.

Senator CORNYN. The right case?

Mr. ISSACHAROFF. Yes.

Senator CORNYN. And, of course, notwithstanding what some have tried to make out of what Judge Alito said, he has testified here and in other areas that he considers one person/one vote a bedrock of our democracy. You have said everybody believes that, at least every American believes that today, although it was fairly

controversial not that many decades ago, or at least in terms of the court's role.

What he did say, and I want to get your comment on this, is that—and maybe it was because of his father's experience, as you alluded to a little bit—that strict numerical precision in terms of the size of districts, whether they be for city councilmen, whether it be for a State representative, a State Senator or Congressman or whatever, there was sort of the troublesome issue of how do you deal with things like municipal boundaries and communities of interest, lines that ordinarily you would think define those communities of interest in a way that you just don't want to run roughshod over. Is that a legitimate consideration on the way to try to achieve that goal of one person/one vote, or is that just bogus?

Mr. ISSACHAROFF. I think, Senator—and I still have the temptation to refer to you as Justice Cornyn—but Senator, I think that it is absolutely a legitimate concern. I think that one person/one vote turns out to do two things. One, it is emblematic. It is our aspiration that everybody be equal in the political process.

And secondarily, and perhaps more importantly, it serves as a check on what those in power can do to try to preserve themselves in power, and that second feature of it has been difficult and the efforts to ratchet up mathematical exactitude have usually come in cases that were about something completely different. For example, in the New Jersey case in the mid-1980s, *Karcher* v. *Daggett*, the real issue was a partisan gerrymander and everybody understood that and the court didn't know what to do about it, just as it has had trouble with that issue for the decade since, and so it fell back on this extraordinary mathematical exactitude, which, in fact, is completely illusory because the census isn't that precise.

So I agree with you fully. I don't think that that was where the controversy had moved in the late 1960s. I would stay by that statement. But nonetheless, you are absolutely right that this is a legitimate course of concern.

Senator CORNYN. Professor, thank you. My time is up. I appreciate your response to my question. Thank you.

Chairman SPECTER. Thank you, Senator Cornyn.

Senator Coburn?

Senator COBURN. Thank you, Mr. Chairman. I have been listening. I was not here for all of it, but I was paying attention by the video screen in the back room, and just some observations. You know, I live on Capitol Hill with two Democrats and the things that normally asked of them is, how can you live with that guy? And their answer is you don't know his heart. And then I get asked the same thing: how can you live with those two guys? And I say you don't know his heart.

And it strikes me as I look at this panel, the three people who testified favorably for Judge Alito know him and the three people who didn't testify—who testified somewhat negatively about Judge Alito don't know him. They have read some of his cases, not all of his cases. And so it just kind of strikes me that one of the most valuable pieces of information that this Committee has gotten from outside witnesses was the judge panel that came before you, the people that have worked with him for over a decade, worked with him in a closed room. I believe they know his heart. And I believe

anyone in this room—you can take anything that we have written at some time or said at some time and you can make each of us look terrible.

And I only have really one question and that is for Professor Liu. How do you explain the fact that Judge Lewis, who is adamant about Title VII of the Civil Rights Act, his observations about Judge Alito are completely contrary to yours? How do you explain that? Here is a guy that knows him, here is a guy that has very liberal leanings in terms of the political spectrum, here is a guy that is basing his whole legal career on civil rights. And yet he says I know this man and there is no a bit of truth in any bias or any direction that he goes.

How do you explain that?

Mr. LIU. Well, Senator Coburn, I certainly can't dispute Judge Lewis's account or views on Judge Alito. I understand the previous panel to be testifying to the integrity and intellectual honesty of the nominee, none of which I dispute. In fact, I conceded in the very first sentence of my testimony that I find him also to be an intellectually honest person.

My only viewpoint, I guess, that I am offering is not really a viewpoint at all. What I am trying to simply urge is that some attention be paid to his record and that the record speaks for itself. And it doesn't speak to the nominee's intellectual—any negatives regarding the nominee's intellectual honesty. Rather, I think it speaks more to the set of values or instincts or the intangible qualities of judging, I think, that every judge, every human being brings into the world.

It is not that any judge decides to go about any case saying, oh, I come in with this bias or I come in with that bias. I grant that Judge Alito, like every judge, tries to be impartial, but every judge also has a set of instincts, a central tendency, and I think it can be revealed, not definitively, but it can be revealed by looking at patterns across large numbers of cases.

Senator COBURN. And you looked at 50 cases of his. Is that correct?

Mr. LIU. Well, I have actually looked at more, but the cases that I have—

Senator COBURN. How many more?

Mr. LIU. I have probably looked at 60 or 70 cases.

Senator COBURN. Out of 4,000?

Mr. LIU. Out of the 360 that he has written.

Senator COBURN. Written opinions on, but he still has adjudicated over 4,000 cases.

Mr. LIU. Certainly, that is true.

Senator COBURN. All right. Thank you, Mr. Chairman. I yield back.

Chairman SPECTER. Thank you, Senator Coburn.

I had hoped to finish up this evening, but the sense of the proceeding at this point is that it is not a wise thing to do. This panel took an hour and 15 minutes, and projecting with a break, we would be in the ten o'clock range or perhaps even later. That would depend upon how many Senators were here to question, and I think in the morning we may have more questions.

I think it is a fair observation that we are not at our best. We started at nine, so we are in the tenth or eleventh hour. And we have tomorrow to proceed and still meet the schedule that I had announced early. I know that it is a likely inconvenience to some of the people who were on the later panels, although nobody on the latter panels, if we were to finish tonight, would be out of this town tonight anyway. So it is really staying over, and I know that in making your plans to come here, you didn't know whether you would testify on Thursday or Friday and nobody else knew whether you would testify on Thursday or Friday. We tried to follow the Roberts model, but on Roberts we finished up his testimony close to 11 and today we didn't start on the outside witnesses until 2:30.

That is probably more than you want to know, but I like to tell you what is on my mind. I see some of the witnesses on the later panels nodding an affirmative. Nobody seems to be too distressed about calling it a day at 6:36 after starting at 9 a.m. So we will be in tomorrow morning at 9.

Senator KENNEDY. Mr. Chairman, could I enter into the record a letter from the National Association of Women's Lawyers at an appropriate place, and then also a letter from Professor Higginbotham, as well, at an appropriate place in the record?

Chairman SPECTER. Certainly. Without objection, they will be placed in the record at what we conclude to be an appropriate place after consulting with you.

Thank you all very much. That concludes our hearing.

[Whereupon, at 6:36 p.m., the Committee was adjourned, to reconvene at 9 a.m., Friday, January 13, 2006.]

NOMINATION OF SAMUEL A. ALITO, JR., OF NEW JERSEY, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

FRIDAY, JANUARY 13, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:02 a.m., in room SH–216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee presiding.

Present: Senators Specter, Hatch, DeWine, Sessions, Cornyn, Coburn, Leahy, Kennedy, Feinstein, and Schumer.

Chairman SPECTER. The hearings for the confirmation of Judge Alito for the Supreme Court of the United States will now reconvene. I have just been discussing with Senator Leahy the allocation of time, and we had seven judges who testified yesterday who exceeded the 5 minutes. I thought it the better part of prudence to not bang the gavel, but allow them to go on, but they did take some extra time, in the seven-, eight, nine-minute range.

So I have just said to Senator Leahy that we will give seven of the witnesses selected by Democrats five extra minutes, or he can allocate the time as he chooses. I don't want to split hairs over how much the exact time was, but I think it is very important to keep the balance. And we did that in the selection of the number, 30. In the past, it had been divided about 18 to 12, with the majority party taking more. But we have worked out the arrangement of 15 to 15 to keep it level.

Senator LEAHY. Mr. Chairman, if I might, you have been fair on this. Ultimately, of course, everything has to be determined based on what the nominee says, but the public witnesses are important. You know, when we are deciding whether to replace Justice Sandra Day O'Connor with Samuel Alito, I think they help focus us, as the witnesses yesterday did, on aspects of his record on the bench with respect to civil rights and privacy rights.

These are long-time pioneers in our Nation's sometimes rocky journey toward equal justice and respect for women's rights. They are the people on the front line today. We are going to hear from representatives of minority communities. We have a number of written statements.

As I have said over and over again, we are the only 18 people who get to ask questions on behalf of 295 million Americans and of generations for a long time to come. So I think these hearings

are important. Again, I thank you for your courtesies and your fairness in keeping them going.

Chairman SPECTER. Thank you very much, Senator Leahy.

We now turn to our first witness on our next panel, Professor Nora Demleitner, from the Hofstra School of Law. She teaches and has written widely on criminal, comparative and immigration law; Managing Editor of the Federal Sentencing Reporter, and serves on the executive editorial board of the American Journal of Comparative Law; a Bates graduate, summa cum laude, and a graduate from the Yale Law School in 1992—we have a heavy representation of Yale Law graduates here; that is a very healthy thing—and was Symposium Editor of the Yale Law Journal. I didn't know there was a Symposium Editor. There wasn't one there in my time.

Thank you for joining us, Professor, and the floor is yours.

STATEMENT OF NORA V. DEMLEITNER, VICE DEAN FOR ACADEMIC AFFAIRS AND PROFESSOR OF LAW, HOFSTRA UNIVERSITY SCHOOL OF LAW, HEMPSTEAD, NEW YORK

Ms. DEMLEITNER. Thank you, Mr. Chairman, Senator Leahy, members of the Committee. Good morning, and thank you for the opportunity to testify today. The one thing I should—

Chairman SPECTER. I should have added, Professor, that you clerked for Judge Alito after graduating from law school. I think that ought to be on the record.

Start the clock back at 5 minutes.

Ms. DEMLEITNER. I was about to add that. Thank you very much.

Now, since the very early days of my clerkship, I must admit that Judge Alito has really become my role model. I do think that he is one of the most brilliant legal minds of our generation, or of his generation, and he is a man of great decency, integrity and character. And I say all of this as what I would consider to be a left-leaning Democrat; a woman, obviously; a member of the ACLU; and an immigrant.

And my view is not one that is unique with regard to people who have worked with him or with regard to people who have worked for Judge Alito. Now, all of his clerks, many of whom are politically liberal, have signed on to a letter strongly urging the Senate to confirm Judge Alito as Associate Justice. A number of non-Republican legal academics who have worked with or for Judge Alito have also issued an equally forceful statement on his behalf.

Let me explain to you why I believe that Samuel Alito deserves to sit on the highest Court and why his confirmation will, in fact, not pose a threat to the rights of women, to the rights of minorities, immigrants, or other vulnerable groups.

Now, Judge Alito does not have a political agenda. He gives very careful consideration to the lower court record and to prior judicial decisions. Now, let me point you to two cases that may explain the judge's philosophy.

While I clerked for him, he had to decide the case of Parastoo Fatin. Ms. Fatin had left Iran in part to be escaping the regime of Ayatollah Khomeini. She applied for asylum in the United States, but was denied by the immigration court and by the Board of Immigration Appeals.

Now, without revealing any confidences, I can tell you that Judge Alito was very much moved by the personal tragedy of the situation and the moral dilemma Ms. Fatin would face. If returned to Iran, she would either be unable to speak her deep feminist convictions or the Iranian regime would penalize her.

Now, the problem with her case was that there was really an absence of favorable case law and, even worse, a very thin record that indicates only very limited opposition on her part to the Iranian regime.

Now, the judge did not see himself in a position to help Ms. Fatin, who was, however, ultimately permitted to stay in the United States. He, however, did take this opportunity to write one of the most progressive opinions on gender-based asylum. Now, his decision was the first to recognize that gender alone could constitute a basis for asylum. This revolution in asylum law has not been widely recognized outside a very small group of asylum practitioners, and neither has Judge Alito gotten a whole lot of credit for garnering the votes of both of his fellow panelists for this decision, one of whom was a Nixon appointee.

Now, the Fatin case hasn't gotten a lot of attention, but you have spent part of the day yesterday on the *Rybar* case, where Judge Alito dissented. Now, I think you should read the case a little differently than the way in which it has been portrayed. Now, let me just set the context.

In 1995, the Supreme Court decided *Lopez*, Justice O'Connor joining the majority striking down the possession of machine guns on school grounds as unconstitutional. Now, I think a lot of commentators expected this to create a major shift in lower court jurisprudence. This did not happen, I think, in part because the lower courts read the decision extremely narrowly and arguably incorrectly.

Now, Judge Alito, who has been, I think, generally labeled as an anti-criminal defendant judge, was very much willing to follow Supreme Court precedent to the point where it would necessitate the dismissal of a host of criminal indictments. At the same time, he took pains to note that Congress could very easily remedy the problem with the statute by indicating in the record that there was a connection between the possession of machine guns and interstate commerce. Now, let me also point you to the fact that a blue ribbon ABA task force has increasingly critiqued the increasing Federalization of criminal law.

Now, Judge Alito's record, I think, indicates, and *Rybar* confirms, that he will follow Supreme Court cases very carefully, and that he will read congressional legislation very carefully. He has also used, I think, his prior background experience very effectively in working, for example, on sentencing reform with the Constitution Project and at one point as an advisory board member of the Federal Sentencing Reporter.

I believe overall that his criminal background experience will inform the judge's decision, but it will surely not bias him in one way or the other. He will be able to strike a practical balance that is informed, but not predetermined by his background.

And for all those reasons, I believe very strongly that he deserves to be confirmed as the Court's next Associate Justice.

[The prepared statement of Ms. Demleitner appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor.

We now turn to Professor Erwin Chemerinsky, the Alston & Bird Professor of Law and Political Science at Duke. Prior to coming to Duke in 2004, he had been for 21 years at the University of Southern California Law School, where he was the Irmas Professor of Public Interest Law. He is a graduate of Northwestern University with a bachelor's degree, and a law degree from Harvard. Last year, he was named by Legal Affairs as one of the top 20 legal thinkers in America.

Thank you for coming in today, Professor, and the floor is yours.

STATEMENT OF ERWIN CHEMERINSKY, ALSTON & BIRD PROFESSOR OF LAW AND POLITICAL SCIENCE, DUKE UNIVERSITY LAW SCHOOL, DURHAM, NORTH CAROLINA

Mr. CHEMERINSKY. Thank you, Mr. Chairman, Senator Leahy, distinguished Senators. It is truly an honor and a privilege to testify at these historic hearings.

It is impossible to overstate the importance of this nomination to the future of constitutional law. In recent years, the Supreme Court was often referred to as the O'Connor Court because Sandra Day O'Connor so often has been in the majority in 5–4 decisions in crucial areas: protecting reproductive freedom, enforcing the separation of church and state, limiting Presidential power, and advancing racial justice. Replacing her has the possibility of dramatic changes in so many areas of constitutional law.

A crucial question for this Committee is what will be the effect of Samuel Alito on the Supreme Court. I want to focus on one area, Executive power. I choose this area because no area of constitutional law is likely to be more important in years ahead than this.

As you know, in recent years the Bush administration has made unprecedented claims of expansive Presidential power, such as the claim of authority to detain American citizens as enemy combatants without meeting the Constitution's requirements for warrant, grand jury, or trial by jury; the claim of authority to torture human beings, in violation of international law; the claim of authority to eavesdrop on conversations of Americans without complying with the Fourth Amendment or the Foreign Intelligence Surveillance Act; the claim of authority to hold American citizens indefinitely and citizens of other countries indefinitely as enemy combatants.

Now, my goal here isn't to discuss the merits of any of these issues; instead, to point to the fact that separation of powers is likely to be an enormously important issue in the years ahead. And, of course, there is no need to remind this body of the crucial role that checks and balances and separation of powers play in our constitutional structure.

Some of the most important Supreme Court cases in history have been those where the Court has said no to assertions of Presidential power, such as in *Youngstown Sheet and Tube* v. *Sawyer* in striking down President Truman's seizure of the steel mills, and *United States* v. *Nixon* in saying that President Nixon had to reveal the Watergate tapes.

A key question for this Committee is whether Samuel Alito will continue this tradition of enforcing checks and balances or whether he will be a rubber stamp for Presidential power. I have carefully read the writings, the speeches and the decisions of Samuel Alito in this area and they all point in one direction—a very troubling pattern of great deference to Executive authority.

I have closely followed the hearings this week and I know you are familiar with the examples. To mention just a few, in 1984 while in the Solicitor General's office, Samuel Alito wrote a memo saying that he believed that the Attorney General should have absolute immunity to civil suits for money damages of engaging in illegal wiretapping, a position the Supreme Court rejected in language that seems so appropriate now in saying there was too great a danger of violation of rights from executive officials who, in their zeal to protect national security, would go too far.

The next year, he said there should be increased use of Presidential signing statements. He said, quote, "The President should have the last word as to the meaning of statutes," which would mean an increase in Executive power.

As you know, in a number of writings and speeches, he said he believed in the unitary Executive theory. Now, there was a good deal of discussion this week as to what that means. But if you look at the literature of constitutional law, those who believe in a unitary Executive truly want a radical change in American Government. They believe that independent regulatory agencies like the Securities and Exchange Commission or the Federal Communications Commission are unconstitutional. They believe the special prosecutor is unconstitutional. They reject the ability of Congress to limit the Executive.

Now, as a judge on the Third Circuit, Judge Alito has not had the opportunity to review assertions of Presidential power, but there have been many cases where he has considered assertions of law enforcement authority. Over and again, he comes down on the side of law enforcement.

I think his dissenting opinions are particularly revealing because Judge Becker said he rarely dissents. One case, I think, shows Judge Alito's overall philosophy and it is one discussed yesterday at the end of the day, *Doe* v. *Groody*. This, of course, was the case where the police strip-searched a mother and her 10-year-old daughter who were suspected of no crime.

As Carter Phillips said yesterday, this was an issue of qualified immunity. That means did the officers violate clearly established law that a reasonable officer—should the officer have known that it violates the Constitution? Senators, any police officer, any judge should know that strip-searching a 10-year-old girl who is suspected of nothing violated the Constitution. Senators, this is one of so many cases where Judge Alito deferred to law enforcement.

I am here for a simple reason. I believe that at this point in time it is too dangerous to have a person like Samuel Alito, with his writings and records on Executive power, on the U.S. Supreme Court.

Thank you.

[The prepared statement of Mr. Chemerinsky appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor.

We now turn to Professor Anthony Kronman. After teaching at the University of Chicago Law School and Minnesota Law School, Professor Kronman came to Yale, where he has been on the faculty for 16 years and was the dean of the law school from 1994 to the year 2004, and is the Sterling Professor of Law at Yale.

He has his undergraduate degree from Williams in 1968, with highest honors, a Ph.D. in philosophy, and a law degree from Yale in 1975, when he was a classmate of Judge Alito.

Thank you for being with us today, Professor, and the floor is yours.

STATEMENT OF ANTHONY KRONMAN, STERLING PROFESSOR OF LAW AND FORMER DEAN, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT

Mr. KRONMAN. Thank you, Mr. Chairman, Senator Leahy, other members of the Committee. I am grateful for the opportunity to appear this morning and offer my testimony.

I have known Sam Alito for 33 years, since we met in the fall of 1972 as members of the entering class at the Yale Law School. Over the next 3 years, we took nearly a third of our law school courses together. We worked on the law journal together. We debated in the moot court program. I had a chance to observe Sam Alito at close range and to form an estimate of his character.

Sam was hard-working and ferociously bright. No one, I think, would challenge that, but that wasn't the first thing that impressed me about Sam. What impressed me first and most emphatically was his generosity and gentleness. When Sam spoke in class or out, others listened. But when others spoke, Sam listened, and not just in the superficial sense of waiting politely until they had finished, but in the deeper and more consequential sense of straining to grasp the good sense of their position and to see it in its most attractive light.

Sam always spoke with modesty, but even when he was defending a position that he believed clearly to be right, did so with the knowledge that he might be wrong. Learned Hand once described the spirit of liberty as the spirit "that is not too sure of itself." That is a phrase that has always had a special meaning for me and it well describes the quality in Sam that I noticed from the start.

I noticed something else and admired something else as well, and that was Sam's faith in the law. Sam believed in the integrity of the law and in the essential fairness of its processes. Anyone who has studied the law knows that it is not a mechanical system. It requires moral judgments at many points.

But there is all the difference in the world between a person who approaches the law from the outside and views it as an instrument for the advancement of some program of one kind or another and a person who approaches it from the inside and whose fundamental, leading allegiance is to the law itself.

Sam falls clearly in that second category. He had, so far as I could tell, no political agenda of any kind. I would have described him in law school as a lawyer's lawyer, and if you had asked me on the day we graduated whether he was a Democrat, as I was then and am today, or a Republican, I couldn't have told you.

My knowledge of Sam Alito is based almost entirely on my personal acquaintance with the man, but since his nomination to the Supreme Court, I have attempted, as have many others, to glean at least a sense of his judicial temperament by reading a few of his opinions. I haven't read many. I haven't made a systematic study of them, but the ones that I have read suggest to me rather strongly that the judicial temperament that I discern in these opinions is entirely consistent with the human temperament of the man I came to know and admire more than 30 years ago.

The temperament of the judge, as I see it, is marked by modesty, by caution, by deference to others in different roles with different responsibilities, by an acute appreciation of the limitations of his own office, and by a deep and abiding respect for the past.

There is a name that we give to all of these qualities, taken together. We call them judiciousness, and in calling them that we recognize that they are the special virtues of a judge. Judge Alito has been a judicious judge and my confidence that he will be a judicious Justice is based on my personal knowledge of the man and my belief that his judicial temperament is rooted in his human character, which is the deepest and strongest foundation it could have.

Thank you very much.

[The prepared statement of Mr. Kronman appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Kronman.

We turn now to Ms. Beth Nolan, a partner in Crowell & Moring's Litigation Group. She has a broad practice which focuses on constitutional and public policy issues. Ms. Nolan held prestigious and high-ranking positions in the Clinton administration and the Department of Justice in the Office of Legal Counsel. She had been a clerk to Chief Judge Collins Seitz, of the Third Circuit, has an undergraduate degree from Scripps College and a law degree, magna cum laude, from Georgetown in 1980.

Thank you for being with us today, Ms. Nolan, and we look forward to your testimony.

STATEMENT OF BETH NOLAN, PARTNER, CROWELL & MORING, LLP, WASHINGTON, D.C.

Ms. NOLAN. Thank you, Mr. Chairman, Senator Leahy, members of the Committee. I am delighted to be here today, and thank you for inviting me to provide my views.

I want to address one issue: how Judge Alito, if he should become Justice Alito, would approach questions of Executive power. I have served, as you mentioned, Mr. Chairman, in the White House as Counsel to the President and in political and career positions in the Office of Legal Counsel in the Clinton and Reagan administrations.

And as might be expected of one who has served as Legal Counsel to the President, I believe it is essential to defend the power of the President to undertake his constitutionally assigned responsibilities and to resist illegitimate incursions on that power. And certainly, in my position as White House Counsel, I sometimes was in conflict with Congress, as each branch struggled to assert its views of its authority.

This does not mean, however, that the Executive should assert a view of its power that is virtually unconstrained or that fails to take account of the constitutional powers of Congress. Presidential power should be interpreted even by lawyers for the President with proper respect for the coordinate branches, not solely to maximize Presidential power.

Judge Alito's service, as has been mentioned, on the Third Circuit has not offered him much opportunity to address issues of Executive power, but we do have some indication of his views, and I find particularly instructive and troubling his 2000 Federalist Society remarks in which he announced his support of the unitary Executive theory. What he means by that support is a critical question.

It is a small phrase in one way, "unitary Executive," but it has almost limitless import to many of its adherents. At one level, it embodies the concept of Presidential control over all executive functions; as Professor Chemerinsky mentioned, a concept that has been soundly rejected by the Supreme Court.

But the phrase also often serves to embrace a bundle of expansive interpretations of the President's substantive powers and correspondingly stringent limits on the legislative and judicial branches. This is the apparent meaning of the phrase in many of this administration's signing statements claiming broad powers for the President.

In his Federalist Society speech, Judge Alito endorsed the theory of the unitary Executive as developed during the period he served in the Office of Legal Counsel as a supervising deputy. An important question is how he views OLC precedents from that time. In one opinion from that time involving covert activities, OLC expressed the President's authority in sweeping terms, adopting Justice Sutherland's dicta from a very different context to assert that the President's authority to act in the field of international relations is plenary, exclusive and subject to no legal limitations, save those derived from the applicable provisions of the Constitution itself, while declaring that Congress had only those powers in the area of foreign affairs that directly involve the exercise of legal authority over U.S. citizens.

This would seem to mean that the President is essentially above the law in the areas of foreign affairs, national security and war, and Congress is powerless to act as a constraint against Presidential overreaching in these areas. It is a fair question whether Judge Alito agrees with these sweeping views.

This is not just of historical interest, of course. That version of unitary Executive from the 1980s sounds remarkably similar to the assertions of unreviewable and unconstrained powers the current President has asserted with regard to this authority to ignore the laws passed by Congress, such as those forbidding torture and those regulating electronic surveillance. These issues may well come before the Supreme Court.

Judge Alito indicated over 20 years ago his strenuous disagreement with the usurpation by the judiciary of the decisionmaking authority of political branches. Does this signal that he will defer to the executive branch's positions on its power and its claims that these positions are largely unreviewable, or will he, as Justice

O'Connor did in *Hamdi*, see a clear role for the courts in protecting our constitutional balance and hence our civil liberties? Judge Alito's statements about Executive power raise legitimate and serious questions that should be explored.

[The prepared statement of Ms. Nolan appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Nolan.

Our next witness is Professor Charles Fried, of the Harvard Law School, an expert in the areas of constitutional, legal and moral philosophy. From 1985 to 1989, he was Solicitor General of the United States, and from 1995 through 1999 he was an Associate Justice of the Supreme Judicial Court of Massachusetts. He holds a bachelor's degree from Princeton, a doctor of law from Columbia, and both a bachelor's and master's from Oxford University. Professor Fried, in his capacity as Solicitor General, was Judge Alito's superior when Judge Alito worked in that office.

Thank you for joining us, Professor Fried, and we look forward to your testimony.

STATEMENT OF CHARLES FRIED, FORMER SOLICITOR GENERAL OF THE UNITED STATES, AND BENEFICIAL PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. FRIED. Thank you, Chairman Specter, and I thank the members of the Committee for inviting me.

I think what I can most usefully do is cast some light on Judge Alito's—and if I slip into "Sam," please forgive me, because we were a small and very colleaguely and friendly office—Judge Alito's work in that office.

The Reagan administration, no doubt, had a point of view about the law, just as did the FDR administration in 1933 or the JFK administration in 1961. That is not unusual. That is what elections are about. Part of that view encompassed the notion that the lower courts had gone too far in limiting the ability of law enforcement; that the lower courts had moved too far away from an appropriate view of affirmative action, as expressed by Justice Powell in *Bakke*, toward quotas. And I suppose emblematic of the notion that courts sometimes just make things up was the notion that *Roe* v. *Wade* was incorrectly decided, a notion which, may I say, was shared by people across the political spectrum—Professor Paul Freund; Archibald Cox expressed that view as late as 1985; and Dean Ely.

Now, the first job of the staff of the Solicitor General's office was to make sure that when the Solicitor General presented the Solicitor General's client's position to the Supreme Court, this was done in a professional, correct and respectful way.

That office had career lawyers, some of whom stretched back to the time of Lyndon Johnson. I myself appointed as deputies people who I knew to be Democrats, liberal Democrats. None of that bothered me or bothered them because we were a professional office and they understood that their work was professional work. That is exactly how Judge Alito viewed his work.

If I look at the two examples that have been much featured in these discussions, his memo to me in the *Thornburgh* case on *Roe* v. *Wade*—it is said that he argued that *Roe* v. *Wade* should be over-

ruled. He did not. You need only read that memo because he said in that memo that we should not argue that *Roe* v. *Wade* should be overruled. I didn't follow that advice, but that was what the advice was.

Similarly, it said that he argued for the absolute immunity of the Attorney General in connection with wiretaps. He did not. What he said was I don't question that immunity, but we should not propose that argument; we should not make that argument to the Court.

Now, in 1985 he wanted a job in the administration, and at that point he took on a different role and he spoke in a different tone of voice. I think that is perfectly understandable and appropriate. And when, 15 years later, he became a judge—when, 15 years ago, he became a judge, he once again assumed a different role. His whole career shows that he understands the different between a professional lawyer, an advocate, and a judge. And no more eloquent testimony of that understanding can be had than the wonderful testimony of his colleagues, Democrat and Republican, liberal and conservative, who served with him for those 15 years.

I believe that it is perfectly appropriate for this panel, for this Committee, to have probed Judge Alito's disposition. Everybody has a disposition. He is in the mainstream. He tends toward the right bank of the mainstream, I agree. When this Senate approved two wonderful judges to be Justices, Justice Breyer and Justice Ginsburg, it was perfectly plain that they tended toward the left bank of the mainstream and they were confirmed, and properly so. I believe Judge Alito should be as well.

[The prepared statement of Mr. Fried appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Fried.

Our next witness is Professor Laurence Tribe, Loeb University Professor at Harvard University and Professor of Constitutional Law at the Harvard Law School. Professor Tribe has argued before the U.S. Supreme Court over 33 times, served as a law clerk to Justice Potter Stewart, and received his bachelor's degree from Harvard College, summa cum laude, in 1962, and his law degree also from Harvard, magna cum laude, in 1966.

Professor Tribe, the floor is yours.

STATEMENT OF LAURENCE H. TRIBE, CARL M. LOEB UNIVERSITY PROFESSOR AND PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. TRIBE. Thank you, Mr. Chairman. It is a great honor to be here on this very important occasion.

I am not here to endorse the nomination of Judge Alito, as I did with my most recent testimony before this Committee on a Supreme Court nomination with Justice Kennedy. I am not here to oppose his nomination, as I did several months before that time with Robert Bork. And I am not here to lecture the Committee on its responsibilities or its role. I don't think that is my role.

I think the only useful function that I can perform is to ensure to the limited extent I can that Senators not cast their votes with, to borrow an image from a Kubrick movie, their eyes wide shut.

It is quite clear that there are two central concerns in the country and in the Senate with respect to this nomination, and they do not relate, honestly, to what a truly admirable, collegial, modest, thoughtful and brilliant fellow Sam Alito is. And I don't mean to call him "Sam." I don't really know him the way that my colleague, Charles, does.

They relate to whether Justice Alito might, by casting a decisive fifth vote on many cases, narrow the scope of personal liberty, especially for women, and broaden the scope of Presidential power at a time when we see dramatically the dangers of an unfettered Executive by weakening the ability of both Congress and the courts to restrict Presidential assertions of authority.

A word first about liberty. It is certainly true that in the Solicitor General's office the memorandum that Judge Alito wrote for the Solicitor General did not urge that the Court be confronted frontally, overrule *Roe*. But he made it clear even then that the strategy he thought wise to pursue was a step-by-step process toward the ultimate goal of overruling *Roe*.

That is the only prospect on the table. I assure you that if the Supreme Court actually overrules *Roe*, I will have thousands of students to tell that I predicted the wrong thing. That is not the danger. They won't say *Roe* v. *Wade* is hereby overruled. What they will do—and I am saying "will" because I am assuming that confirmation will occur. Maybe it won't, but with the vote of Judge Alito as Justice Alito, 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.

It is the liberty interest which occurs not only in *Roe*, but in the right to die and in many cases that we can't predict over the next century, and certainly over the 30 years that Justice Alito would serve—it is that underlying liberty which is at stake. And it is crucial to know that Judge Alito dramatically misstated the current state of the law, and I say that with deference and respect, but it was clear.

When pushed on whether he still believed, as he said, not in his role as a Government lawyer but in his personal capacity that he believed the Constitution does not protect a right to abortion—when he was asked, do you still believe that, he said, well, I would approach it by starting with *Casey*. *Casey*, in 1992, he said, began and ended with precedent, *stare decisis*. *Casey* simply followed *Roe*. And he thereby avoided the issue.

That is not true. *Casey* split the baby in half; that is, *Casey* said there are two fundamental questions here. One, does the woman have a fundamental liberty at stake when she is pregnant and wants to make a decision? And No. 2, assuming she does, at what point does the state's interest in the fetus trump the woman's liberty?

On the liberty issue, the Court did not rely on *stare decisis* and *Roe*. The moderate Justices who wrote the joint opinion, Justices O'Connor and Kennedy and Souter, said that on the underlying issue of liberty, we agree clearly the woman's liberty is important, special, not just like the right to fix prices, because if we didn't think that and if we had a case where a teenage girl was being

forced to have an abortion, her liberty wouldn't be special either. And therefore we must conclude, without relying on *Roe*, this is a liberty deserving of special protection.

Never in the descriptions that you heard from Judge Alito with respect to the issues in *Roe* did he confront the question, does he too believe that that liberty is special or does he, as did Robert Bork and as do many, believe that there is no special liberty. Simply because the woman happens to have a fetus inside her, her interest is no greater than my interest in learning how to play tennis.

So it seems to me clear that the indications we have of Judge Alito's belief are that he does not have a conviction that that liberty is special, and he is unwilling not only to commit to treating this as a so-called super precedent; he is not even willing to indicate to this Committee that he believes that the Court has a special role in protecting intimate personal liberties.

Now, with respect to consolidating the powers of the President, I want to associate myself completely with the remarks of Beth Nolan. It is very clear that with respect to the unitary Executive theory that is being espoused that what you saw in the instance of Judge Alito's testimony was not a forthright description of what he said he believed—

Chairman SPECTER. Professor Tribe, you are a minute-and-a-half over. If you could summarize, I would appreciate it.

Mr. TRIBE. I am sorry. I will certainly summarize.

When he spoke in November of 2000, after *Morrison* was decided, he outlined a strategy for consolidating the power of the President, notwithstanding *Morrison*. And I think it is easy to explain, but I won't try to do it over time. The distinction he tried to draw between the President's control of functions within his power and the scope of Executive power is a completely phony distinction.

Chairman SPECTER. Professor Tribe, did you say you were not testifying against Judge Alito?

Mr. TRIBE. I am not recommending any action. I am recommending that everybody, because I think it is foolish—nobody really cares what I think.

Chairman SPECTER. Aside from your recommendation, are you saying you are not testifying against Judge Alito?

Mr. TRIBE. I am not testifying for or against Judge Alito. I am explaining why I am very troubled by his views. Obviously, it follows from that that I would be hard-pressed to recommend his confirmation.

[The prepared statement of Mr. Tribe appears as a submission for the record.]

Chairman SPECTER. The clock needs to start at 5 minutes even for the Chairman and for everybody. I had already started the 5-minute round, but we will proceed. And as we all know, after the panel testifies, each Senator has 5 minutes of questioning.

Professor Fried, you testified in the confirmation hearing of Chief Justice Roberts that you thought *Roe* was wrong decided, but you also thought that *Roe* should not be overruled. And that is based on the reliance and upon the precedents and upon *stare decisis*.

You have worked closely with Judge Alito. I know you have followed his career. What is your sense as to how Judge Alito will ap-

proach the *Roe* issue if it should come before the Court for reversal or being sustained in the context of your understanding of his approach to *stare decisis*?

Mr. FRIED. Well, I think it is a version, but only a version of what my colleague and friend, Larry Tribe, has said. I think he will not—and Larry agrees with that—move toward a frontal overruling, just as he has been urged and others have urged should happen. That is my belief, and I could be quite wrong. I could be quite wrong about that, but that is my belief.

Now, the idea that he would chip away at it—I am not sure I know what that means. When the *Casey* decision came down and Justice O'Connor—and it is clearly Justice O'Connor—moved from the very strict, almost abortion-on-demand standards of *Roe* toward the undue burden standard, a cry went up from the community which I think Professor Tribe is associated with that this was a disaster. But, in fact, it was a reasonable thing to do.

And we do not know what the future holds, but I don't expect him to do things which would be other than in the reasonable tradition of *Casey*, which I agree with Professor Tribe is a much better decision and a much better-founded decision than *Roe*.

Chairman SPECTER. Ms. Nolan, the critical issue which the Congress is going to be looking at and this Committee is going to hold a hearing on is the President's power on eavesdropping without a warrant, in contravention of the specific provisions of the Foreign Intelligence Surveillance Act.

During the Clinton administration, Deputy Attorney General Jaime Gorelick testified—I see you nodding; you know she testified that the President had inherent authority to conduct those warrantless searches.

What have you seen—aside from the generalizations of unitary power, anything specific in the record of Judge Alito that he has a view on that critical issue?

Ms. NOLAN. First of all, I just want to be clear that Deputy Attorney General Gorelick's testimony was about inherent authority in the absence of a statutory provision. It was physical searches not covered by FISA, so just to clarify that.

Chairman SPECTER. Well, she testified during the Clinton administration, which was long after FISA was adopted.

Ms. NOLAN. Yes, but it didn't cover physical searches and that was the question at that time. It was part of the Ames case. And, in fact, the administration brought to Congress a request that FISA be amended to cover physical searches.

Chairman SPECTER. OK, on to Judge Alito.

Ms. NOLAN. I am not aware of anything in Judge Alito's record with regard to that.

Chairman SPECTER. Professor Chemerinsky, do you think—you comment on the issue as to Judge Alito as to whether he would be a rubber stamp or not for Executive power. Do you think he would be a rubber stamp.

Mr. CHEMERINSKY. Everything that I could find in his record points to tremendous deference to Executive authority.

Chairman SPECTER. Well, tremendous deference is a little different from being a rubber stamp.

Mr. CHEMERINSKY. I think the key question that this Committee has to face is will this be a Justice who on these issues that we are talking about come before the Court will be willing to enforce checks and balances. In light of his entire career before going on the bench being in the executive branch, in light of his writings when he was in the Solicitor General's office, the speeches that he has given and the opinions he has written on the Third Circuit, I don't find anything to indicate that he will be enforcing checks and balances.

Chairman SPECTER. So you think he would be a rubber stamp?

Mr. CHEMERINSKY. I think the record here does speak for itself. I think if we can't find anything that points to that he will enforce checks and balances—

Chairman SPECTER. I have to interrupt you. I want to ask a question of Professor Kronman and Professor Demleitner. There has been a lot of talk about Judge Alito and whether he is deferential to the powerful and to the government.

You, Professor Demleitner, were his clerk. You know him pretty well. You know him, Professor Kronman, for several decades. I would like you to address your sense of him on that issue.

We will start with you, Professor Demleitner.

Ms. DEMLEITNER. I have never seen anything while I clerked for him or in subsequent years that led me to believe that he had an agenda or any kind of plan to favor particular groups over others. He really, in my experience, looks at each case individually, and I am sure he was surprised when he saw the statistics adding up how often he voted for a corporation or for an individual.

Quite to the contrary, I think his opening statement was a very powerful one in which he addressed his own background, and I think he indicates that he would not be inclined to favor big government or big corporate interests over individual interests.

Chairman SPECTER. Professor Kronman?

Mr. KRONMAN. I would agree with that. I have no reason to think that Judge Alito begins with a strong dispositional inclination to always favor governmental power over individual rights. He does, I think, have an inclination to be respectful of those in positions of institutional authority who have wrestled with questions that come before his court and to take seriously the thought they have given to those questions and to weigh them appropriately.

Chairman SPECTER. Thank you very much.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

I am curious, and I listened very carefully, Professor Chemerinsky—did I pronounce that correctly, Chemerinsky?

Mr. CHEMERINSKY. Yes, you did. Thank you.

Senator LEAHY. Thank you. In 2004, in the *Hamdi* case—and I am sure you are very familiar with that—the Supreme Court considered whether due process required that a citizen of this country who is being held as an enemy combatant should be afforded a meaningful opportunity to challenge the factual basis for the detention.

Justice O'Connor's decision for the Court upheld the fundamental principle of judicial review over Executive authority. She said, in effect, that even if you are at war, whether a declared war or a war

on terror or whatever, it is not a blank check for the President when it comes to the rights of the Nation's citizens.

Now, the unitary Executive theory which Judge Alito espoused in remarks just as recently as 5 years ago was championed in dissent by Justice Thomas in *Hamdi*, saying that the war powers of the President couldn't be balanced away by the Court.

Well, I am going to ask you this and then I will ask Ms. Nolan the same question. What are the implications for the rights of Americans to be free from governmental intrusion were Justice Thomas's views to prevail rather than Justice O'Connor's?

Mr. CHEMERINSKY. It is an enormously important question. *Hamdi* was a tremendous victory for all American citizens because, as you say, the Supreme Court said that before an American citizen can be held as an enemy combatant, there must be due process—notice of the charges, an opportunity to be heard, representation by counsel.

There was only one dissent directly to that and that was Justice Thomas, who advances the unitary Executive theory as the reason why the President should be able to hold individuals without due process. You asked, well, what might be the implications of this?

Well, the question would be can the President engage in electronic eavesdropping, in violation of the Foreign Intelligence Surveillance Act? It seems clear what the unitary Executive theory would say about that. Can the President hold an American citizen as an enemy combatant without a warrant for arrest, a grand jury indictment, or a jury trial? I can think of nothing more antithetical to the Constitution, but the unitary Executive theory would seem to say yes.

Senator LEAHY. Ms. Nolan, what would you say about that? The professor added this question of wiretapping outside the Foreign Intelligence Surveillance Act. If you could go to my original question, but also tell me what would you have given as advice to the President of the United States if he said, "I am going to bypass FISA, and I am just going to go wiretap on my own innate authority."

Ms. NOLAN. Well, here, I am going to show my credentials as the lawyer to the President and say that I am not exactly sure because we don't know the full contours of the program. So I want to be clear that it is possible that the President could bring something to me that would make me say under these circumstances of emergency powers—

Senator LEAHY. Let's go by what you have seen in the press.

Ms. NOLAN. By what I have seen, I would say you have to follow FISA or you have to go to Congress and get it amended.

Senator LEAHY. And do you agree with Professor Chemerinsky that as to the theory of the unitary Executive, we would be in a much different world if that theory had prevailed in the Supreme Court, rather than Justice O'Connor's view in *Hamdi*?

Ms. NOLAN. Absolutely, and I think the electronic surveillance is a perfect example of this theory going to the next step, which it is based on this unitary Executive theory and the commander-in-chief power. But the theater of war now is the entire world, including the United States, and the end of the war may be never when we are talking about the war on terror. And so we are not talking

about limited emergency Presidential powers in a very short period of time.

Senator LEAHY. We are talking about powers being used for the rest of my lifetime and your lifetime.

Ms. NOLAN. That is correct.

Senator LEAHY. And if I might, because the time is limited—and I would like to pursue that because I think you are absolutely right. If we say it is a war on terror, nations have faced terrorist threats throughout their history. Look at Europe, look at other countries. Do we set aside our Constitution on the claim that we may face these threats?

Professor Tribe, you and I have talked about a number of issues over the years, and I appreciate all the help you have given both me and this Committee. Last month, we passed a McCain amendment that prohibited inhumane, degrading treatment of detainees by U.S. personnel under all circumstances, which was originally strongly, strongly opposed by the administration; the White House's polling and published polling showed that their opposition was not a sustainable position.

They worked out a deal with Senator McCain, and the President, with great fanfare, signed the McCain amendment into law, but, of course, then very quietly issued a statement, in effect, construing what the law was and exempting or carving out an exemption for the Executive.

Now, let's say there was a violation brought before the courts on the McCain amendment prohibiting cruel, inhumane and degrading conduct, and it came before a court. What weight would a court give the President's signing statement? Would the court give equal weight to the statute overwhelming passed by Congress, signed into law by the President? Would they give equal weight to that as they would to this signing statement by the President which carved out exceptions to the law?

Mr. TRIBE. Senator, under current law, a clear majority of the Supreme Court and most circuit courts would say that although in cases of ambiguity the understanding of the President of the law's meaning at the time it is signed might be a factor to consider, when, as in this case, the law was clear, or as clear as one can be in talking about gradations of methods of interrogation, the McCain law, the statute and the Levin-Graham compromise, or whichever way it was sequenced, is the law.

And the statement made by the President of the United States on December 30 of 2005 that this will be enforced by the President only in accord with his power over the unitary Executive, a phrase that is constantly used by this administration, and when that was understood to mean that he will decide in his unfettered discretion when the method of interrogation crosses the McCain line and is cruel and inhumane, that will be given no weight.

But there is no way, consistent with his expressed beliefs, that a Justice Alito could go along with that view; that is, under his view, which would be, I think, quite similar to the view of Justice Thomas dissenting in *Hamdi*, it is up to the President to decide how he will, through his subordinates in the unitary Executive branch, carry out his authority as commander in chief, especially given the authorization for the use of military force.

And it is interesting that when asked by Senator Durbin about the role of the unitary Executive theory in *Hamdi*, which goes directly to the question whether American citizens could be detained indefinitely or made subject to eavesdropping under the broad authority of the authorization for the use of military force notwithstanding FISA, he said, well, I am not sure that Justice Thomas referred to the unitary Executive theory. Well, in fact, he did. Just read his opinion.

He relies heavily on and names—he says because the unitary Executive must have discretion to decide how to carry out the war, it is his views that will prevail. But it would not be on the theory that the President's understanding of the law trumps Congress's intent. It would rather be on the theory that the President has unfettered power to control the entire executive branch within the reach of his authority.

Now, let me, if I might, just say why this distinction between scope, the reach of his authority, and control is not a coherent one. Yes, it is true that the unitary Executive theory would not suddenly add to the executive branch a distinct lump of law-making powers. For example, the power that Truman exercised in the steel crisis; the President couldn't suddenly, under the unitary Executive theory, gain the power of eminent domain.

But the President does have the power to disregard Acts of Congress that would impinge on his carrying out of an executive function. And under the views that were expressed by Judge Alito in his testimony and the views that were really the underpinning of the unitary Executive theory when it was cooked up on a creative storm in the Office of Legal Counsel in the period when Judge Alito was there, the underpinnings included the notion that the President has inherent power over foreign affairs, war-making and the executive.

Chairman SPECTER. Professor Tribe, we are way over time on this section. If you could wrap up that answer—

Mr. TRIBE. It is wrapped up.

Chairman SPECTER.—I want to be deferential to Senator Leahy, who has a followup. This is not a precedent now.

Senator LEAHY. No, no, no, that is OK. Actually, my followup was going to go into this subject, so I was interested in the answer.

Chairman SPECTER. OK, if you are sure.

Senator Hatch.

Senator LEAHY. Thank you. Thank you very much, Professor Tribe.

Senator HATCH. Well, I have to apologize to this brilliant panel because I was not here. I was down at the Blair House with the Chancellor of Germany that I needed to do, and I have respect for all of you. I just have one question. Maybe, Professor Fried, you could assist me with this.

Could you please—you know, we have had some difference of opinion as to what settled law is in this body. A common question to ask is do you believe *Roe* v. *Wade* is settled law or any number of other opinions as well.

Professor Fried, could you explain the difference between settled law and settled precedent? Because, as I heard both of the—as I heard both now-Chief Justice Roberts and Sam Alito, Judge Alito,

they basically both said that they believe that *Roe* v. *Wade* and a number of other cases are settled precedents.

Now, I think what I would like you to do is could you please explain the terms "settled law" and "settled precedent" so that we all understand it once and for all, and whether the two witnesses, now-Chief Justice Roberts when he was Judge Roberts and Judge Alito, whether they were consistent in their answers on that particular issue.

Mr. FRIED. I am afraid I am unable to say what the difference between settled law and settled precedent is. I think that came out during the very excellent questioning by Senator Feinstein, and Judge Alito's answers, I think, were admirable.

Chief Justice Roberts answered Senator Feinstein and came up with the statement of settled law, settled precedent. I don't think that there was an attempt to make some distinction between those two concepts. But what he was suggesting is that this is something that is so well understood that it would be really extremely disruptive and unfortunately disruptive to overrule it.

Now, Judge Alito—I am sorry. This was taken by members of this body and in the press as an absolute commitment how Judge Roberts would vote. I don't believe he meant it as that. And Judge Alito, to his credit, when he was asked that question, was so scrupulous about giving a commitment, which he absolutely must not do, and which I don't think any member of this panel would want him to do, to make a commitment, that he avoided a formulation which had come to be made the equivalent of commitment, of an oath that I shall never do that. No judge, no person who aspires to be on a court, should ever make a commitment about how he or she will vote. I think you all agree with that. And I think Judge Alito, though it is causing trouble for him and will cause trouble for him, was unwilling to enter that territory because of his very admirable scrupulousness.

Senator HATCH. Well, thank you, Mr. Chairman. I just wanted to clarify that, and I think that does clarify that, because that is the way I interpreted it as well. But thank you for answering that.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman.

To come back to this unitary Executive, Judge Alito was asked frequently about his view about this and also about its impact upon the administrative agencies. And he responded during the course of the hearings that the *Humphrey's Executor* and *Morrison* cases upheld the powers of Congress to create the independent agencies and tried to leave it at that.

Of course, what is enormously interesting was his statement that his dissent in the *Morrison* case, where he took exception to *Morrison*, he says, "But perhaps the *Morrison* decision can be read in a way that heeds if not the constitutional text that I mentioned, at least the objectives for setting up a unitary Executive that could lead to a fairly strong degree of Presidential control over the work of the administrative agencies in the areas of policymaking."

So this is his view. We would appreciate an understanding what the law is. I think Professor Tribe indicated what he thought would be the decision. But this is his view.

And then in his work at the Justice Department at OLC on signing statements—and I will include the appropriate paragraph, but let me just in the issue of time mention his statement here. "Since the President's approval is just as important as that of the House or Senate, it seems to follow that the President's understanding of the bill should be just as important as that of Congress." That is rather, at least for me, and I think for most legislators, a bizarre concept. I thought we were the legislative branch.

But then he continues: "From the perspective of the executive branch, the issue of the interpretive signing statements would have two chief advantages: first, it would increase the power of the Executive to shape the law"—"increase the power of the Executive to shape the law; and, second, by forcing some rethinking by courts, scholars, and litigants, it may help to curb the prevalent abuses of legislative history."

The question is, Are we talking about someone that has a different understanding of the balance between the Executive and the Congress and the judiciary in terms of the makings of law? It seems to me that this is an attempt to tip the—to change that balance and tip it more towards the Executive at a time when we have certainly the challenges that are out here before the country to make it fairer, more equitable, to deal with the problems and challenges that we are facing in the country in terms of opportunity. Professor Tribe?

Mr. TRIBE. Well, I think I would underscore one aspect of what you were quoting, Senator Kennedy. Those statements that were made by Judge Alito about how he understands and how he believes one could shape the relationship among the branches of Government after *Morrison*, which was the decision upholding the validity of the independent counsel law and the decision rejecting Congress's—sort of rejecting the attack on Congress's role with respect to the Executive.

When Judge Alito made those statements, he was not working for the Government. He was not speaking in some other role. He was a judge. He had been a judge of the United States Court of Appeals for the Third Circuit for about 10 years. The statement was made on November 17, 2000, to a gathering of the Federalist Society, obviously a group exercising considerable influence with what was then the likely new administration. That was 10 days after the votes were counted in the election of 2000. It was 10 days after now-President Bush had declared victory even though the recounts were going on.

So he was speaking to the decisionmakers who would perhaps decide—he was already discussed as a possible nominee to the Supreme Court—who would decide whether he would remain on the Third Circuit. And he was saying to that group, "I still believe in what we were arguing back in 1986 at OLC." He talks about the "Gospel according to OLC." He says, "I still believe in that gospel." He is speaking as a judge, and he says, "Under that gospel, we have a way of giving the President more power."

I cannot imagine more direct evidence—

Senator KENNEDY. I am sorry to interrupt you, but I have very brief time. Just how would that change the relationship between the Executive and Congress?

Mr. TRIBE. Well, it would make it much harder for Congress to say you cannot interfere with the SEC in the following way, you cannot override the directives of the Fed. Even the independence of the Federal Reserve Board, which could be distinguished on grounds that historically monetary control was outside the Executive power, but that is shaky ground when you believe in the full unitary Executive. In theory, it could take over the conduct of all of the agencies because there are only three branches of Government, and they belong in the Executive.

Senator KENNEDY. My time is up, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kennedy.

The Committee is going to break very briefly for the memorial service for David Rosenbaum, which is being held at 10:30 in this building. A number of members of the Committee have expressed an interest in going there. I do not intend to stay for the full ceremony. I will be back. Others may stay longer. But I just wanted to point that out, and we will be breaking at about 10:20 or so.

Now, Senator Sessions?

Senator LEAHY. Mr. Chairman, could I just ask unanimous consent to place in the records several news articles regarding this whole issue?

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

Senator Sessions?

Senator SESSIONS. Professor Demleitner, I found your comments insightful, and from your perspective, as you said, a left-leaning Democrat, an ACLU member, and who worked at the Criminal Justice Clinic while you were at Yale. And you told the story about being with Judge Alito as his clerk, and you saw something that concerned you in an opinion, and you asked him about it and he took the transcript home that night to read it. Would you share briefly how that came about and what that meant to you as a young law clerk?

Ms. DEMLEITNER. Of course. I would be happy to. Thank you for asking, Senator.

I think it was in the fall of my clerkship, and as you said correctly, I had worked in the prison clinic at Yale, and obviously it was representing prison inmates, and so I had a very pro-defense outlook, which I think I still have today. And so clerking for a former Federal prosecutor was somewhat—I guess I was somewhat apprehensive about that. But from the very first day on, I think Judge Alito made it very clear that he wanted to hear all kinds of arguments, and I was, I think, generally inclined to argue to him that he should vote to reverse convictions.

There was one particular case that I remember very distinctly. It was a bribery case, and I had read the record, I had read the lower court transcript, and I thought there was some reason why he should vote to reverse. And, you know, I think a lot of other judges would have said, No, I don't see it, and just left it at that.

He took the entire lower court record home, took my memo home, and the next morning, when he came back, it was very clear he had spent quite a bit of time with it. He had read it. He had digested it. He sat me down and explained to me why I was wrong. He was right.

But I was so impressed with it because he didn't just laugh, you know, this is one of Nora's other theories to set someone free, but he really took it seriously. And he did this with every single case.

So I actually wanted to respectfully disagree with Professor Tribe on this issue because I think collegiality, brilliance, listening to others, which Professor Kronman had talked about, are very important on a court that consists of only nine members, because I think it shows he will be open minded, he will listen. He always listens, and I think that is very important, and he can be moved. I mean I remember writing memos to him and discussing cases with him where I saw this is his position, and he came out of oral argument and came out of the bench meeting with the judges afterwards, and he had changed his mind. So he has not said he is nondoctrinaire, and I think that is important to know about him.

Senator SESSIONS. That is consistent with what his colleagues on the bench have said, that is for sure. You mentioned the *Rybar* case. I agree with you on that, and in fact, in that case he ruled for the little guy against the prosecutors and the Government, who wanted to put the man in jail. He threw out the conviction. People have forgotten that in the course of the discussions.

Ms. Nolan, I remember you served as legal counsel in the opportunities that we had to chat, and you point out that you believe it is essential to defend the power of the President to undertake his constitutional assigned responsibilities, whether considering the exercise of his powers under the Appointments Clause or under the Commander-in-Chief Clause. You had to do that in that position in Department of Justice. You note that: In my view the executive branch is right to resist inappropriate incursions on its power from the legislative and judicial branches, and we should thus expect that executive branch lawyers will strongly defend Executive powers.

Just briefly, before we get into some of my questions, Congress is never reluctant to expand its power, and oftentimes to diminish Executive power, and it is a constant tension there, is it not, from your perspective? You served on the President Clinton—

Ms. NOLAN. There is definitely a tension. I do think Congress is sometimes reluctant, but there is definitely a tension.

Senator SESSIONS. Professor Fried, most of us, I think, are not familiar with this idea of unitary Executive. I have heard it complained for many years—and I assume this is the genesis of it—that these ABC agencies, these alphabetical entities that are quasi a part of the executive branch, but nobody controls them, is somehow contrary to our three branches of Government concept, and you have served in the Department of Justice, you have been Solicitor General, you are now a professor of law. Could you share with us the tensions that might exist and how we might think about these issues?

Mr. FRIED. I would be glad to, but only if the Chairman will give me the time.

Chairman SPECTER. Professor Fried, to the extent you can, would you make it brief?

Mr. FRIED. I have a talent for making things brief.

[Laughter.]

Mr. FRIED. Yes. First of all, *Morrison* v. *Olson*, the independent counsel case, was the crucial case on the unitary Executive. It was my bitter experience to have argued that case and lost it 7–1. I always tell my class that if that had come up later and had been styled "Clinton against Starr", I would have won it, because by then it became perfectly obvious what an abomination that Independent Counsel Law was, how it had been misused, and how it tore the fabric of our constitutional system.

I think what has been said about the unitary Executive in these hearings is very misleading. The unitary Executive says nothing at all, nothing about whether the President must obey the law. It talks about the President's power to control the executive branch. That is the subject. And in this, the unitary Executive theory is not an invention of the Reagan Justice Department or the Office of Legal Counsel, it was propounded in the first administration of Franklin Delano Roosevelt, who objected to the powers of the Controller General, who tried to fire a Federal trade commissioner, and who referred to himself as the general manager of the executive branch. That is the origin of the notion in FDR's administration.

Chairman SPECTER. Thank you very much, Professor Fried, and thank you, Senator Sessions.

I had asked you to be brief because Senator Feinstein wants to question before our break, and that is imminent.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much. I would like to quickly go down the line and ask each witness which present or past justice do you think Judge Alito will most be like, please? If you do not, Dr. Chemerinsky, we will come back. Do you have a view?

Mr. CHEMERINSKY. Sure. Your Honor, having read over 200 opinions written by Judge Alito, I think ideologically he is closest on the current Court to Justice Scalia, which, of course, is exactly what President Bush said he wanted in appointing a Justice to the Court.

Mr. KRONMAN. I would name Justice John Harlan, who Judge Alito identified as one of his four heroes on the Supreme Court.

Ms. NOLAN. I think it is likely to be Justice Scalia, although I think he may be more aggressive on Executive power than Justice Scalia has been in all areas.

Mr. FRIED. It is certainly not Justice Scalia, because he has not sworn allegiance to any of the theology which Justice Scalia has propounded, never on any occasion. I think it is Robert Jackson.

Mr. TRIBE. I only wish it were Jackson or Harlan. I think he would be—I do not know that I accept the question as being sort of directly—

Senator FEINSTEIN. You do not have to answer if you do not have—

Mr. TRIBE. I would not mind answering. I think he is somewhere—

[Laughter.]

Mr. TRIBE [continuing]. Between Scalia and Thomas, and I could explain the differences, but I do not think he is anything like Jackson or Harlan.

Senator FEINSTEIN. Thank you.

Mr. Fried, I listened to your testimony on Justice Roberts with great interest. In a dialog you had with Senator Specter, I want to quote what you said. You said, talking about *Roe*, "It is not only that it's been reaffirmed as to abortion, but that it has ramified, it has struck roots, so it has been cited and used in the *Lawrence* case . . . in some of the opinions in the right-to-die cases, in the *Troxel* case, which is the grandparent visiting right case. So it is not only that it is there and it is a big tree, but it has ramified and exfoliated, and it would be an enormous disruption. So you not only get branches, you get leaves."

And then you went on to say, "Since I do not know Judge Roberts except most casually, and I certainly have never discussed it, if you want a prediction from me, I would predict that he would never vote—not never—but he would not vote to overrule it for the reasons that I have given."

Would you make the same prediction about Judge Alito?

Mr. FRIED. I would, and I should say that after Judge Alito left my office, which was late in 1985, I think I have spoken to him three times, and then maybe 15 words. So it is a guess there as it was with Roberts, but, yes, that would be my prediction.

Senator FEINSTEIN. Thank you.

Now, my question of anyone who would care to answer is about the value of a Presidential signing statement. If it is true—and it is—that the legislature passes legislation, makes findings of fact, that legislative intent is generally based on those who formulate the legislation and pass it, does a Presidential signing statement shape the law?

Mr. FRIED. I think that this has been much misunderstood here too. The Presidential Signing Statement Initiative, which I was involved in, I must say, was principally devised to curb the abuses of legislative history and legislative reports in which staff often—and I am afraid we continue to see that—with the assistance of outside groups and lobbyists—different groups, different lobbyists—but with their assistance, plant little stink bombs in the legislative history, which then flower in later litigation.

[Laughter.]

Mr. FRIED. The point of the signing statement was, if you like, a kind of Airwick against those stink bombs.

[Laughter.]

Senator FEINSTEIN. You have aroused the staff.

Mr. TRIBE. There may be a lot of staff-oriented stink bombs, but the power to inject a poison pill in the legislation is what we see in the Signing Statement Initiative. And whatever was the original intent under Charles's tutelage, what has happened under the current administration is totally different. There are something like 100 examples now of references in these signing statements to the unitary Executive, and they are being used, they are being used to give the President the kind of control that not only FDR, but all the way back to George Washington you can find examples of the President saying, "I am the President. This is my Government." But it is a big fallacy to say, as my friend Charles Fried did, that this has nothing to do with the power of Congress. Congress often enacts legislation to structure the executive branch and to limit the power of the President as the head of the branch, to tell the limbs

of that tree that Charles described, and the leaves, exactly what to do.

Chairman SPECTER. Thank you very much, Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Chairman SPECTER. We are going to adjourn for a—

Senator COBURN. Senator Specter, I will defer my questions so that we will not have to have the panel come back, if that would be OK, and I will submit some questions.

Chairman SPECTER. You are entitled to your round.

Senator COBURN. But I think in all courtesy to our distinguished panel, this would release them, and I will be happy to submit some questions for the record.

Chairman SPECTER. All right. We will proceed in that manner at your suggestion.

As I had said earlier, New York Times reporter, David Rosenbaum, a memorial service is being held for him. he was brutally murdered on the streets of Washington very recently. We will recess for just a few moments. I would like the next panel to be ready and the Senators to be ready.

[Recess at 10:05 a.m. to 10:40 a.m.]

Chairman SPECTER. The hearing will resume.

The first witness on our next panel, Panel 5, is Mr. Fred Gray, senior partner at Gray, Langford, Sapp, McGowan, Gray & Nathanson, a veteran civil rights attorney with an extraordinary record of representation. At the age of 24, he represented Ms. Rosa Parks, whose involvement in the historic refusal to give up her seat on the bus to a white man is so well known. That action initiated the Montgomery bus boycott. He was Dr. Martin Luther King, Jr.'s first civil rights lawyer. In 2004, Mr. Gray received the ABA Thurgood Marshall Award for his contributions to civil rights. A graduate of National Christian Institute, Alabama State University, and Case Western Reserve. Thank you for joining us, Mr. Gray.

I haven't had an indication from Senator Leahy about whom they would like to give extra time to, but my sense is that you would be on the list, so we are going to set the clock at 10 minutes for you. You may proceed.

STATEMENT OF FRED D. GRAY, SENIOR PARTNER, GRAY, LANGFORD, SAPP, MCGOWAN, GRAY & NATHANSON, TUSKEGEE, ALABAMA

Mr. GRAY. Thank you very much, Mr. Chairman.

Chairman SPECTER. By way of explanation, the judges talked longer yesterday, and I thought it appropriate not to interrupt them, and I want to give the extra time to this panel. If Senator Leahy comes in and cuts you off, Mr. Gray, just remember I gave you 10 minutes.

[Laughter.]

Mr. GRAY. Thank you very much, Mr. Chairman. And to my Senator, Senator Sessions, who represents us well in the Senate, to the other members of the Committee, of course, I am Fred Gray. I live in Tuskegee, Alabama, with offices there and in Montgomery. I appreciate this Committee inviting me to appear. I consider it an honor.

For over 50 years, I have filed almost every imaginable type civil rights case in Alabama. Many of those cases have resulted in Supreme Court rulings and many of them precedent-setting cases in which the Court declared unconstitutional certain State and city ordinances, including in the field of registration and reapportionment.

As one who has been in the trenches and still is in the trenches, I appear today to attest to the tremendous importance of the reapportionment cases, those cases decided by the Warren Court, one of which I actually litigated and was my brainchild, the case of *Gomillion* v. *Lightfoot*.

I am still troubled, extremely troubled by Judge Alito's comments made in his application, notwithstanding the testimony before this Committee. The reapportionment cases decided by the Warren Court made certain that the Federal courts had the power to ensure that voting rights were meaningfully protected. These rights had been violated by many of our States since Reconstruction. The cases illuminate the inequities of malapportionment which deprived African-Americans of voting strength across the Nation. In my view, there is no more important body of law than that generated in the field of voter registration and in civil and human rights.

African-Americans in Alabama and other Southern States for years, even before *Browder* v. *Gayle*, which is the case that integrated the buses and which was a unanimous case of the Warren Court, were actively working toward obtaining the right to vote. For example, in my hometown now, Tuskegee, Alabama, the home of Tuskegee University where Booker T. Washington was its first president, where George Washington Carver made many of his scientific discoveries, and the home of the Tuskegee Airmen, African-Americans in that county filed lawsuits as far back as 1945 in order to obtain the right to vote.

After years of litigation, when we were finally able to get approximately 400 African-Americans registered for an upcoming municipal election, in 1957 the Alabama Legislature passed a law which changed the city limits of the city of Tuskegee from a square to a 26-side figure, excluding all but three or four African-Americans and leaving all the whites in the city. And then the State said, "We are not denying you the right to vote. We are simply changing the political boundaries of the city of Tuskegee, and you cannot vote now in the city elections because you are no longer there." I thought that was wrong, and so did the Supreme Court. We filed the case of *Gomillion* v. *Lightfoot*. That case substantially strengthened the law in securing the right to vote for African-Americans.

The *Gomillion* case was the first significant reapportionment case decided by the Warren Court. In a unanimous decision, the Court held that the boundary change violated the 15th Amendment. Just as importantly, the Court rejected the argument that impairment of voting rights could not be challenged in the face of a State's unrestricted power to realign its political subdivisions. The Court stated: "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the 15th Amendment....Apart from all else, these considerations lift this controversy out of the so-called 'polit-

ical arena' and into the conventional sphere of constitutional litigation."

There is no question in my mind that it gave rise—*Gomillion* v. *Lightfoot* did—to the other subsequent cases you have heard about, great reapportionment cases, *Baker* v. *Carr*, *Gray* v. *Sanders*, *Reynolds* v. *Sims*.

I cannot overstate to this Committee the importance of these cases, for they laid the foundation for our democracy. The reapportionment cases enshrining the principle that every citizen has a right to an equally effective vote, rather than the right to simply cast a ballot. State legislatures could not dilute the votes of racial minorities by perpetuating unequal voting districts. And, most importantly, the reapportionment cases also established principles for challenges "at-large" and "multi-member" electoral systems enacted by many of the Southern States after the passage of the Voting Rights Act.

When I filed the *Gomillion* case, we had very few African-Americans registered to vote and had no legislators. I was one of the first two in 1970. Now Alabama has—and across the Nation there are over 9,000 registered—9,800 appointed and elected officials, and they are there because of the result of the Warren Court's decisions in *Gomillion*, *Baker*, *Gray*, *Reynolds*, and these other cases enacted by legislation since that time. So we have these persons serving with honor and distinction, from city council to the Congress.

However, we still need a strong Supreme Court to continue to enforce these laws. I have seen in my home State, as fast as we get one law stricken, they will enact another. Now that we have a proportionate number of African-Americans in the legislature, we want to be sure that we have a strong Supreme Court that will not permit that to be changed.

I respectfully submit and suggest that this Committee carefully scrutinize Judge Alito's disagreement with these cases. A nominee to the Supreme Court who has a judicial philosophy that is set against the Warren Court and against the reapportionment cases is, in effect, saying that he would turn the clock back. If this occurred, not only would African-Americans lose, the entire Nation would lose the great richness of their contributions as we are currently enjoying. In my opinion, a Supreme Court Justice with these views would impede instead of protecting the right to vote.

In conclusion, I submit that the next appointee to the Supreme Court should favor the protection of voting rights and should strengthen, and not weaken, the voting rights case law as developed by the Warren Court.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Gray appears as a submission for the record.]

Chairman SPECTER. Thank you, Mr. Gray, and thank you for your remarkable service on civil rights and voting rights. Your listing of cases and listing of clients is enormously impressive, and it has been a great contribution to America.

Mr. GRAY. Thank you very much, Mr. Chairman.

Chairman SPECTER. We turn now to Ms. Kate Michelman, who for 18 years, up until 2004, was president of the National Abortion and Reproductive Rights Action League, more properly known as

NARAL Pro-Choice America. Prior to joining NARAL in 1985, she was Executive Director of Planned Parenthood in Harrisburg, Pennsylvania, where she expanded the range of reproductive health services available in the area. She also trained medical students and residents in child development as clinical assistant professor in the Department of Psychiatry at Pennsylvania State University School of Medicine. And it is worthy of brief comment that we two Pennsylvanians have had many discussions on this issue at the same health club. Remarkable what the health clubs will do.

Ms. MICHELMAN. We miss you.

Chairman SPECTER. What is that?

Ms. MICHELMAN. I said we miss you over there.

Chairman SPECTER. Well, they don't have a squash court.

[Laughter.]

Ms. MICHELMAN. I know that was a big mistake on their part.

Chairman SPECTER. I had to change health clubs except for the Senate gym, where I see Senator Kennedy.

[Laughter.]

Chairman SPECTER. What is your time—

Senator KENNEDY. Can we take you up on that?

Chairman SPECTER. We are going to put your time at 10 minutes, Ms. Michelman, and we look forward to your testimony.

STATEMENT OF KATE MICHELMAN, FORMER PRESIDENT, NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE (NARAL) PRO-CHOICE AMERICA, WASHINGTON, D.C.

Ms. MICHELMAN. Thank you, Senator. Mr. Chairman, Senator Leahy, who is not here, and members of the Committee, it is my pleasure to talk with you today, and I must say I am deeply honored to be sitting next to this great man, Mr. Gray.

Certainly for many days we have heard many legal experts and constitutional law theorists, but I think the voices of real people whose lives will be affected by the potential confirmation of Judge Alito have been absent from this discussion. And I am here as one woman among millions whose lives could be indelibly shaped by the confirmation of this judge.

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, ever occurred to me until the day my husband suddenly abandoned me and our family. In time, with nothing to live on, we were forced onto welfare. Soon after he left, I discovered I was pregnant. After a very long period of soul searching, of balancing my moral and religious values about the newly developing life, with my responsibility to my three young daughters, I decided to have an abortion.

I might add, Mr. Chairman, that of the countless women I have encountered throughout my life, not one has made a decision about abortion without first contemplating the gravity of that choice. 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 single one of them deserve the respect and protection afforded by *Roe* v. *Wade*.

Now, because all of this 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, who probed every aspect of my private life, from my sex life with my husband, to whether I was capable of dressing my children. Eventually they gave me their permission. I 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.

Now, this was incredibly humiliating, and an experience that awakened me to a lifetime of activism. I tell you this story not to get your sympathy, I tell this story because this nomination poses a real threat that women will once again face the dreadful choice between the degradation of the Review Board and the danger of the back alley, and this is neither hyperbole nor hype. It is the simple demonstrable reality of the situation.

Predicting how any given judge will decide any given case is a Washington parlor game, in my view, 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 public record to suggest that he recognizes such limits for anyone, and even less so for women, and there is much in his record that indicates, I think, clearly and beyond the boundaries of reasonable dispute, that he rejects the idea of privacy, personal privacy, as a fundamental American ideal.

A woman's right to choose is a powerful manifestation of privacy, but it is one right among many, and all of them should concern us. There is no sense in Judge Alito's writings or rulings that privacy is a fundamental constitutional right. In his record, not only are individuals often powerless against the prerogatives of the State, individuals are more often than not simply absent all together. In many ways, what Judge Alito has written is less disturbing than what he omits, any sense of how his legal rulings bear on real people whose lives are shaped by his decisions.

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 ever existed or even mattered. When he wrote that commonly used methods of birth control could be classified as methods of abortion, there was no indication he considered the women who would be forced into unwanted pregnancies. His writings contain ample veneration for the State, but I think place little value on the individuals whom Government exists to serve, protect and respect.

I have been involved in many Supreme Court nominations, but frankly, none more important than this one, nor as dangerous, for the contrast between Judge Alito and the Justice he would replace is quite stark. As the first woman to serve on the Court, Justice O'Connor brought a very unique perspective to the law that is evident in her opinions, upholding a woman's right to choice, protecting women from discrimination, and defending affirmative action. Quite often—you have talked about this a lot—she has been

the decisive vote in 5–4 cases, whose balance Judge Alito would now tip the other way.

Here, Mr. Chairman, it is important to note that Justice O'Connor is a judicial conservative, who has not always fully protected constitutional rights and liberties, but she crafted opinions that retained meaningful protections for rights that other Justices sought to deny completely.

But the most disturbing difference between these two jurists is not simply the conclusions they reach, but also how they reach them. Justice O'Connor considered each case with careful attention to what the law means and who it affects, for she knows that that is the essence of justice. In Judge Alito's approach to the law, there is neither justice, nor regard for women's human dignity.

Judge Alito has parried challenges to his record by promising an open mind and a respect for precedent. We must ask whether this assurance offered only now, can be allowed to outweigh the totality of this man's record. Millions of American women whose lives, privacy and dignity have a place in this debate would have to conclude no.

Thank you.

[The prepared statement of Ms. Michelman appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Michelman.

Our next witness is Professor Ronald Sullivan, Associate Clinical Professor of Law at Yale. He is a graduate of Morehouse College in 1989, and a law degree from Harvard in 1994. He served for 1 year in Nairobi, Kenya as a visiting attorney for the Law Society of Kenya, and in that capacity was on a committee charged with drafting a new constitution for Kenya.

We very much appreciate your coming in today, Professor Sullivan, and the floor is yours, and the clock will start at 10 minutes.

STATEMENT OF RONALD S. SULLIVAN, JR., ASSOCIATE CLINICAL PROFESSOR OF LAW, AND SENIOR FELLOW, JAMESTOWN PROJECT, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT

Mr. SULLIVAN. Thank you very much, Senator Specter, and Senator Leahy in his absence, members of the Committee. Thank you for inviting me to testify at this very important expression of our democracy.

I have been asked to comment on Judge Alito's Fourth Amendment jurisprudence. Two broad themes follow from his record. First, Judge Alito's Fourth Amendment opinions reveal a clear pattern of privileging Government power when it comes into conflict with individual liberty. Indeed, in the 17 opinions that the nominee has authored regarding the Fourth Amendment, in his more than 15 years on the bench, Judge Alito has ruled to suppress evidence only once.

The second broad theme is that Judge Alito is a skilled, legal writer with a sharp analytical mind. Almost none of his opinions appears to be a radical departure from accepted jurisprudential conventions. Rather, his constitutional criminal procedure decisions, read together, demonstrate a pattern that cannot be ignored. In over 50 constitutional criminal procedure cases that I have re-

viewed, Judge Alito ruled in the government's favor over 90 percent of the time. To borrow an old phrase, as the government goes, so goes Judge Alito in a criminal law context.

But the point I make here is more than a mere statistical correlation. I want to make a deeper and more substantive point. Judge Alito's tendency to privilege government power in a criminal context represents a failing in his jurisprudence for the following three reasons.

Number 1: Judge Alito criminal law corpus demonstrates a judicial philosophy that improperly subordinates privacy, dignity and autonomy concerns to the interest of the government.

Number 2: Even when the government undeniably violates the Fourth Amendment, Judge Alito employs legal rules to excuse the government for its misbehavior.

Number 3: Judge Alito shifts from a strict constructionist to an activist jurist at times when the government's interest so dictates.

Let me briefly address each of these propositions in turn, and of course, I give much greater detail in my written statement. First, privacy and dignity concerns. *Groody* v. *Doe* has been discussed all week, and I assure you I shall not be redundant. Let me simply invite the Committee to read my comparison of *Groody* with another one of his cases, *Leveto* v. *Lapina*. In *Groody*, Judge Alito was only able to muster up one clause, not even a full sentence, giving voice to the highest order dignity concerns involved or implicated in the strip search of a 10-year-old girl. Compare this to *Leveto*, a tax evasion case involving the search of a wealthy veterinarian and his spouse, who was wearing a nightgown, where Judge Alito devotes four entire pages of text to express the "indignity" or "stigma" concerns associated with the illegal search. In no other, I repeat, no other Fourth Amendment case that Judge Alito authored, did he spend even a fraction of the time expressing the dignitary objections that he did in *Leveto*. One is forced to wonder whether Judge Alito has a more robust appreciation for the privacy and dignity concerns of the wealthy or the class of individuals typically charged with tax evasion or crimes of that sort.

In the area of what I have characterized as excusing governmental misbehavior, Judge Alito frequently uses the good faith exception or the qualified immunity doctrine to cure an otherwise illegal search. Indeed, in nearly one-third of his Fourth Amendment cases, Judge Alito excuses the government's unconstitutional invasion of our privacy. Now, the insidious effect, the on-the-ground effect of the heavy reliance on the good faith exception or the qualified immunity exception is that the exceptions tend to swallow up the rule. This gives government officials the perverse incentive to knowingly violate the constitutional rights of our citizens because no practical consequences follow.

So Judge Alito's rulings will take the following form. There was no substantive violation of the Fourth Amendment, therefore, conviction affirmed; or, yes, there was a substantive violation of the Fourth Amendment, as in the *Leveto* case, and it was a horrible violation, but even though there was a violation, I am going to interpose a qualified immunity defense, and the government is therefore shielded from civil liability. This form of argument can be seen throughout his jurisprudence.

Now to the strict constructionist argument. Judge Alito was praised by many as being a true conservative jurist, a strict constructionist, and that proposition has been almost assumed, as I have listened to the hearings this week. But that he is a strict constructionist is not true all of the time. A review of his entire criminal law jurisprudence demonstrates that Judge Alito shifts his interpretive style when necessary to rule in accord with the government's interests.

Two of Judge Alito's opinions illustrate my claim, *Sandoval* v. *Reno* and *U.S.* v. *Lake*. In *Sandoval*, Judge Alito employs a literalistic and plain meaning construction of the relevant statute to limit, to limit the scope of a defendant's rights. There is a very technical habeas issue that I will not go into, but essentially Judge Alito said—he cited the captions in the relevance statute in bold letters and all caps twice, and said, "This is all we have to look at. This answers the question to congressional intent." And that is within the norm of judicial reasoning for a strict constructionist. But he uses this interpretive style to limit the scope of a defendant's right.

But in *Lake* he shifts his interpretive style and uses a broad, liberal even, statutory construction to augment the scope of government power. More specifically in *Lake*, Judge Alito found that a car, located the functional equivalent of a city block away from its owner and out of its owner's eyesight, was nonetheless in the "presence of the owner." To do so, Judge Alito relied on a Ninth Circuit, yes, a Ninth Circuit Court of Appeals ruling to articulate a remarkably broad definition of "presence." This sort of shifting jurisprudence begins to look like it is result driven and not restrained in the jurisprudential tradition in which Judge Alito positions himself.

We are living in a moment where the Executive is making extraordinary claims of authority to conduct investigations of U.S. citizens. The delicate balance between liberty and safety that the Framers fought so hard to erect, and that their successor generations fought so hard to maintain, needs our continued vigilance to sustain.

In the United States perhaps no right is regarded as more sacred, more worthy of vigilant protection, than the right of each and every individual to be free from government intrusion without the unquestionable authority of the law. Judge Alito, on my read of his constitutional criminal procedure opinions, shows an inadequate consideration for the important values that underwrite these norms of individual liberty, the very norms upon which this constitutional democracy relies for its sustenance. This Committee and this Committee's decision on whether to consent to Judge Alito's nomination will have a profound impact on how liberty is realized in the United States.

In addition to Judge Alito's constitutional criminal procedure decisions, I have reviewed nearly 415 of Judge Alito's opinions under both the auspices of the Alito Project at Yale, where a number of my colleagues and I reviewed all 415 of his opinions, and under the auspices of the Jamestown Project at Yale, where I serve as a Senior Fellow. While I have not studied in detail all 415 of his opinions—and I should say the opinions that he authored, which I

found to be most instructive—I find this tendency to be consistent with other areas of the law as well.

That said, I would like to thank the Committee for the opportunity to share my remarks with you, and I look forward to answering any questions that the Committee may have.

[The prepared statement of Mr. Sullivan appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Sullivan.

We now turn to Professor Amanda Frost, Assistant Professor of Law at American University's Washington College of Law. She is a graduate of Harvard College, 1993, with a bachelor's degree and a law degree from Harvard Law School in 1997. Her areas of specialization include civil procedure in Federal courts, and is the author of several Law Review articles. As staff attorney for the Public Citizen's Litigation Group, she has litigated cases before the U.S. Supreme Court and Federal Courts of Appeals. She was a consultant for the Shanghai Municipal Government in drafting open government legislation.

Thank you for being with us today, Professor Frost, and we will set the clock at 10 minutes for your testimony.

STATEMENT OF AMANDA FROST, ASSISTANT PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY, WASHINGTON, D.C.

Ms. FROST. Thank you. Mr. Chairman, Senator Leahy and members of the Committee, I feel honored to have the opportunity to testify at these important proceedings. My comments today are about reforms that are needed, and the procedures and practices that govern recusal of Federal judges.

Your consideration of Judge Alito may be affected by your views about whether he should have recused himself from certain cases while sitting on the United States Court of Appeals for the Third Circuit. That is why I wanted to discuss with you today certain problematic recusal practices that too often have led Federal judges into situations into which their recusal decisions undermine the public faith in the judiciary.

Because the reputation of the judiciary is affected as much by the appearance as the reality of bias, Congress has enacted a statute, 28 USC section 455, that provides, "Any justice, judge or magistrate judge of the United States, shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." By using this language, Congress sought to ensure that even when a judge is certain that he or she could be impartial, that judge must step aside if members of the public might reasonably disagree.

In essence, the law requires a judge to recuse even in borderline cases in which the possibility of bias or appearance of bias is slight.

I think this is a good standard, but a key problem with the statute is that it contains no procedural mechanisms to govern the recusal decision. It does not say how the parties are to seek recusal, does not say how evidence about a judge's potential biases or conflicts are to be shared with the parties, does not clarify who should make the recusal decision, or whether that person should articulate any reasons for making that decision.

So, for example, Supreme Court Justices recuse themselves in dozens of cases a year, and they almost never explain why they are doing so. When a party files a motion seeking a Justice's recusal, which is a rare event and something that most parties would be reluctant to do, there is no formal process through which the entire Court considers and decides that motion. Instead, it is sent to the one Justice whose impartiality is being questioned, and that Justice makes the decision on his or her own, often without explanation.

This procedural vacuum has, I believe, been the cause for recurring controversies over judges' failures to recuse, controversies that undermine the very goal of section 455 to protect the integrity of the judicial branch.

I want to give just a few examples of some of the recusal problems that have occurred over many years. In 1969, Supreme Court nominee Clement Haynsworth failed to be confirmed for that position, in part due to revelations that while sitting on the Fourth Circuit he had sat on a number of cases in which he had a small financial interest.

In 1972, then-Associate Justice William Rehnquist was criticized for sitting and hearing a case that he had commented on publicly while he was in the Department of Justice.

In 2004, most of us remember, Justice Scalia made a controversial decision not to recuse himself from a case in which Vice President Cheney was a party, despite having vacationed with the Vice President shortly after the Supreme Court had agreed to hear the case.

And then most recently, Judge Samuel Alito has been questioned by this Committee for his failure to recuse himself from a case in which Vanguard was a party, despite the fact that he owned mutual funds with Vanguard, and as stated in his 1990 Judiciary Committee questionnaire that he would recuse himself from all such cases.

What everyone's views are about whether the individual judges and Justices in these examples should have recused themselves—and I recognize there is differences of opinion on that—but whatever your views are, I think most would agree that the process by which that decision was made did not work to foster public confidence in the judiciary. These problems with the recusal law are particularly evident and disturbing at the Supreme Court level. When a district court judge or circuit court judge fails to recuse themselves, that decision may be reviewed by a higher court.

As I said, when a Supreme Court Justice faces a question of recusal, the Justice makes the decision on his or her own and there is obviously going to be no review of that decision. There is no higher court.

Furthermore, the stakes are simply that much higher at the Supreme Court, which hears the most divisive and important cases and which sets the law for the Nation.

Finally, the Supreme Court is the public face of the judiciary, and because of this, their recusal practices are more likely to have a negative effect on the public's perception of the Judiciary.

I propose a series of procedural reforms that could be made either by the Justices themselves in a rule, or by Congress, by

amending the recusal laws. First, there should be more transparency. Judges should be required to inform the parties and the public of any information that would be relevant to the recusal question. Even if they do not think recusal is required, the parties should be given full information, and the public as well.

Second, when judges do decide to recuse themselves, they should at least issue a brief explanation explaining why. That will provide a body of precedent to guide future litigants and judges facing these difficult recusal situations.

And third, when a judge does not decide or does not think it is clear that he should recuse himself, that judge should turn that decision over to his colleagues, or at the very least consult his colleagues, rather than make the decision on his own.

With these reforms in place, I think we would better protect both the reputation of the judiciary and of the judges who serve the public.

Thank you for inviting me to share my views with you today.

[The prepared statement of Ms. Frost appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Frost.

We now turn to Professor John Flym, professor of law at Northwestern. He has taught Professional Responsibility and Advanced Criminal Procedure. He served as counsel to Ms. Shantee Maharaj, the plaintiff in the 2002 case where Judge Alito ruled in favor of the Vanguard Mutual Fund. He got his bachelor's degree from Columbia in 1961 and his law degree from Harvard.

Thank you for agreeing to be a witness here today, Professor Flym, and we look forward to your testimony.

STATEMENT OF JOHN G.S. FLYM, RETIRED PROFESSOR OF LAW, NORTHEASTERN UNIVERSITY SCHOOL OF LAW, BOSTON, MASSACHUSETTS

Mr. FLYM. Thank you, Mr. Chairman, Senator Leahy, members of the Committee. I am honored to be before you today.

I would like to make one correction, if you please. It is a common error, but I have taught at Northeastern University, which is in Boston.

I am indeed the lawyer who challenged Judge Alito's failure to recuse in the *Monga* case, the *Monga/Vanguard* case.

What I would like to do now is to address three points, one of which was particularly addressed by Senator Hatch yesterday in his questioning of John Payton, the Eighth Federal Circuit representative. Does the law require Judge Alito to recuse given his investments in Vanguard?

Now, my colleague Amanda Frost addressed Provision (a) of the statute, which speaks in general terms and states the general principle based on the appearance. A judge shall recuse if someone could reasonably question the judge's impartiality. Section (b), however, is the applicable provision. Section (b) doesn't state a general proposition. It states a specific proposition. Among them (b)(4) says that a judge shall recuse if the judge has a financial interest in a party to the case. It then goes on in subsection (d) to define what "financial interest" means, and it says a financial interest means

a financial interest, "however small," and then it goes on to list the various exceptions.

Now, Judge Alito in his answers filed in the questionnaire which he submitted to this Committee relies on the third exception in subsection (d), the one which plainly has nothing whatsoever to do with mutual funds. It has to do with interests, for example, in insurance policies. The one exception that does address mutual funds is the one raised by Senator Hatch, but it says the opposite of what Senator Hatch suggested yesterday. It says that one of the exceptions is that an investment in a mutual fund shall not be regarded as a financial interest in the securities held in the fund's portfolio. Now, that is an obvious proportion. It has nothing whatsoever to do with simply saying that an investment in mutual funds doesn't qualify as an interest, as a financial interest within the meaning of subsection (b), because if it did, Congress would simply have defined what—it would simply have said in the exceptions that financial interest doesn't include an investment in a mutual fund. That is what the statute says.

Now, the statute goes back to 1974. It would be astonishing if there weren't interpretations, case law of the statute. There are lots of interpretations. The Second Circuit in 2002, that is, the year before Judge Alito wrote the December 10th letter to Judge Scirica saying, "After I received the November 2003 motion that I should have recused myself, I reviewed the law, and having reviewed the law, I concluded that the statute doesn't require me to recuse. But, nevertheless, I am going to do that so that you can appoint a panel to consider the pending motion." He did not recuse from the case. A more important detail than might otherwise appear.

Now, in his statement to this Committee, his reliance on the third exception for insurance policies is unexplainable. It is incoherent. It has nothing whatsoever to do with mutual funds. The first exception, with due respect to Senator Hatch, says the opposite of what the Senator suggested yesterday. It says mutual funds do count as financial interests. These simply do not include investments that the fund makes in the securities, that is, the securities which are listed in the fund's portfolio.

Now, I, like everyone else, have been enormously impressed by all of the testimony, particularly his colleagues and everyone who has worked with judges, that he is a brilliant man, that he studies the law very carefully, that he pays particular attention to the arguments presented to him because he is a fair-minded man.

Now, at the time that he wrote this letter, he had the benefit of the motion, which included everything that I have just told you, including the case law and the analysis, and a lot more. It is inconceivable to me that he could have made the statement that he made in his letter to Judge Scirica and in his questionnaire to this Committee.

I will now move on to a second point. The second point is part of what he testified to. He said that he is—and I think this was in response to the question by Senator Kennedy: "And I am one of those judges that you described who take recusal very, very seriously." Is that a credible statement?

He also says that it never crossed his mind that there was a recusal issue when he looked at the *Vanguard* case. The name

"Vanguard" is plastered all over the documents. We are talking about literally dozens and maybe hundreds of references to Vanguard, including in the opinion that he himself authored.

He made a pledge to this Committee in 1990, which I assume he did after reading and understanding what the 1974 recusal statute said, he continued to invest in Vanguard over the years and watched his investments grow into the hundreds of thousands of dollars. I have heard estimates that run way beyond the $370,000 which has been mentioned here. And while he was sitting on the appeal in the *Vanguard* case, he continued to make investments, both before and after the opinion.

Now, I would like now to move to a third point, which I consider to be perhaps most important in a sense—not most important, but just as important. I spent 40 years of my professional life representing the little guy. My client, Ms. Maharaj, exemplifies the little guy. She has nothing, not one penny. All she had was the IRA which, by law, passed to her at the death of her husband in 1996.

Now, that IRA is supposed to be sacrosanct. The Supreme Court has held in a trilogy, beginning with *Guidry* in the 1980s, *Patterson* in 1992, and most recently, *Rousey* in 2005, that creditors can't reach IRAs.

Now, just as has been suggested with respect to how the *Roe* decision may be undone through small, creative exceptions to that ruling, likewise here what the judge did—and I am confident that he did read the record and that he understood all too well what was at stake—was go out of his way on the most dubious of legal principles to rely on the supposed decision of the Massachusetts court, which, in fact, is on appeal—I argued the appeal in October. There is no decision yet. We don't know how the Massachusetts court will decide. But all of the law which I set out in my motion makes it clear that he had no business relying on that Massachusetts decision.

What that means is that, with respect to IRAs only, never mind the other forms of retirement savings, 40-plus million Americans with their savings in IRAs, with more than $2.3 trillion in those IRAs, could see the security in what they thought were sacrosanct savings beyond the reach of any creditors, no qualification, as the *Patterson* court said in 1992, all of a sudden threatened the same way that the employees of IBM suddenly woke up to discover that their pensions were pretty much smoke and mirrors.

Thank you very much, members of the Committee. I realize that I spoke with some passion. I had promised myself to be calm and collected, but I confess that unless—but for the fact that President Bush nominated Judge Alito, no one would ever have heard of Ms. Maharaj or the *Vanguard* case and Judge Alito's role in it.

Thank you.

[The prepared statement of Mr. Flym appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Flym.

Mr. Gray, beginning my 5 minutes of questioning with the issue of voting rights, which you have testified about so eloquently, are you at all comforted by Judge Alito's statement that the principle of one person/one vote is firmly embedded in the law of the land and he will follow that?

Mr. GRAY. Well, I am still troubled by the fact. I am glad to hear that. And if what that means is that if he is confirmed he will be the type of Justice protecting civil rights and human rights that Hugo Black did when he was on the Court, then I would be happy to have him serve. But I don't remember—and I think the first time I recall that he made this statement is after it was raised in these hearings.

I would think if he was sincere about it, realizing what he had said in 1985, that he would have disclosed the fact that, "I said that then, but my position now is entirely different," and would have been rather candid upright before the matter was raised, I am troubled that we would even have a nominee who would have to explain this. Because if these rights are so embedded, then there should never have been any statement the way it was in the first place.

Chairman SPECTER. Ms. Michelman, on the *Roe* issue, which is a matter of enormous importance, I started my questioning of Judge Alito with that subject, as I did with Chief Justice Roberts. And we have had the examples of Justice O'Connor, who was against abortion rights before she came to the Court, and Justice Kennedy against abortion rights, and a lot of worry about Justice Souter. And you have the political process where the judicial appointments are part of the process. And you heard Judge Alito talk about the precedents and the culture of the country and being embedded and a living document, which is very different from what some others have testified to in recent times.

You have watched this situation very closely, and you have noted who some of the other prospective nominees are, at least reported. If Judge Alito is rejected, what do you think the prospects are of getting a nominee whom you like better?

Ms. MICHELMAN. Well, Senator, it is true that the President won the election and he has the right to nominate Justices who share his values and his views. He made it very clear that his model Justices were Scalia and Thomas, whose views about women's constitutional legal rights, including the right to choose, are a danger to American women and to their lives and their health and their dignity. So he has that right, but you share a co-equal responsibility, and the American public, the individuals in this Nation have only a voice in this process through you. And I would answer you by saying that I think every nominee has to be evaluated on his or her merits, on his or her record, on his or her views, judicial and philosophical views included. And we have to take one at a time. And if that nominee's record is clearly a danger to the constitutional and fundamental rights of the American people, then I think that nominee should be defeated, and we will take on the next one.

But I think the President has, you know, made his case on this nomination. I think Judge Alito's record—and if you look at the totality of his record, his service in the Justice Department, his service on the court, it is very clear that he will move the Court in a very different and dangerous direction for women's legal rights. And—

Chairman SPECTER. I want to ask you one more question, and my time is almost up. You have commented about the other issues, philosophical—you have enumerated them, but we have been over

Executive and legislative power. We have been over congressional power, affirmative action, many items. Do you think that a nominee ought to be rejected on the basis of a single issue?

Ms. MICHELMAN. I don't consider the right to privacy, personal privacy, the right to dignity and autonomy and control over one's life as a single issue. I do think it is profound and will have enormously important implications for women, for men, for families in this Nation. And I do indeed think it is so serious and profound that he should be rejected on those grounds, even if there were no others, and I would subscribe there are other grounds.

Chairman SPECTER. Well, thank you very much for your testimony, Ms. Michelman—

Ms. MICHELMAN. You are welcome.

Chairman Specter [continuing]. And for your service. You have been in the forefront of this issue for a long time, and I know how deeply you feel about it. And I thank you for sharing with us your personal experiences. They are not easy to testify about.

Senator Leahy?

Senator LEAHY. I would concur with that. I thought of that prior to your testimony when reading the article about you yesterday in the Post, a story I was familiar with. And you are one of the reasons I came back. I was at a friend's memorial service and will return to that right after my questioning.

Ms. MICHELMAN. Thank you.

Senator LEAHY. But you are absolutely right that there is an awesome responsibility in the Senate in the choice, first with the 18 of us here, who are the only 18 people in America who got to question Judge Alito, if you don't count the first vetting they had by Vice President Cheney, Karl Rove, and Scooter Libby a day or two before he was nominated by the President. As to that, of course, we are not privy to what was said or what assurances were made, nor was he about to share that with us.

Mr. Gray, I am glad you are here. You spent a lifetime, a very distinguished lifetime, fighting for those denied the right to equal protection, equal dignity. I know that after you graduated law school, you immediately went to work defending two icons of America, Rosa Parks and Dr. Martin Luther King, Jr., in the Montgomery bus boycott.

We have heard Judge Alito say that one of the things that motivated him was his objection to *Baker* v. *Carr*, the reapportionment case. We heard Justice Frankfurter, who delivered a scathing dissent in that. And we know the position of the second Justice Harlan, who Judge Alito admires, who feels very strongly that *Baker* was wrong.

How important was it that the Supreme Court didn't follow these attitudes, didn't follow Justice Harlan's lead, and instead intervened in the 1960s to correct massive disparities in the size of voting districts, the underrepresentation of voters from urban areas, and to ensure the removal of poll taxes and other barriers to minorities to vote? What is the difference it makes in America today that the dissenters did not win?

Mr. GRAY. The difference is then, prior to these decisions, and even prior to *Brown* v. *Board of Education*, and prior to *Gomillion* v. *Lightfoot* and *Browder* v. *Gayle*, the case that desegregated the

buses, we had very few African-Americans and other minorities registered. We had little or no African-Americans in public office. For example, in my state, in 1957 we had none. Now my State has approximately the same number of persons in our State legislature. It mirrors the population. We now have thousands of African-Americans and other minorities who are holding public office, and an additional thousand that those public office holders have appointed to elected office.

Senator LEAHY. When you started this fight, did you very believe you would see an African-American mayor, an African-American sheriff in some of—

Mr. GRAY. No, sir. And the first one since Reconstruction was Lucius Amerson in my county. I got him elected, but I couldn't get elected to the State legislature.

Senator LEAHY. That is why I raised that. You anticipated what I was raising.

Ms. Michelman, you know about the job application of Judge Alito to the Meese Justice Department. He said he personally believes very strongly the Constitution does not protect the right to an abortion. In your reading of Judge Alito's writings, but especially your observations of the past few days of these hearings, have you seen or heard anything to reassure you that Judge Alito's personal beliefs about constitutional privacy will not affect his decisions as a judge?

Ms. MICHELMAN. No, I haven't. In fact, I don't think there is—again, if you go back to his memo you are referencing, the work he did in the Justice Department, and his record on the court, his decisions on the court I think reveal very clearly that he does not believe deeply in a fundamental right of privacy and apply that belief that the Constitution protects that fundamental right of privacy to individuals.

So, no, I am not—I am deeply concerned that Judge Alito not only was proud and discussed very openly how proud he was to be a part of an administration that repeatedly sought the Court to overrule *Roe* and overrule other privacy cases, but that he actually laid out a strategy for the administration to pursue the overruling of *Roe* in an incremental strategy, to pursue taking away the right of women to decide for themselves and to keep the government out of these very private decisions. He laid out a strategy that you could keep *Roe* in place as a shell, not overturn it directly, but incrementally dismantle those rights. And the States, by the way, have—the anti-choice movement in this country has pursued that strategy very effectively and there are now hundreds of laws that really burden women, both financially and emotionally, when they are trying to make responsible choices.

No, I have no confidence at all that Judge Alito, when faced with the question of whether women should decide or whether the government, State and Federal, has the right to interfere in these intimate decisions that women make, that he will come down on the side of the government.

Senator LEAHY. My time is up.

Ms. MICHELMAN. Thank you.

Senator LEAHY. I just want to thank all five of you for being here. I know that it is not easy to come and very publicly oppose

somebody who has the backing of the President of the United States and the backing of so many powerful Senators to be on the U.S. Supreme Court. But it goes to the tradition of speaking truth to power, and I thank you all.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Hatch?

Senator HATCH. I think I will reserve my time, Mr. Chairman.

Chairman SPECTER. Senator Kennedy?

Senator KENNEDY. Thank you. Five minutes, a number of areas to cover.

First, I thank all of you for being here. And, Dr. Gray, in the application, the 1985 application and where the nominee points out, "In college, I developed a deep interest in constitutional law, motivated in large part by disagreements with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment."

Just very, very quickly, how important—in terms of having our Nation, a fairer and more just Nation—how important are those Warren Court decisions on reapportionment? And just quickly, what would this country look like if they had not made those judgments? Would we be a different Nation?

Mr. GRAY. We would be a different Nation, and it would all appear to be whites and no persons of color would have very little if any involvement in it.

Senator KENNEDY. Professor Sullivan, I want to ask you about the impact of Judge Alito on average Americans. This is something we have heard from the power structures around here. I want to hear what impact you believe his service on the Court would have for average Americans, and I want to clarify that not all Fourth Amendment cases are criminal cases, there are civil cases too. Could you comment about that?

Mr. SULLIVAN. Yes, that is correct.

Senator KENNEDY. The idea that sometimes innocent people are caught up on these police searches and bring Fourth Amendment charges.

Mr. SULLIVAN. Yes. In *Groody*, for example, which we have talked about a lot, it was a civil damages case. Congress has provided a remedy for our citizens when their rights have been violated, their constitutional rights, in this case search and seizure rights.

Let me say that the Warren Court, in answer to your question, set forth a jurisprudence with respect to the Fourth, Fifth and Sixth Amendment, that in effect, limited the scope of police power vis-a-vis the average citizen, that there are some rights deeply enshrined in the Constitution that we all have from the highest and most powerful to the average Joe, and that is what the Fourth, Fifth and Sixth Amendment protect.

My read of Judge Alito's jurisprudence in this area is that he weakens the protections. He is very deferential to institutions and would allow law enforcement practices to expand in a way that I suggest to you would have a negative and detrimental impact on the nonpowerful in our country.

Senator KENNEDY. Professor Flym, just on this issue of recusal, is it your understanding that under the existing code of conduct for

U.S. judges, that Judge Alito should have complied, should have recused himself, and should have established on his letter of recusal or on the system, Vanguard, and that he failed to do so with his interpretation of the ethic?

Mr. FLYM. Absolutely, Senator. But in addition to the Code of Judicial Conduct that is frequently understood in terms of ethical rules, the statute enacted by Congress in 1964 trumps whatever else may be adopted, and it is unmistakably clear that he had an obligation to recuse.

Senator KENNEDY. Ms. Michelman, I want to first of all thank you. That was a splendid performance on Meet the Press.

Ms. MICHELMAN. Thank you.

Senator KENNEDY. In response to the questions, just to pick up on the Chairman's thought where you talked about the dignity of women. You touched on it here now. I would just like you to use up whatever time I have in talking about what you think the implications would be by this nominee, just on women's issues just generally. I think you have spoken very, very eloquently on the choice issue. Obviously, refer to that if you would too, but I am very, very interested in this broad view of yours about both the dignity of women, women in the family, women in our society, the role that they are playing, and a bit about what kind of country we would be if we did not have justices that protected that, and what kind of country we can become if they do.

Ms. MICHELMAN. Thank you, Senator, also for your generous comment about my Meet the Press performance. We should not forget that women have had a long and hard journey to full equality in this Nation. It has only been 84 years since we have had the right to vote. So it has been a long and difficult journey, and one that has taken great effort, and both as a political movement, but also through the law, to have recognized that we could vote, we could own property, we could get charge accounts—which I was denied the right to have a charge account because I was not married in 1969. It was shocking.

So it has been a very long and arduous journey. Women's equality and full capacity to be partners, equal partners with men in the socioeconomic political life of this Nation is dependent on our right to determine the course of our lives, our right to education, our right to employment, our right to equal pay. All of these things are determined by our right to control our lives, and we absolutely need a legal system that recognizes, respects women's dignity and autonomy, including our right to determine when to become mothers and under what circumstances, and even whether. It is hard to find the words to adequately express how important that is.

Senator KENNEDY. Thank you.

My time is up. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kennedy.

Without objection, there will be placed in the record a large group of letters relevant to the issue, and I want to remind everybody on the Committee that under Committee practices, that as with the proceeding on Chief Justice Roberts, all questions must be submitted within 24 hours of the close of the hearing, which will be a little later today, perhaps even shortly.

Senator Hatch?

Senator HATCH. Let me just greet all of you and thank you for being here. Dr. Gray, I have tremendous respect for you. You have led a lot of fights in this country under very, very trying circumstances. Having been born on the other side of the street myself, I understand a little bit about how tough that might be from time to time, but I am sure not nearly as much as you understand it.

Mr. GRAY. Thank you, Senator.

Senator HATCH. Ms. Michelman, it is always nice to see you.

Ms. MICHELMAN. Good to see you too.

Senator HATCH. As you know, I have respect for other points of view as well.

Mr. Sullivan, nice to get acquainted with you. Ms. Frost, with you.

Mr. Flym, I have to say I disagree with you, as do almost every ethics expert I know, including the American Bar Association, but I appreciate your advocacy for your client. That is always appreciated by me, and respect you for it.

I just wanted to greet all of you and let you know that we appreciate you coming.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Sessions?

Senator SESSIONS. Mr. Gray, it is a delight to have you here. You are certainly one of Alabama's most distinguished citizens.

Mr. Chairman, Mr. Gray just completed tenure as President of the Alabama Bar Association and traveled the State extensively and talked on these subjects, and I think, reminded people a lot about just what our situation has been and how far we have come and things that we still need to do. So, Mr. Gray is an extraordinary leader, capable of holding any high office in this country, and it is a pleasure to get to know him.

I have read with great interest his book, "Bus Ride to Justice." He talks about that first bus boycott in the '50s with Rosa Parks and Martin Luther King, and the tension, and the work, and the enthusiasm, and the courage that was shown at that time. It is really remarkable, and it is important for us to remember it. We have a lot of things to do, but, Mr. Gray, I thank you for your service.

Mr. GRAY. Thank you very much, Senator, and I even talk about the judgeship which was not to be in that book too.

Senator SESSIONS. Well, we have both been there, have we not? [Laughter.]

Mr. GRAY. Yes, sir.

Senator SESSIONS. We may have a little more jaundiced eye than some around here about this process.

Mr. GRAY. That is correct.

Senator SESSIONS. When you came out of college, I notice in your book you mention several times you had a commitment in the '50s, "destroying everything segregated I could find."

Mr. GRAY. That was the motivating factor, Senator, as to why I became a lawyer, and I wish this nominee had that kind of commitment. If so, I would not feel uncomfortable and would not be troubled.

Senator SESSIONS. But *Gomillion* v. *Lightfoot* was—I mean you had the Vivian Malone case at the University of Alabama, you were involved in that, the syphilis study at Tuskegee, the *Gomillion* v. *Lightfoot*, and of course, Rosa Parks case. But on *Gomillion* you made an argument that I think at first appeared not to be. I mean, *Colegrove* v. *Green* was a Supreme Court case that seemed to stand squarely in your way. In fact, you lost it in earlier rounds of the Court, but you had a vision that this gerrymander of that city was directly driven to deny people the right to vote, and that was your idea and your concept. Would you just share that?

Mr. GRAY. Yes, sir, that is exactly the thing, and I illustrated it by having a map drawn to scale of the old city limits and the new city limits, showing where the blacks were excluded, and go all the way in to include whites. And I think that case, no question, set the precedent for these other cases. If *Reynolds* v. *Sims* had been first, I do not think we would have won, but with *Gomillion*, which shows an extreme situation, but the purpose of the State in all of these cases was the same, and that was to avoid minorities from voting.

I am glad we have passed that, but we still have, even in Alabama, major cases. The higher education case, the *Knight* case is still pending. We still have cases—and *Lee* v. *Macon* that I filed in '63, elementary school cases, where there are no degrees in, and now my sons are handling those cases, and we still have a teacher testing case in Alabama that is still pending. So we need to have a strong Supreme Court if we are going to continue to make progress.

Senator SESSIONS. I would point out a couple of things. First, it took a reversal of precedent to make this happen, so sometimes bad precedent ought not to be kept on the books. We have been talking about precedent and *stare decisis* an awful lot here, and I wanted to mention that.

I would just say, Mr. Gray, I think, as Judge Alito has explained it, his father was a nonpartisan clerk for the New Jersey legislature. They were trying to redistrict the legislature, and the court was ignoring classical, geographical or political boundaries, counties and that kind of thing, and that is where his frustration came, not with the concept, which he has affirmed clearly here, of one man/one vote.

Mr. GRAY. I want to thank you, Senator, and I want to publicly thank you for doing what you have done in helping the Tuskegee Human and Civil Rights Multicultural Center, which is designed to preserve some of this rich history in that part of the State, and I want to thank you for it.

Senator SESSIONS. And we can thank Chairman Specter for helping us some on that.

Mr. GRAY. Thank you very much.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman SPECTER. You were not going to conclude, Senator Sessions, without saying why you can thank Senator Specter.

Senator SESSIONS. For helping us with the Tuskegee Human and Civil Rights Center. Thank you, sir.

[Laughter.]

Chairman SPECTER. Senator Coburn.

Senator SESSIONS. You have always been accommodating.

Senator COBURN. Senator, I will defer. There is obviously a very distinguished panel before us, each a leader in their own way, respected for their advocacy and their heart, and their desire to make our country better. The fact that you would come here today and put forward your views lends great credibility to the process, and places more responsibility on us to hear every point of view as we make a consideration on this nominee, and I thank you for coming.

Thank you.

Chairman SPECTER. Thank you very much, Senator Coburn.

Thank you, Mr. Gray and Ms. Michelman, Professor Sullivan, Professor Frost, Professor Flym. We will take a 5-minute recess while the next and final panel comes forward.

[Recess at 11:57 a.m. to 12:04 p.m.]

Chairman SPECTER. The Committee will resume.

The Committee will resume. Let's have order in the hearing room, please.

Our first panelist on the sixth and final panel is Kate Pringle from the Litigation Department of Friedman, Kaplan, Seiler and Adelman, a graduate with honors from American University in 1990, cum laude from Georgetown University Law Center, editor-in-chief of the Law Journal there. Ms. Pringle was one of Judge Alito's clerks in the 1993–94 term.

Thank you for joining us, Ms. Pringle, and the floor is yours for 5 minutes.

STATEMENT OF KATHERINE L. PRINGLE, PARTNER, FRIEDMAN KAPLAN SEILER & ADELMAN, LLP, NEW YORK, NEW YORK

Ms. PRINGLE. Mr. Chairman and honorable members of the Committee, thank you very much. I greatly appreciate the opportunity to share my experiences with and personal observations of Judge Alito, for whom I did clerk in 1993 to 1994 and who has served as my mentor since that time.

First, let me explain briefly the job of a law clerk. It is the law clerk's job to provide legal research to the judge, to assist him in his analysis, and generally to act as a sounding board in the difficult process of deciding cases. As Judge Garth indicated yesterday, it is an unusually close professional relationship.

I began my clerkship for Judge Alito upon my graduate from Georgetown Law School. I was then—as I am now—a committed and active Democrat. I had heard from some of my professors that Judge Alito had a reputation as a conservative, and I, therefore, expected his to be an ideologically charged chambers, in which I would battle to defend my liberal ideals against his conservative ones.

But what I found was something very different than what I had expected. I learned in my year with Judge Alito that his approach to judging is not about personal ideology or ambition, but about hard work and devotion to law and justice.

I would like to share with you several things that I learned about Judge Alito during the time I which I worked with him.

First, I learned that Judge Alito reaches his decisions by working through cases from the bottom up, not the top down, to use a

phrase that we heard from Judge Roberts. Judge Alito taught me to try to ignore my personal predispositions and to come to each case with an open mind. He taught me to work carefully through an analysis of the facts of the case and the legal precedents, and to try to find the resolution that flowed from that analysis.

Judge Alito consistently applied this bottom-up approach. He approached every case without a personal agenda and with a commitment to careful and methodical review. His approach was demanding. He read and reread the record of each case, the decisions cited, and the relevant decisions that the parties had failed to cite. I remember him building a model from string and paper to try to figure out the events of one case, and I remember him physically acting out the events of another, all in an attempt to truly understand the facts. He worked hard on every case, large or small, and he sought to find the result that flowed from the facts and the law, divorced from any personal bias or interest.

Second, I learned that Judge Alito is interested in, and respectful of, differing points of view. The law clerks with whom I worked spanned the ideological spectrum. I later learned that this is typical and that Judge Alito selects law clerks with widely varying backgrounds political outlooks, and personal views. This led to lively debates amongst the law clerks. In my experience, Judge Alito was never dismissive of any point of view. He encouraged our input, challenged each of us to substantiate our views, and listened carefully to the points that each of us made.

Judge Alito treated advocates before him with that same respect. He asked probing questions, which he refused to let the advocates sidestep. But he was never caustic or rude, and he always appreciated the honest efforts of an advocate.

Judge Alito was similarly respectful of the differing opinions of his fellow judges on the Third Circuit. He sought to forge consensus where consensus could be reached. When he dissented from another judge's views, he did so in a respectful and intellectually honest way. The appreciation that all of Judge Alito's colleagues on the bench have for him is reflected in the outpouring of support at these hearings from other judges on the Third Circuit.

Finally, I learned that Judge Alito approaches his job with personal humility and a great respect for the institution of the courts. What I saw was a person cognizant of the limited role assigned to him by the Constitution to interpret the law as established by written law and prior precedent. Judge Alito did not, in my experience, ever treat a case as a platform for a personal agenda or ambition. Rather, his decisions are limited to the issue at hand. They demonstrate an effort to interpret honestly and faithfully apply the law to the parties that seek justice before him.

Apart from his judicial approach, Judge Alito was a thoughtful and generous boss. He took the time to get to know his clerks and to learn about us and our families. He had none of the personal arrogance that sometimes attends power.

It was my great privilege to work with and learn from Judge Alito at the outset of my career. Many of Judge Alito's law clerks, both men and women, both Republicans and Democrats, have traveled to Washington to be here for these hearings. We are all here because we feel strongly about Judge Alito's talent and character.

We all believe that he will be an outstanding Justice of the U.S. Supreme Court.

Thank you very much.

[The prepared statement of Ms. Pringle appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Pringle.

Our next witness is Congressman Charles Gonzalez. Representative Gonzalez was first elected to the House in 1998. He is a member of the House Energy and Commerce Committee. He served as a Texas Regional Whip for the Democratic Caucus and as Chair of the Hispanic Caucus Civil Rights Task Force. Congressman Gonzalez has been Chair of the House Judiciary Initiative for the Congressional Hispanic Caucus.

There is a little extra time left over from the time given to the judges yesterday, so we are going to start the clock at 8 minutes for each of the witnesses invited by the Democrats, and you have 8 minutes, Representative Gonzalez.

STATEMENT OF HON. CHARLES A. GONZALEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Representative GONZALEZ. Well, thank you very much, Chairman Specter, and, of course, Senator Kennedy. And today I am representing the Congressional Hispanic Caucus in my capacity as the Chairman of the Hispanic Judiciary Initiative and Task Force on Civil Rights.

The Hispanic Caucus was obviously disappointed that the President did not nominate a highly qualified Hispanic to the bench. We did not expect a Hispanic to be nominated for the sake of being a Hispanic. We did expect the administration to have recognized the need for our Nation's highest Court to reflect the Nation's diversity in all its forms—thought, experience, and expression.

The Hispanic Caucus's policy with respect to the evaluation of nominees for judicial vacancies requires an extensive examination of each nominee in order to assess the following: his or her commitment to equal justice and right of access to the courts, his or her efforts in support for Congress's constitutional authority to pass civil rights legislation, and his or her efforts in support of protecting employment, immigrant, and voting rights, as well as educational and political access for all Americans.

Our process is also assisted by the excellent work of many legal and advocacy organizations, and I would like to especially thank the Mexican American Legal Defense and Educational Fund for their efforts to assist us in our work.

Allow me to highlight a few areas that cause the Hispanic Caucus great concern:

Discrimination in jury selection, *Pemberthy* v. *Beyer*. Judge Alito's ruling would allow the use of language to serve as a pretext to discriminate on the basis of ethnicity.

Voting Rights Act violation, *Jenkins* v. *Manning*. Judge Alito appears to have joined the majority opinion in that case. It dealt with at-large school district voting systems. Judge Alito, along with the majority—and we are assuming that that is what he signed off on—found no violation of the Voting Rights Act even though his-

torically only 3 out of 10 black candidates over a 10-year period were elected.

Constitutional rights of noncitizens. His 1986 memo to FBI Director William Webster, in which Judge Alito appears to ignore precedent, cited old law to accommodate denying constitutional protections to immigrants.

Commerce Clause application. You all have discussed the *United States* v. *Rybar* case. Judge Alito's reasoning would seriously hamper Congress from passing laws to address civil rights abuses.

Equal employment opportunity, *Bray* v. *Marriott Hotels*, which you have also touched on. Judge Alito would impose a standard that deviates from accepted legal norms, making it extremely difficult to prove discrimination based on race or gender.

The Hispanic Caucus wishes to acknowledge the indispensable role the U.S. Senate plays in determining the composition of the Supreme Court. We know that the nominee will be someone of President Bush's choosing. However, this does not necessarily mean that the Supreme Court should be a mere extension of the executive branch. The Nation's Founding Fathers did not intend it to be and, therefore, subjected the President's nominees to Senate approval by way of advice and consent.

There may be a good-faith disagreement as to the appropriate parameters limiting the types of questions asked of the nominee by this Committee, but no one would argue that questions establishing a nominee's judicial philosophy are universally contemplated under advice and consent. The Hispanic Caucus is aware that political, social, and economic forces in any society play to the advantage of the employer over the employee, the able-bodied over the disabled, the citizen over the immigrant, the majority over the minority, the wealthy over the poor, and the state over the individual. But in this country, it has been the third branch of Government, the judicial branch, which has countered the tendency to abuse this innate "advantage" by acting as the great equalizer regardless of one's status.

For the Hispanic Caucus, the desired judicial philosophy is a simple one and is best expressed in the following quotation: "There is so much to be done that demands the full capacities of our hearts and souls, but, truly, where shall we begin? Perhaps I will begin with you? Keep in mind...that if your life is without value, so is mine. If the law does not protect you, it will not, in the end, protect me."

The Hispanic Caucus does not believe that Judge Alito's writings and decisions embrace this simple but profound judicial sentiment. We do not argue that he possesses a brilliant legal mind and has had an accomplished career. And I will state that we do not believe that he is a racist or a bigot. But this is not the controlling issue. The issue is what judicial philosophy guides and motivates such a gifted and talented person in his decisionmaking process. In the end this should not be a question of party affiliation or conservative versus liberal beliefs. Any Republican, any Democrat, any conservative, or any liberal should share a judicial compass that points them to the inevitable truth that indeed "if the law does not protect you" then it protects no one.

I will be recommending to the Congressional Hispanic Caucus that it oppose this nomination. Thank you very much.

[The prepared statement of Representative Gonzalez appears as a submission for the record.]

Chairman SPECTER. Thank you, Representative Gonzalez.

We now turn to another Member of the House of Representatives. Representative Debbie Wasserman Schultz serves the 20th Congressional District of Florida. Her resume notes—and since it is on her resume, I will read it—she is the first Jewish Congresswoman ever elected from Florida to the House. She serves on the Financial Services Committee and the Committee on the Judiciary.

Thank you for joining us, Congresswoman Wasserman Schultz, and you have 8 minutes.

STATEMENT OF HON. DEBBIE WASSERMAN SCHULTZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Representative WASSERMAN SCHULTZ. Thank you very much. Good afternoon, Mr. Chairman, Senators. I am honored to speak to you as you consider the nomination of an individual to a lifetime position on the Supreme Court. And I come before you today in several capacities.

First, I am here as a Member of Congress, proudly representing the people of South Florida.

Second, I am here as a member of a generation that benefited from long-fought Supreme Court battles, resulting in equal rights for all Americans, which is a fundamental principle of our democracy.

Third, I am here in my most rewarding role: as the mother of three young children who will come of age in an America guided by many of the decisions that this Court will make.

I cannot imagine my children's future in an America without privacy rights and the civil rights and liberties that all Americans enjoy today.

These are the reasons that I am here today, to express the concerns about the rights and freedoms that, based on his record, I believe would be threatened by Judge Alito's elevation to the Supreme Court. And, therefore, I urge you to reject his nomination.

By now we are all very familiar with Judge Alito's writings and views on reproductive rights, each one indicating a different nuance of his opinion on a woman's right to choose. But really here is the bottom line: You are considering a nominee who wrote a memo urging the courts to restrict a woman's right to make her own reproductive choices. Judge Alito ruled, actually ruled in support of spousal notification. In essence, he is comfortable putting a woman's constitutional right to make decisions about her body in the hands of her spouse as soon as she signs her marriage license.

This blatant disregard for individual rights is why our Founding Fathers designed a meaningful system of checks and balances. And once any branch of Government surrenders itself to the others, that authority is difficult to regain.

Now, I come from a State where Executive power and Government intrusion on privacy rights has been repeatedly abused. Florida's Governor pushed the State legislature to grant him authority

to overturn a judicial decision in the Terry Schiavo case, and Congress inserted itself into that family's private tragedy.

Ultimately, the case could have reached the Supreme Court. Now, let's think about this for a minute. Can America risk Justice Alito, a Supreme Court Justice Alito, casting the deciding vote to drag us through another tragic saga similar to the Terry Schiavo case? I don't think America can endure another Terry Schiavo case.

In another disturbing privacy matter, Judge Alito's lack of judgment, I believe, was appalling. In this case, a police officer strip-searched a 10-year-old girl and her mother. They were not named in the search warrant; they were simply on the premises.

According to the Boston Globe, the 10-year-old girl's lawyer later reported Judge Alito as saying, "Why do you keep bringing up the fact that this case involves the strip-search of a 10-year-old child?"

Why? Because this was not a simple case of whether or not the officers exceeded their investigative authority. It escalated to an unconscionable level.

Judge Alito was the only member of a three-judge panel who found the strip-search of the 10-year-old acceptable under his interpretation of the law.

Now, I am horrified that someone could strip-search my children because of selective interpretation of a warrant.

And as you consider this nomination, I ask you to reflect: Would you be comfortable if your own child was the subject of a strip-search? Based on his record, would you be comfortable if your little girl was the plaintiff with Judge Alito as the deciding vote?

The standard must be higher when cases involve the most vulnerable members of our society—our children. When enforcement authorities lapse, our courts must not.

Now, despite his questionable affiliations with discriminatory organizations such as the Concerned Alumni of Princeton, there is no question, as has been acknowledged by many others, that Judge Alito had impressive education credentials and he had led a distinguished career. But credentials alone do not qualify an individual for elevation to the Supreme Court.

Senators, as you contemplate the profound influence Justice O'Connor's successor will have on the lives, liberties, and legal protections of Americans for decades to come, I ask you to consider that Judge Alito is a nominee who will replace one of only two women Justices. This really reflects a missed opportunity to retain or even expand, as my colleague referred to, the existing diversity of the Court.

Now, I distinctly remember the feeling that I had in 1981, Mr. Chairman, when I was 14 years old and I first heard that a woman would serve on the Supreme Court. It proved to me what my parents had told me my whole life: that in America, little girls really can grow up and be anything that they want to be. That is an amazing thing about this country, and it is one that we really need to carefully think about, especially with the selection and elevation of a Supreme Court nominee. The message that we send to little girls in America really needs to be a strong one when it comes to nominations like this one.

The Supreme Court, Senators, is the final arbiter in our Nation, and today you stand as the guardians to its membership. From

Marbury v. *Madison* to *Brown* v. *Board of Education*, the fingerprints of the U.S. Senate have subtly steered the highest Court in this Nation time and again. And long after we have completed our public service here, the decisions made by the Supreme Court will continue to impact all Americans, and history will really judge your decision.

And I just want to close by just asking you to think about the role of the legislative branch. I have served as a legislator in the State legislature or in the Congress for the last 13 years, and I think we should zealously guard our legislative authority. We are, after all, the only directly elected branch of Government. And I think we need to carefully think about how this nominee thinks about our role in the governmental process. I think many of his views have demonstrated that given his belief in a unitary Executive or, at the very least, the strength of the Executive, we should carefully think about how we believe our role as legislators would be compromised if he was elevated to the Supreme Court.

Thank you very much for this opportunity.

[The prepared statement of Representative Wasserman Schultz appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Congresswoman Wasserman Schultz.

Our next witness is Mr. Jack White, associate in the San Francisco law firm of Kirkland and Ellis, graduated magna cum laude from Pepperdine Law School, editor in chief of the Law Review there; bachelor's degree from the United States Military Academy at West Point, served as an active duty officer in the Army, and continues to serve as a captain in the Reserve. He is, according to his resume, a dedicated member of the ACLU and NAACP. He was one of Judge Alito's law clerks in the 2003–04 term.

Thank you for coming from San Francisco, Mr. White, and the floor is yours, but only for 5 minutes.

STATEMENT OF JACK WHITE, ASSOCIATE, KIRKLAND AND ELLIS, LLP, SAN FRANCISCO, CALIFORNIA

Mr. WHITE. Thank you, Mr. Chairman, Senator Kennedy. I appreciate the opportunity to testify here today.

In order to provide some context for my comments, I would like to share some personal information about myself. I am the son of African-American parents born in the segregated South. Their respect for the recognition of civil liberties that enabled them to succeed and raise principled children inculcated the same respect in me. This respect is what led me to become a member of the NAACP and the ACLU. The same respect for our freedoms as Americans encouraged me to serve our country after graduating from West Point on active duty in the United States Army.

Now, as I clerked for Judge Alito, I saw a deep sense of duty, diligence, humanity, and respect for his role as a Federal appellate judge. Judge Alito required searching analysis of the factual and procedural background of every case. He required thorough evaluation of the applicable law in every case. He uniformly applied the relevant law to the specific facts of every case. Judge Alito recognized that every case was the most important case to the parties and attorneys with something at stake. There was no wavering

from this consistent, predictable method of his judicial decisionmaking process. Working for Judge Alito, I saw in him an abiding loyalty to a fair judicial process as opposed to an enslaved inclination toward a political or personal ideology.

What I found most intriguing and particularly exceptional about Judge Alito's judicial decisionmaking process was the conspicuous absence of personal predilections. I never witnessed an occasion when personal or ideological beliefs motivated a specific outcome in a case. Indeed, after a year of working closely with the judge on cases concerning a wide variety of legal issues, I left New Jersey without knowing Judge Alito's personal beliefs on any of them. Now, the reason I didn't know his personal beliefs on all of these issues was that the jurist's ideology was never an issue in a case that Judge Alito heard. Indeed, it is never an issue in any case. My fellow former law clerks have uniformly agreed, and we have communicated this notion to the Committee in a letter that we have provided.

Although Judge Alito's sense of duty, diligence, and commitment to the decisionmaking process have inspired the collective support of his former law clerks, there is an additional characteristic that also heavily impressed me. On a daily basis, Judge Alito dealt with a wide variety of individuals, including law clerks, fellow judges, experienced attorneys, inexperienced attorneys, court staff, law students, and individuals throughout the community. Without fail, I saw Judge Alito treat everyone, every individual, with dignity and respect. In fact, on one occasion, my parents went to New Jersey to visit their son. Judge Alito suggested that I bring them to his chambers. Now, because oral arguments were rapidly approaching, I thought that the judge would shake their hand and we would quickly be on our way. Over an hour later, my parents left his office understanding my extreme regard for this jurist. At the end of the day, my parents left believing that meeting them was the highlight of Judge Alito's day. Perhaps it was.

Working for Judge Alito provided me with the opportunity to witness American justice at work. I saw a jurist with an abiding respect for the strength, purpose, and authority of our Constitution, and a particular regard for the limited role of the judiciary envisioned by the Framers of our Constitution. From my experience, I will feel confident with Judge Alito serving as an Associate Justice on the Supreme Court, interpreting las that affect me.

Thank you, Mr. Chairman.

[The prepared statement of Mr. White appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. White.

We turn now to Mr. Reginald Turner, president of the National Bar Association, partner in the Detroit law firm of Clark, Hill, practiced labor law and employment law and governmental relations for over 15 years, served as president of the Michigan State Bar Association, was a White House fellow, a graduate of Wayne University, where he got his bachelor's degree, and a law degree from the University of Michigan Law School.

We welcome you, Mr. Turner, and you have 8 minutes to testify.

STATEMENT OF REGINALD M. TURNER, JR., PRESIDENT, NATIONAL BAR ASSOCIATION, WASHINGTON, D.C.

Mr. TURNER. Thank you very much, Mr. Chairman and Senators. It is an extraordinary honor for me to be here today to testify on behalf of the National Bar Association.

Our association was founded in 1925 at a difficult time in our Nation's history when lawyers of color could not belong to the American Bar Association or many of the State bars and other voluntary bar associations around the country. Today, we represent a network of over 20,000 lawyers with 80 affiliates around the world.

The National Bar has established a rigorous process for evaluating judicial nominees. We take a position on a nomination only after an exhaustive evaluation of the nominee's record.

Judge Alito was evaluated consistent with this process. The results of our review are troubling to us, and we cannot support this nomination. We don't take this position lightly. With President Bush's nominations that exceed 200 in number, we have only taken positions either without support for or in opposition to three of President Bush's nominees.

We understand that Judge Alito has solid educational and professional credentials, but these credentials alone are not sufficient, in our view, for a lawyer or judge to be an Associate Justice of the U.S. Supreme Court. We strongly believe that a nominee to our Nation's highest Court must share an unequivocal commitment to the basic rights and liberties afforded to all Americans under the United States Constitution.

In this country, race and the treatment of racial issues by the judiciary profoundly affect every aspect of American life and play critical roles in the formulation of social, economic, and political agendas. Accordingly, the National Bar Association has adopted a standard to determine whether a Federal judicial nominee will interpret the Constitution and laws to advance our great Nation's slow but steady progress toward equality of opportunity.

Unfortunately, our legal system is not as colorblind as it aspires to be. In *Grutter* v. *Bollinger*, Supreme Court Justice Sandra Day O'Connor acknowledged that. She said, and I quote, "...in a society, like our own...race unfortunately still matters." Thus, judicial nominees should be able to articulate support for constitutional principles, statutes, and legal doctrines that serve to extend the blessings of liberty to all Americans.

In sharp contrast to Justice O'Connor's philosophy, Judge Alito's work as a lawyer and as a judge reveal a hostility to these basic civil rights and civil liberties that makes his nomination particularly troublesome to the National Bar Association. His philosophy as a lawyer is revealed in his 1985 application for the position of Deputy Assistant Attorney General. Among other things in that application, then-Attorney Alito expressed disagreement with well-established Supreme Court precedents that relate to fundamental rights. Attorney Alito indicated at the time that he was attracted to constitutional law because of his "disagreement with Warren Court decisions," including a series of landmark decisions that established the constitutional principle of one person/one vote. Under this fundamental doctrine, every citizen of the United States has

the right to an equally effective vote, rather than the mere right to cast a ballot.

We heard Fred Gray testify a few moments ago very eloquently about the impact of the Warren Court decisions that upheld the provision of one person/one vote. We heard of the tremendous impact on the inclusion in our Nation's cadre of elected officials of people of color for the very first time in many States in the Southern part of this United States and in States around the country. We have heard of the tremendous progress made as a result of those decisions, progress which would not exist today if Judge Alito's views on this issue had carried the day.

In addition, Judge Alito expressed opposition to programs designed to increase diversity in education and employment. He mischaracterized these programs as "quota systems" when, in fact, many of these programs were benign efforts on the part of educational institutions and employers to promote opportunities for those who traditionally had been disenfranchised from the mainstream of American society.

At the same time, then-attorney Alito proudly listed his membership in Concerned Alumni of Princeton, a group that advocated quotas for children of alumni of Princeton in an effort to reduce the admissions of women and minorities to that prestigious university.

Although these writings are 20 years old, they are relevant today because the views espoused by attorney Alito are reflected in the judicial record of Judge Alito. His judicial opinions evidence an agenda to reverse hard-fought civil rights gains and to limit improperly the authority and power of Congress, particularly in the area of providing remedies to unlawful discrimination and protecting the health, welfare, and safety of the American people.

Just to summarize some of these points, Judge Alito has been the most frequent dissenter among the Third Circuit Court of Appeals judges since his appointment in 1990. According to estimates by University of Chicago law professor Cass Sunstein, more than 90 percent of Judge Alito's dissents take positions more conservative than those of his colleagues. He rejected the views of a majority of his court, as well as the rulings of six other Federal appellate courts, when he reasoned that the Federal law limiting the possession and transfer of machine guns was unconstitutional.

In civil rights cases where the Third Circuit was divided, Judge Alito opposed civil rights protections more than any of his colleagues. Indeed, he has advocated positions detrimental to civil rights 85 percent of the time and has filed solo dissents in more than a third of these cases.

In one civil rights case, *Sheridan* v. *Dupont*, all 10 of Judge Alito's colleagues—appointed by Republicans and Democrats alike—agreed that a sex discrimination victim's case was properly submitted to the jury, contrary to Judge Alito's sole dissent.

In *Doe* v. *Groody*, Judge Alito's dissent condoned the strip-search of a 10-year-old girl and her mother, even though they were not named in the warrant that authorized the search. The majority opinion by then-Judge Michael Chertoff criticized Judge Alito's view as threatening to turn the search warrant requirement into "little more than the cliche 'rubber stamp.'"

In his dissent in *Bray* v. *Marriott*, Judge Alito argued for imposing an evidentiary burden on victims of discrimination that, according to the majority, would have eviscerated legal protections under Title VII of the Civil Rights Act. In particular, the majority contended that Judge Alito's position would protect employers from liability even in situations where employment discrimination was the result of conscious racial bias.

In conclusion, on the basis of our thorough review of Judge Alito's record, the National Bar Association cannot support the nomination of Judge Alito to the U.S. Supreme Court. For several decades, Judge Alito has championed limitations on civil rights and voting, resulting in curtailed educational and employment opportunities for people of color and women. If his views had prevailed in many cases, our Nation would not be far beyond the regrettable days when opportunities for Americans, like retiring Justice Sandra Day O'Connor and the late Justice Thurgood Marshall, were truncated on the basis of gender and race. Now is not the time for retrenchment. Now is the time for America to step forward into the 21st century and open the doors of mainstream society for the benefit and protection of all Americans.

Again, thank you very much for the opportunity to testify.

[The prepared statement of Mr. Turner appears as a submission for the record.]

Chairman SPECTER. Thank you, Mr. Turner.

Our final witness on this panel—and our final witness—is Mr. Theodore Shaw, Director-Counsel and President of the NAACP Legal Defense and Educational Fund here in Washington, D.C.; a graduate of Wesleyan University with honors and from Columbia University Law School, where he was a Charles Evans Hughes Fellow. He has also served in the Office of Civil Rights in the Department of Justice.

Welcome, Mr. Shaw, and you have some of that extra time. The clock is set at 8 minutes.

STATEMENT OF THEODORE M. SHAW, DIRECTOR-COUNSEL AND PRESIDENT, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NEW YORK, NEW YORK

Mr. SHAW. Thank you, Mr. Chairman. In his absence, I would like to thank Senator Leahy and, of course, Senator Kennedy and the other Senators who are members of the Judiciary Committee.

Let me make one small clarification. While we have a Washington, D.C., office, the Legal Defense Fund headquarters are in New York, and I am a New Yorker.

I am acutely aware that I am the last witness on the last panel of these hearings, so I will come right to the point. You have my written testimony, and I would like to request that the NAACP Legal Defense and Educational Fund, Inc.'s report on the nomination of Judge Alito to the position of Associate Justice of the Supreme Court be entered into the record.

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

Mr. SHAW. Thank you, Mr. Chairman.

We at the Legal Defense Fund do not relish opposition to a nominee to the Supreme Court or, for that matter, any court, and our

ordinary posture is to take no position on nominees to the Federal courts. So I am not here with any pleasure.

I am not here to challenge Judge Alito's intellect or his integrity. I am not here to engage in the politics of personal demonization, which takes all of us on a low road that leads us to a place where I think we are all diminished.

Many fine people have testified on both sides of this nomination, people whom I know and respect and admire, and I think it is very important to understand that people of good will may differ on this nomination and the substantive issues that lead them to take positions on this nomination.

I, with all due respect, hasten to add that there is nothing remarkable about colleagues on the Federal bench and former law clerks taking positions in support of this nominee. Collegiality is a very, very important commodity on the bench, and, of course, I think it is quite a heady thing to know someone who is being nominated to the Supreme Court. I don't suggest that that is why they support him. I am saying that they know him personally. But this is not about personality and it is not personal.

We are compelled to testify in opposition to the nomination of Judge Alito to the U.S. Supreme Court based on a standard that the judge himself articulated. I think it is the correct standard. He said, "If you want to know what kind of Justice I would be on the Supreme Court, look at my record on the court of appeals."

That is exactly what we have done, and it is only on that basis that we have arrived at the position that we have taken.

I want to encourage all of the members of the Judiciary Committee to read our report in full. Our review of his record has convinced us that his confirmation to the Supreme Court would cause a substantial shift in the Court's civil rights jurisprudence in a manner that would make it significantly more difficult for civil rights plaintiffs to prevail.

In his 15 years on the bench, Judge Alito has a record in civil rights that is extremely troubling to us. For example, in all that time he has voted for employment discrimination plaintiffs who are African-Americans on the merits of their cases twice. Some might say that that is a reflection of the strength of the cases that are coming before the court these days. We believe it is not, and without going into the detail that other people have gone into already—it would be redundant—I point to, for example, the *Bray* case—and I think it is very instructive—where Judge Alito took a position that appeared to us, at least, to be gratuitous.

The issue there was whether the jury would get an employment discrimination, whether it would go to the jury. And the reason proffered by the employer for the adverse employment decision claimed to be discriminatory, was proven and shown, demonstrated to be pretextual under the law as the majority saw it, and I think logic supports it. An inference can be drawn by a jury that the motivations were in fact discriminatory once the pretext has been exposed.

Judge Alito, it seemed to us, worked hard to arrive at a conclusion that that case should not even go to the jury, and it demonstrates a cramped and narrow reading of Title VII and civil

rights laws, which we believe is symptomatic of his views on civil rights issues in general.

I want to be very clear, because one of the members of this Committee raised the issue of whether anyone was alleging that Judge Alito harbors a bias. I want to be very clear on behalf of the Legal Defense Fund, that we are not saying that he harbors racial bias or that he is a racist. That would, as I indicated before, diminish all of us. Whatever his reason for ruling the way he does in cases, the record is consistently clear, as my colleague and friend, Reginald Turner, has indicated, and as our report has indicated. It is very difficult for African-American plaintiffs in civil rights cases to prevail.

Now, it is not limited to African-American plaintiffs, but those are the individuals whom we represent at the Legal Defense Fund. Certainly, his view of interpretation of civil rights laws extends to gender discrimination, some of the cases which we have highlighted in our report, and it extends to other areas with respect to individual rights.

Now, we believe that his views with respect to reinforcement, which have been here, are deeply troubling. We believe in the area of criminal justice his views are troubling, but I particularly want to point to an area about which we have a deep concern. The analogy with baseball has been very popular—and I want to end on this point—before this Committee and in these nominations. And Judge Alito, at one time, used to like to say about affirmative action that Henry Aaron would not be regarded as the all-time home run king and hero that he is if the fences had been moved in whenever he came to bat. I think that reflects a fundamental misunderstanding about affirmative action. The issue, with respect to civil rights and affirmative action advocates is not about asking that the fences be moved in, it is about asking about an opportunity to take the field, to stand at the plate, it is about an opportunity to play the game. And that is, I think, a fundamental difference in how one views the world with respect to issues of race these days.

I would like to conclude by saying that no one more than those of us at the Legal Defense Fund in this Nation would be happier if in fact our views are misplaced. And I am told, or we are told, we read that he will certainly be confirmed. We think that is before the Senate Judiciary Committee. But no one would be happier if our views are misplaced. We hope that that is right if he is confirmed. But we cannot take a position based upon hope. We have taken a position based upon his record, and we reluctantly and regretfully conclude that we must oppose Judge Alito's nomination to the United States Supreme Court.

Thank you.

[The prepared statement of Mr. Shaw appears as a submission for the record.]

Chairman SPECTER. Thank you, Mr. Shaw.

And now my 5 minutes of questioning. Mr. White, when you served as Judge Alito's law clerk—and you have identified in your brochure your membership in the NAACP and ACLU—what was your sense of his view of equality of African-Americans, equality of opportunity?

Mr. WHITE. When I served I worked with him on several cases where race issues arose among blacks and whites and other types of race issues. Mr. Shaw, for whom I have the utmost respect, says that it is not about personality, it is not about the person, and I respectfully disagree. Judge Alito, when he was testifying, he said he has an open mind. During my testimony I said that Judge Alito treats everyone the same, and I also mentioned that he looks at every case as a brand new case. My experience was that he did look with an open mind, and that it is not personal. I have to respectfully disagree with that as well. It is kind of personal.

On the street that I live I am the only African-American, and I can walk down the street without being racially profiled. Judge Alito has ruled that racial profiling is incorrect. So that is very personal to me. In my experience, he was very fair and open-minded.

Chairman SPECTER. Thank you, Mr. White.

I want to move to Mr. Turner at this point. Judge Tim Lewis testified yesterday, had been on the Third Circuit with Judge Alito for several years, an African-American. Identified himself as being very strongly pro-choice and very active in civil rights issues, and said that he would never consider supporting Judge Alito if there was any doubt in his mind as to Judge Alito's dedication to civil liberties. Do the views of Judge Lewis, Mr. White, who worked with him closely, have any impact on your thinking?

Mr. TURNER. Well, I would agree with my colleague and dear friend, Ted Shaw, that the folks who have worked with a lawyer or judge very closely in the course of their careers will have developed friendship and camaraderie with that person in ways that would promote good feelings about that person's character, temperament and ability.

Chairman SPECTER. You think a little bias for Judge Alito?

Mr. TURNER. I would not use the word bias. That is a very positive—

Chairman SPECTER. Wait a minute. That is why I used it.

Mr. TURNER. Mr. Chairman—

Chairman SPECTER. Wait a minute. You do not have to use it. [Laughter.]

Mr. TURNER. Thank you, Mr. Chairman. Our view of Judge Alito is based upon his record as a lawyer and as a judge. It is based on his writings during the time that he was a lawyer in the Justice Department, and on the basis of his rulings from the bench, which have presented an ultra-conservative tendency to rule against people of color and women in cases involving discrimination, and to rule in favor of employers and other institutions that have sought to—

Chairman SPECTER. Thank you, Mr. Turner. I have to move on to Congresswoman Wasserman Schultz.

Mr. TURNER. Thank you, Mr. Chairman.

Chairman SPECTER. You know the political process, the election of Presidents and campaign issues, and I am sure your deep interest in this issue has led you to see the other reported prospects for the Supreme Court should Judge Alito be rejected, and you have heard Judge Alito's statements about what he would consider on *stare decisis*. Do you think if Judge Alito is rejected you will get somebody you like better?

Representative WASSERMAN SCHULTZ. I am hopeful—I recognize that the President, obviously, has the right to nominate a conservative. And I am a Democrat, and I recognize that given that the President is a Republican that that is likely what he would do with almost any nominee.

But Americans have the right to expect that he will not nominate an extremist, and I agree with Mr. Shaw and Mr. Turner, it is well expected that colleagues of his—I served in the State Senate. I understand what collegiality is. Colleagues of his, former law clerks, they are going to express—

Chairman SPECTER. Thank you, Congresswoman Wasserman Schultz.

One last question, Ms. Pringle and also Mr. White. Ms. Pringle, two parts. What do you think about as concerns about women's issues? And both Mr. White and Ms. Pringle, there has been concern that Judge Alito may favor the powerful in the Government. You both clerked for him, saw him on specific cases. I would like your evaluation on that. Ms. Pringle?

Ms. PRINGLE. I found that the Judge approached each case without a predisposition toward one party or the other. He does have respect for law enforcement, but I also felt that he had respect for the individual plaintiffs or the individual parties who came before him, and treated them in a fair and open-minded way.

And I also think that—I understand the comments that have been made about personal relationships bearing on a witness's testimony, but I do think that a 15-year record gives an opportunity for every group to find something that they like or dislike.

What I wish is that everyone on the Committee had had the opportunity that I have had to really get to know this person, because I believe that the concerns about his character and his approach to judging would be alleviated by that opportunity to really know and work with this person.

Chairman SPECTER. Mr. White?

Mr. WHITE. Judge Alito's testimony and his record show that he has ruled in favor of the Government, and he has ruled in favor of what has been called the little guy, and from my experience, he always ruled fairly after thorough evaluation of the facts and application of relevant law.

Chairman SPECTER. Thank you. Senator Leahy?

Senator LEAHY. As I just came, I was going to let Senator Kennedy go.

Chairman SPECTER. Senator Kennedy?

Senator KENNEDY. Thank you, Mr. Chairman. I was interested in Mr. Shaw and Mr. Turner's reactions to the significance of Judge Alito's opinion in that *Riley* v. *Taylor* case, where he analogized statistics on left-handed Presidents and right-handed Presidents to statistical evidence of discrimination in jury selection. You are familiar with this case where they struck three blacks from the jury and a black defendant was sentenced to death. Judge Alito found no cause to reject that, and used this right-hand, left-hand analogy. Are you familiar with that case? And maybe you would comment on that briefly. Has that got a ring to you, and does it within the community? It was such a startling fact situation, certainly for me. I am just wondering your own response, reaction.

Mr. SHAW. Senator Kennedy, the Legal Defense Fund has litigated issues involving discrimination in jury selection almost throughout its existence. In fact, the late Judge Constance Baker Motley, when she was a Legal Defense Fund lawyer, argued *Swain* v. *Alabama* in the Supreme Court, which set a standard that existed for many years, which was inadequate to protect against discrimination in jury selection. The Legal Defense Fund litigated *Batson* v. *Kentucky*, which changed that standard.

We believe that Judge Alito's comparison of race discrimination with people who are left- or right-handed really trivializes the significance of race discrimination and the history of race discrimination, and a continuing problem with respect to jury selection.

And within the Third Circuit, Philadelphia itself and the District Attorney's Office recently, has had some terrible problems that have been exposed with respect to intentional discrimination with respect to jury selection.

Senator KENNEDY. I will ask Mr. Turner, but just this last comment to Dr. Gray's comment about the continuing ongoing challenge that we are facing, I think there are many of us in the Congress who just think, "Well, the next thing up is the Voting Rights Act," but that is really the only thing that is out there. I think what has been mentioned by Mr. Shaw and also Mr. Turner and Dr. Gray, is that this is an ongoing, continuing everyday battle in almost every part of the country, including my part of the country.

Mr. TURNER. Yes. Thank you, Senator Kennedy. I agree with you wholeheartedly, and in fact, Justice Sandra Day O'Connor, as I quoted in my remarks, understands that, unfortunately, in this Nation race still matters. Our justice system is not as blind as it aspires to be, as we would all like for it to be, and it is particularly reprehensible for attorneys to use racial bias in the selection of jurors. Jurors are central, critical to our American system of justice. It is through the jury as fact-finder that we commonly seek to find truth in our justice system, and where that process is subverted on the basis of racial discrimination, particularly in a death penalty case, we strike at the very heart of what I know we all believe to be fundamental principles of justice in our society, and we believe Judge Alito's position and his remarks certainly minimize those important principles, if not completely disregard them.

Senator KENNEDY. Just in the brief time left, just one question, and that is how the Supreme Court looks to all of you. You represent different traditions, women, Hispanics, blacks. We want the Supreme Court to be universally respected and their decisions respected, and I think most of us believe that to the extent that it can reflect what our society has become in its diversity, and with all of its dynamism and its creativity, and evolving opportunity. I am just wondering whether any of you have a reaction. I think the Congressman has mentioned—I know we are short in time, but if each of you could just take just half a minute or so to tell us what you think in terms of this nominee versus what we are really hopeful of achieving in terms of a Supreme Court that is going to be reflective of our country and our society. Are you concerned about it? Should it make a difference? Does it make a difference? What do you think? Just go down the line. I know my time is up. This will be my last question, obviously.

Ms. PRINGLE. I personally would like to see more women justices on the Supreme Court, and I hope that is something that we will aspire to as a country, but I am also pleased to see an Italian-American, first generation, lawyer on the Supreme Court as well.

Representative GONZALEZ. And as a Hispanic, of course, it would be important to have a Hispanic on the Supreme Court of Texas, but Senator, at the end of the day, in final analysis, the truth is, give us anybody up there who will give us a fair shake and is not predisposed, and when we have a President who says, "I am going to be nominating individuals more in the mode of Scalia and Thomas," he gives us great cause to pause and ponder and question.

Representative WASSERMAN SCHULTZ. This nomination is particularly important because of who Judge Alito would be replacing. He is replacing the first woman to ever serve on the Supreme Court, and he is replacing someone who has consistently been the key swing vote in very significant cases that matter to women and minorities in this country, and he has very divergent views from Justice O'Connor, and I think that is incredibly important to know.

Senator KENNEDY. Mr. White?

Mr. WHITE. I think it is extremely important to have a Supreme Court that reflects the people for whom it is interpreting the laws. In the absence of an African-American nominee, I think that Judge Alito was an excellent choice.

Mr. TURNER. Thank you, Senator Kennedy. I believe diversity may be America's greatest asset, and when we fail to embrace our Nation's diversity, particularly in an area as important as judicial appointments, we polarize our Nation at a time when unity and tolerance of diversity is critically important to our continued advancement as a great Nation, critical to our national security and our productivity.

Mr. SHAW. Senator Kennedy, I think we are long past the time when a Latino, a Hispanic ought to be on the Supreme Court. I believe diversity on the Supreme Court is important, but I am more concerned about the substance of the Supreme Court. The Court has been divided in race cases for the last 25 years with a narrow 5–4 edge in most cases. Justice O'Connor was the deciding vote in many of those cases. We did not always get her vote, but it was in play. That is what we are concerned about with respect to this nomination.

Senator KENNEDY. Thank you, Mr. Chairman.

Thank all of our panel.

Chairman SPECTER. Senator Leahy?

Senator LEAHY. Mr. Chairman, most of the questions have been asked, so I am not going to ask them again. I have read carefully the statements of each one of you, and I appreciate you being here, and I apologize, as I did to others earlier, about having to leave for the memorial service.

Representative Wasserman Schultz, having you here, I could not resist. I had asked Judge Alito several questions about the very deeply personal matter of Terri Schiavo from your State. I was offended, as many others were, at the number of people in elective office running before the cameras to try to grandstand in what was a terrible family tragedy. We saw them trying to overrule the State

of Florida. I forgot the number of times the State courts in Florida faced this issue.

Representative WASSERMAN SCHULTZ. Twenty.

Senator LEAHY. Twenty. I knew it was a lot. Some Members of Congress were attacking the judges who upheld the State court rulings because it fit their political purposes. The Florida legislatures passed an unconstitutional measure allowing Governor Bush to intervene. Actually a colleague of yours in the other body even issued a congressional subpoena to prevent Terri Schiavo's medical decisions.

I mention this sad and somewhat outrageous conduct of people who know better, but in every single case were attacking the independence of the judiciary. Do you have a sense whether Judge Alito would be one who would value an independent judiciary? I ask this in light of the questions I have asked him on the unitary Executive, and the situation we now see where the President can sort of write sidebars to everything from torture legislation to spying.

Representative WASSERMAN SCHULTZ. I think that that is an extremely important question, and Judge Alito's record is emblematic of the problems with the Terri Schiavo case. His views on privacy are extremely important. In that case you had the Congress insert itself into a family's private tragedy. You had the State legislature give our own Governor the unconstitutional right to overturn a judicial decision. You had, time and again, the Supreme Court rule that this was a matter that should be decided in State court, and decided not to take the case up. And I think it is a very important question. If that case had gone to the Supreme Court and you had the question of whether Congress actually had the right to insert itself into Terri Schiavo's private family tragedy, how would Judge Alito have ruled?

He has very troubling views about the power and the authority of the Executive, and I think that we need to make sure that we zealously guard our legislative authority and make sure that we have a Justice on the Supreme Court that supports the system of checks and balances, and I do not think that Judge Alito's record demonstrates that he does.

Senator LEAHY. Thank you. Thank you very much.

Mr. Chairman, thank you for your patience.

Chairman SPECTER. Thank you. There are two more items that I want to cover, but we will first of all let the panel go.

Thank you very much, Ms. Pringle, Congressman Gonzalez, Congresswoman Wasserman Schultz, Mr. White, Mr. Turner and Mr. Shaw. You have been a very enlightening panel, and I know how deeply all of your views are held. That is one thing we have seen in this hearing. Nobody is casual about Judge Alito. Everybody is very decisive. Emotions run deep.

Two items I want to cover, one in a colloquy with my distinguished ranking member, that is the future schedule on Judge Alito, and then I intend to announce my own decision on my vote now that the hearing is over.

The issue of scheduling has been extraordinarily difficult, as Senator Leahy and I have wrestled with that problem. Preliminarily, let me say that it has been a pleasure to work with Senator Leahy, and I think our collegiality has been demonstrated in many ways,

mostly by all of the pictures taken where we were huddled together so that our voice do not carry too far beyond, and also with a sense of humor. In the bad old days, when I had no hair, the only way that Senator Leahy and I could be told apart was by color of our ties.

[Laughter.]

Senator LEAHY. Of course, you are still wearing the red tie.

Chairman SPECTER. I am glad to have some hair.

But the scheduling issue has been an important one, and it was a difficult issue as to when we would schedule these hearings. The President, as is well known, wanted the matter decided before Christmas, and it seemed to me that was not realistic. We had to do it right and not do it fast. And then the issue came up, OK, not before Christmas, then when? And I wanted to start the hearings the day after New Year's. I wanted to start them on January 2nd. And the Democrats have a right, under our Committee practices, to delay for a week, and it seemed to me that that week could be given from the 2nd to the 9th, and that would be the week's delay. Senator Leahy and I are under—we have a lot to consider. We have Committee members who have views, and we have caucuses which have views.

But at any rate, we came to terms on what I thought was done, and Senator Leahy and I then went up to the radio-TV gallery, and I want to read a bit of the discussion which we had there. I do not do this in a legalistic sense to mind Senator Leahy. I do it to set the parameters as to where we have been and the views that my Committee members have and which I have. This is the transcript.

But at any rate, Senator Leahy and I have worked through it, and said it could be delayed a week in any event by any Senator who wants to hold it over for a week, that we would put that week back at the start on the 9th with the good faith understanding that our intent would be to go to the Executive Committee meeting on the 17th, the day after the Martin Luther King holiday, so that the schedule will be that we will start hearings at noon on the 9th, will have them on Tuesday the 10th, Wednesday the 11th, Thursday the 12th, Friday the 13th, and Saturday the 14th if necessary. Then we will go to the Exec. on the 17th, and here we cannot get everybody bound in writing to waive in advance, but Pat Leahy and Arlen Specter have had no problems, nor have we anybody on the Committee of not fulfilling what we have said we would do as a matter of good faith intent, which would put the Executive Session on the 17th. We finished that with Chief Justice Roberts in the morning.

And then we would go to the 18th, 19th and 20th for floor debate, with a vote on the 20th.

There is more dialog, and Senator Leahy then put in a limitation, quote, "Obviously, this leaves room if something extraordinary comes up that neither, frankly, neither Senator Specter nor I anticipate or expect," close quote. And I did not object to that. Seemed to me that that was a reasonable condition which might change what I had said earlier.

It is my intention to adhere to that schedule and to set the Executive Committee meeting for next Tuesday, the 17th in Dirksen 226, our regular hearing room, at 11 a.m.

Senator Leahy?

Senator LEAHY. Of course, we did this on November 3rd, and the discussion was had by—you are absolutely right, by Senator Frist, who was responding to the—I will not characterize it as pressure, but the direction he had received from the White House to move forward prior to Christmas. You may recall that Senator Frist had first said that the Senate would adjourn for the year in the first week in October, and then under every conceivable circumstance, the week before Thanksgiving, and instead there was a joyful singing of Christmas carols in the halls as we were finishing up just a few days before Christmas.

Had we followed what the White House had told Senator Frist they wanted and gone before Christmas, of course, we could not have even had the hearing. We were having votes every 10 minutes. It would have been chaotic. It would not have been the dignified and thorough kind of hearing we had here.

On January 2nd, of course, was a holiday, we could not come back that day and start the hearings. As I stated at the press conference, it would have meant destroying any of the staff's attempt to have any time over the holidays with their families. They had lost much of the family time during the normal school vacations in August because we had to prepare for the Roberts hearings. This was, of course, the third nominee of the President for this seat.

I would have much preferred, as you know, for a personal reason to have had it the first week during January because of long, long, long standing personal plans for this week, which I canceled, because otherwise it would have meant canceling everybody's time with their families at Christmas.

I had been told that a number of our members are going to be home for Martin Luther King events this weekend, will not be back on time on Tuesday, and so they will exercise their rights. And as you and I discussed privately prior to that press conference, of course, any Senator could exercise their right to put it over, a right that you and I—both of us have served as Chairman—something you and I have always protected.

I understand from something the majority leader said that, again, even though the Court does not come back in until the latter part of February, that the White House has told him they want the debate to begin before the President's State of the Union, even if we had—I do not have a calendar before me—but even if we put this over from next Tuesday to the following Tuesday, there is no reason why then it could not be on the floor on Wednesday, which is still 6 days prior to the State of the Union. Just in case you are wondering.

[Laughter.]

Chairman SPECTER. This is about the first time Senator Leahy and I have not agreed on something, but there has to be a first time for everything.

Senator LEAHY. I agree you are a superb Chairman. We can agree on that I hope.

Chairman SPECTER. The reciprocity of respect, I think, is pretty evident, the way we have conducted these hearings. And I appreciate what Senator Leahy has said about the full and fair—and he used the word dignified—I think they are dignified. There is a

Latin maxim, the exception proves the rule. There might have been 4 minutes in the hearing when it was not dignified, but we worked through that as well. About the only thing the respective parties have been able to agree to on this whole proceeding is that Senator Leahy and I have functioned collegially and have produced a full and fair and dignified hearing.

As far as I am concerned, we are going to proceed on the 17th at 11, and if the right of the—

Senator LEAHY. The right of any Senator.

Chairman SPECTER. Well, if they are held over, they are held over. I had thought we had—I do not fault Senator Leahy. I had thought that the Democratic Caucus knew what we were doing, and they certainly knew about it after we said it, but we will work through this problem like many, many others. This is not a gigantic problem.

Senator LEAHY. I think one of the problems is that—whether this affected it or not, I think the fact that the time that we were going to wrap up the session, the time which is determined by the leadership, by the majority leadership, kept changing, kept changing almost day by day, by day, by day, by day, and it probably has put all the pressure on everything else. I would hope that we could work this out. Maybe you and I can—we have each other on speed dial at home, and Senator Specter has heard many descriptions about my farm house—let us get some of these hearings out of the way, and you and I can sit up there and have dinner and have a good time, but we will talk about this over the weekend.

Chairman SPECTER. Thank you, Senator Leahy.

Let me now move to the final item of the Committee hearing, and that is the announcement of my position. And I intend to vote to support Judge Alito's nomination for Associate Justice to the Supreme Court, and I do not do that as a matter of having a party-line vote or as a matter of party loyalty. If I thought that Judge Alito should not be on the Supreme Court, I would vote no, just as I did with Judge Bork.

My commitment to the President as Chairman of this Committee is to give his nominees prompt hearings and to vote them out of Committee. And I have always believed in that. Before I became Chairman, I believed that there had been too many delays on both sides. Both Democrats and Republicans have delayed hearings on judicial nominees, and that led us to an escalation of events and filibusters and possibility of the constitutional or nuclear option. We have worked through that, and Senator Leahy and I were instrumental in avoiding what could have been a really cataclysmic event in the Senate. And I have always believed in voting people out of Committee.

I recall the days when matters were bottled up in the Committee, and I never agreed with that. And I voted against Judge Bork in Committee, but I voted to send his nomination to the floor. So in fulfilling my commitments to the President and the Republican Caucus to have prompt hearings and to vote people out of Committee, I believed in that before I was Chairman, and I believe in it now. And after fulfilling those duties, whether I vote aye or nay, that is my independent judgment. Under separation of powers, Senators are separate from the executive branch. It would be inap-

propriate to make a commitment on a vote in advance in any way, and I prize that independence very highly.

With respect to Judge Alito's qualifications, I think that they are agreed to, no doubt about the quality of his academic standing at Princeton and Yale or his erudition or his scholarship, working in the Solicitor General's Office and Office of Legal Counsel, then 15 years on the bench. We could not have held these hearings when we did, into January, because there was so much to do. And this Committee has worked very, very hard, and I thank not only the members of the Committee but the staffs. The staffs of this Committee didn't have an August. There was no recess to get ready for Judge Roberts' hearings. We didn't have a December or a November. We haven't had much of a January.

Senator LEAHY. January is not too good so far.

[Laughter.]

Chairman SPECTER. But we wanted to do it right, and I think we have done it right. We have gone very deeply into Judge Alito's background and studied his record.

With respect to the answers which Judge Alito gave, there are going to be differences of views. I thought we had to hear his answers before coming to judgment, and I have urged colleagues on both sides of the aisle not to make up their minds before the hearings are over. There has been an enormous amount of publicity about Judge Alito, as there was about White House Counsel Harriet Miers. And as I have said before, Ms. Miers was run out of town on a rail. The nomination was decided in the radio talk shows, TV talk shows, on the op-ed pages, and not by the Committee, which is what the Constitution says should be done. The Senate should make the decision and it ought to have a hearing in this Committee.

And we kept a level playing field for Judge Alito, and I was frankly a little concerned about the opening statements on both sides—a lot of accusations on one side and a lot of hyperbole on the other. And this is not a court of law, but I wanted Judge Alito to have a chance to explain where he stood and not to come to conclusions from the testimony. It was important to come from him.

I think that his answers in a sense went farther than any in the past because he did not say that he would not respond because the case might come before the Court. He ultimately refused to give judgments as to how he would vote, but when the issue was raised, he discussed the considerations that would be involved on Executive power, a really very important subject, as to whether the resolution for the authorization of use of force comprehends authority to engage in electronic surveillance, and I don't think it does. The Foreign Intelligence Surveillance Act is specific on that point.

But we are going to have a hearing, and we hope to hear from—we expect to hear from the Attorney General on the question of whether there is constitutional authority for the President to override a statute because of his Article II power. Those questions were put to Judge Alito, and he responded with the kinds of considerations which would be involved. And I think he touched all the bases there, but he was not going to say how he was going to rule, nor should he.

When it came to the question of court-stripping and the amendment taking away habeas corpus jurisdiction from the Federal courts on detainees, I think that is an atrocious piece of legislation. I believe it will be declared unconstitutional. But when he was asked about that, he talked about the considerations involved, not how he was going to decide it.

And on congressional power, I think he agreed that the method of reasoning of Supreme Court Justices is not superior to the method of reasoning of Congress, and that there oughtn't be flabby tests, as we talked about Justice Scalia's dissent on the Americans with Disabilities Act.

When it came to *Roe* v. *Wade*, I think he went about as far as he could go. He started off by saying that he agreed with *Griswold*, a constitutional right of privacy in the Liberty Clause, and that it would apply to single people as well in *Eisenstadt*, and that when he was dealing with *Casey*, the issue of reliance was very important, that he thought it was critical by analogy to what Chief Justice Rehnquist had done in *Miranda*, that it was a critical factor as to whether a decision was embedded in the culture of the community. And I certainly think from my own point of view *Roe* is. And he agreed that it was a living Constitution, subject to change, as Cardozo said in *Palco* with the mores and values of the people.

And we had a lot of discussion as to his views on *Roe* v. *Wade* and what then-Judge Roberts had said. And from my reading, I don't think there is a dime's worth of difference between what Chief Justice Roberts said and what Judge Alito said about that. Both relied heavily on precedents, but said that they would not make a final commitment, nor should they have made a final commitment.

I think the judicial panel was very instructive, and there had been some precedents for it in the past, although this broke new ground in having as many testify as they did. And the practice after judges hear arguments to go into conference to discuss it is one which is not widely understood by people, and Judge Alito went into conferences. he and Judge Becker had sat on more than a thousand cases. I believe Judge Becker testified they disagreed only 15 times. Judge Becker received the Devitt Award as the Outstanding Federal Jurist a couple of years ago. Of course, I know Judge Becker very well because we went to college and law school together, and he has been a close friend. But he didn't exert any undue influence on me. But he testified that Judge Alito had no agenda and was not an ideologue. And so did Chief Judge Scirica. And, of course, I know the Third Circuit because it is my circuit. I have argued a lot of cases in the Third Circuit and had a hand in the appointment of Judge Scirica to both the district court and the court of appeals, and Judge Barry.

And then I thought the testimony of Judge Timothy Lewis was very influential, and just a word about Judge Lewis. I first heard about him in about 1990 when he was an Assistant U.S. Attorney in Pittsburgh, an African-American. And Senator Heinz and I were very interested in diversifying the court, having an African-American. Hard to find a Republican African-American. Still is pretty hard to find. And when we found one, I wanted him on the district court bench. And I heard about him one morning in Pittsburgh,

saw him that afternoon in the hotel lobby, and talked to Senator Heinz about him the next day. And he was put on the district court, a very fast time, then on the court of appeals in 1992. And I have known him for more than 15 years, and when he says after knowing Judge Alito as he did, sitting with him, and Judge Lewis being dedicated to pro-choice and to civil rights, active on the ACLU and pro-choice, that he wouldn't testify for him if there was a doubt in his mind, I thought that was significant.

We have gone beyond asking some of the witnesses what happens if Judge Alito is rejected. This was an issue in the Presidential campaign on both sides. Senator Kerrey said he would appoint someone who was pro-choice, and I think President Bush said he would not use a litmus test. And I don't use a litmus test myself. But at least from those who have been reported in the press who would be considered, I put that question to Congresswoman Wasserman Schultz and to Ms. Kate Michelman, whom would they expect to find who would give more credence, thoughtfulness, and the precedents in the field.

Well, those are some of my reasons for supporting Judge Alito. I will prepare a written statement, but I thought it important to state my views now that the hearings are over. I know that I have already been asked many times by the press how I am going to vote, and I don't want to be coy and I don't want to hold back. And if the Senate was in session now, I would wait until the Senate was in session to go to the floor to make a statement. But that is how I think it through.

Senator Leahy?

Senator LEAHY. I will just be very brief, Mr. Chairman. I was following with interest what you were saying, also the interest and the history in Pennsylvania—as you know, one of my favorite States. I visit there often, in fact, drive through there the one time a year when I drive to Vermont, usually during the August recess, this time with a trunkload weighted down with all of then-Judge Roberts's writings.

You had mentioned one thing about voting against a Supreme Court Justice in Committee, but then voting to go on the floor. I think that is a good practice. I joined you on that particular nominee. I had at least a couple nominees for the Supreme Court whom I voted against in Committee as I stated what my position was. But I then voted that they go to the floor of the Senate because I thought for a Supreme Court Justice, we ought to all at least follow the Senate procedures where a hundred of us could decide what procedure to follow and have a vote. That is one of the reasons why I felt so frustrated with the 61—you were not Chairman, but the 61 of President Clinton's judicial nominees who were never allowed to have a vote in Committee but were basically pocket-filibustered. I thought it was a bad practice then. I think it is a bad practice, as I said, a lot of the partisanship that you and I have worked very, very hard to lower, that you and I have tried to go back to the type of Senate it was when both of us came here.

I will work with you, of course, on the scheduling of this. I had obviously not realized, one, that we would go so late in the year, but, two, that we would have a number who are not prepared to vote on Tuesday and will just follow the normal rules. But there

will be no problem then in voting the following Tuesday. You have actually picked up a couple days by having the markup on a Tuesday, not a Thursday, voting the following Tuesday, and I guess it would be on the floor then Wednesday and off we go.

Excuse me. This is not emotion. It is a Friday afternoon voice. And as I said, I expect you and I will talk over the weekend. I admire you as a Senator. I admire your work as Chairman. I have often said that of all the Senators, you were my number 2 choice to be Chairman of this Committee.

[Laughter.]

Senator LEAHY. Unfortunately, I don't get my number 1 unless the Democrats are back in the majority.

Chairman SPECTER. Thank you very much, Senator Leahy.

Senator LEAHY. Thank you.

Chairman SPECTER. Thank you very much for a full, fair, and dignified hearing.

And that, ladies and gentlemen, concludes the nomination hearing for Judge Samuel A. Alito, Jr. for the Supreme Court of the United States.

[Whereupon, at 1:34 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Judge Samuel A. Alito, Jr.
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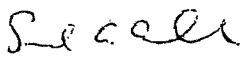
January 20, 2006

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy:

Enclosed please find my responses to your written questions as well as those of Senators Biden, Durbin, Kennedy, Levin, and Schumer. I am also providing my response to Senator Feingold's hearing question to which I indicated that I would respond in writing.

Sincerely,



Samuel A. Alito, Jr.

Enclosures

cc:
The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building

Responses of Judge Samuel A. Alito, Jr.
to the Written Questions of Senator Joseph R. Biden, Jr.

1. **In 1985, you expressed past disagreement with the Warren Court's decisions in the area of criminal procedure. Perhaps the best known Warren Court decision on criminal procedure is *Miranda v. Arizona*, the case that led to police officers reading people their rights, as we so often see on television and elsewhere. Were you referring to this opinion?**

   RESPONSE: Since Miranda was decided in 1966, both our legal system and law enforcement have adapted to and have come to rely on Miranda. As best I can recall, Miranda was a decision that caused me concern when I was in college. Miranda had been sharply criticized by respected legal figures, see FRED P. GRAHAM, THE SELF-INFLICTED WOUND 61-62 (1970), and I was concerned about its effect on law enforcement at a time when the crime rate was rising noticeably. As discussed in response to question two, developments since my college years have allayed these concerns.

2. **When the issue of *Miranda* came back up to the Supreme Court in 2000, it was upheld in an opinion by Chief Justice Rehnquist, a former critic, who wrote that *Miranda* warnings "have become part of our national culture." Justices Scalia and Thomas dissented. Do you agree with Rehnquist, or Scalia and Thomas?**

   RESPONSE: When Miranda was handed down nearly 40 years ago, many important questions were left unanswered, and this uncertainty was a cause for concern. Since then, however, the Supreme Court has issued numerous decisions clarifying Miranda's scope. See, e.g., Mathis v. United States, 391 U.S. 1 (1968) (Miranda applies when the purpose of the custody is unrelated to the purpose of the investigation); Harris v. New York, 401 U.S. 273 (1971) (statement obtained in violation of Miranda may be used for impeachment); Calandra v. United States, 414 U.S. 330 (1974)(evidence obtained in violation may be introduced before grand jury); Beckwith v. United States, 425 U.S. 341 (1976) (full Miranda warnings not required where the petitioner is the focus of a criminal investigation but not in custodial interrogation); Oregon v. Mathiason, 429 U.S. 492 (1977) (defining custody for Miranda purposes); North Carolina v. Butler, 441 U.S. 369 (1979) (explicit waiver of Miranda rights not always required); Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (explaining that "the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."); New York v. Quarles, 467 U.S. 649 (1984) (recognizing "public safety" exception); Oregon v. Elstad, 470 U.S. 298 (1985) (allowing the admission of a suspect's properly warned statement even though it had been preceded and arguably induced by an earlier inculpatory statement taken in violation of Miranda); Colorado v. Connelly, 479 U.S. 157 (1986) (waiver must be proved by preponderance of evidence); Illinois v. Perkins, 496 U.S. 292

(1990) (undercover officer posing as inmate not required to give warnings to inmate); Missouri v. Seibert, 542 U.S. 650 (2004) (clarifying Oregon v. Elstad); United States v. Patane, 542 U.S. 830 (2004) (admission of derivative evidence). A large and complex body of case law implementing Miranda has been worked out over the course of nearly four decades. If Miranda had not been decided, it is likely that comparable judicial resources would have been devoted to the development of a different body of case law dealing with the problem of interrogation.

In addition, law enforcement agencies have devoted substantial resources to training officers to comply with Miranda. If different rules regarding interrogation had been developed, either by the courts or by legislative bodies, officers presumably would have been trained differently. In these and other ways, the country has come to rely on Miranda, and reliance is a factor that counsels in favor of adherence to prior precedent.

3. **Perhaps the next most widely known criminal procedure case from the Warren Court was *Gideon v. Wainright*, the case saying that every person charged with a serious crime is entitled to a lawyer, whether or not he or she can afford one. Were you referring to this opinion in your 1985 application?**

RESPONSE: As best I can recall, I was not referring to Gideon in the 1985 statement.

4. **Judge Alito, in talking to Senator Kohl you identified areas where you disagreed with Judge Bork. You also said, though, that there were some areas where you agreed with them. In what areas do you agree with him? Please be as specific as possible.**

RESPONSE: When President Reagan announced that he was nominating Judge Bork, President Reagan described him as a "powerful advocate of judicial self-restraint" and as a jurist who shared President Reagan's "view that it is essential that judges' personal preferences and values should not be part of their constitutional interpretations." I also share the view that it is essential for a federal judge to subordinate his or her private opinions, and to consider only the dictates of the Constitution and the laws of the United States. As Justice Felix Frankfurter once said, "[t]he highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law."

5. **Why did you think Judge Bork should have been confirmed?**

RESPONSE: I was serving in non-career positions in the Reagan Administration at the time of Judge Bork's nomination and at the time when I commented on his nomination. I supported President Reagan's decision and agreed with the stated purpose of the decision, namely, to select a nominee who was dedicated to judicial self-restraint.

6. **In that interview, you said that *"if the public had accurately understood the positions***

***that he holds ... he would have been overwhelmingly confirmed.*" What do you think people misunderstood about Judge Bork?**

RESPONSE: It was my view at the time that some of the publicity surrounding the nomination was misleading. When legal issues are reduced to sound bites, distortion is almost inevitable.

7. **In a case you briefed while in the Solicitor General's Office, the *Wygant* case, you argued that a school system could not lay off employees in a way that avoids disproportionately firing minorities. Your brief said the argument against this diversity program was "*the same*" as the argument in favor of diversity in *Brown v. Board of Education*. Please explain this to me.**

RESPONSE: Wygant involved a school district layoff plan that the Supreme Court held violated the Equal Protection Clause. The brief on which I worked as an Assistant to the Solicitor General did not equate this plan with the invidious racial discrimination at issue in Brown. Rather, the Wygant amicus brief simply stated that the starting point of the argument in both cases was the fundamental proposition that the Equal Protection Clause guarantees equal treatment under the law for persons of all races. The Wygant amicus brief then went on to explain why the particular layoff plan at issue in that case was unconstitutional. Thus, while the government's amicus briefs in the two cases started by asserting the same fundamental equal protection principle, the Wygant amicus brief did not suggest that the argument in Wygant was the same as the argument in Brown.

8. **You compared that same case to *Plessy v. Ferguson*, the infamous 1896 case that validated "separate but equal." Are you saying that ejecting a black man from a railroad coach in order to separate the races is equivalent to requiring a school to maintain diversity?**

RESPONSE: The Wygant amicus brief referred to Plessy in a passage that recounted how the true meaning of the Fourteenth Amendment was distorted in the late nineteenth century, and the brief noted that Plessy involved a flagrant violation of the fundamental principle embodied in the Equal Protection Clause. While the Wygant amicus brief argued that the layoff plan at issue in that case was unconstitutional (as the Supreme Court later held), the Wygant brief never suggested that the racial segregation in Plessy was "equivalent" to the Wygant plan.

9. **You had a very interesting exchange with Senator Specter on when the courts should or should not second-guess congressional reasoning. You said, "*I think Congress's ability to reason is fully equal to that of the judiciary.*" Could you elaborate for me on this statement, especially keeping in mind Congress's ability to, among other things, hold hearings and confer with outside experts – things that the Court can't do by its very nature?**

RESPONSE: In responding to Senator Specter's question, I understood the term "reasoning" to mean the exercise of logic. The term "reasoning" is defined as "the process of forming conclusions, judgments, or inferences from facts or premises," RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1197 (1967), and I think that Congress and the judiciary are fully equal in their ability to reason in this sense.

The Congress has a decided advantage in being able to evaluate empirical information. Congress can hold hearings and is much freer than the judiciary to receive information from outside organizations and individuals. For these reasons, there is no inconsistency between my view that Congress and the judiciary are equal in reasoning ability but that Congress is better situated to gather data and make empirical judgments.

10. **In discussing the Independent Counsel case this week, you started to say that it's "a settled precedent of the Court," but then corrected yourself and said it's "a precedent of the Court." Why did you do that? In your response, please explain the difference between a settled Supreme Court precedent and one that's merely "a precedent".**

RESPONSE: The term "settled precedent" does not have a precise meaning in the law, and for that reason I generally tried (albeit not always successfully) to avoid using the term in responding to questions during the hearing. This was the reason for the correction to which the question refers.

11. **Under the theory of the "unitary executive" as you have previously espoused, which specific, existing federal agencies (and terms of service of agency heads, commissioners, etc.) would need to be eliminated or restructured?**

RESPONSE: I understand this question to refer to the constitutionality of laws relating to the removal of officers who head federal agencies. "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." Bowsher v. Synar, 478 U.S. 714, 726 (1986). In addition, Congress may not impose restrictions on the President's ability to remove executive officers if the "restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." Morrison v. Olson, 487 U.S. 654, 691 (1988). In Morrison, the Court reaffirmed its decisions in Humphrey's Executor v. United States, 295 U.S. 602 (1935), which held that it was constitutional for Congress to place restrictions on the removal of commissioners of the Federal Trade Commission, and Weiner v. United States, 357 U.S. 349 (1958), which reached the same conclusion with respect to members of the War Claims Commission.

In the talk that I gave about the "unitary executive," I did not suggest that any existing removal restrictions were unconstitutional. I merely suggested that, in future separation

of powers cases, it would be advisable to keep in mind the objectives that the Founders had in mind in deciding to place a single officer, the President, at the head of the Executive Branch. These objectives, I explained, were to ensure, first, that the Executive Branch would have "energy," i.e., that it would be able to get things done, second, that the Executive would be accountable to the electorate, and third, that the Executive would represent the interests of the entire country and not just some narrow factions.

Responses of Judge Samuel A. Alito, Jr.
to the Written Questions of Senator Richard J. Durbin

1. **In your 1985 application essay, you wrote that it was "an honor and source of personal satisfaction" to serve in the Reagan Justice Department and "to advance legal positions in which I personally believe very strongly." During your employment there, the Reagan Justice Department produced a publication entitled "Guidelines of Constitutional Litigation" that was highly critical of the *Griswold* decision. The publication stated: "The so-called 'right of privacy' cases provide examples of judicial creation of rights not reasonably found in the Constitution. The Supreme Court first articulated a constitutional right to privacy in *Griswold v. Connecticut*."**

   A. Question: Judge Alito, do you now, and did you during the 1980s, agree with this position of the Reagan Justice Department – that the right of privacy was an example of "judicial creation of rights not reasonably found in the Constitution"? Please explain.

RESPONSE: In my view, provisions of the Constitution do provide protection for privacy. For example, the Fourth Amendment protects against government intrusion into a place where a person has a legitimate expectation of privacy. See Rakas v. Illinois, 429 U.S. 128, 143-44 (1978). The Fifth Amendment protects privacy by forbidding compelled self-incrimination; the First Amendment protects privacy in certain circumstances relating to the freedom of speech, see NAACP v. Alabama, 357 U.S. 449 (1958). In Washington v. Glucksberg, 521 U.S. 702 (1997), the Court synthesized its longstanding precedents, and stated that the Due Process Clauses of the Fifth and Fourteenth Amendments provide protection for privacy rights that are "deeply rooted in this Nation's history and traditions" and "'implicit in the concept of ordered liberty.'" Id. at 721 (citations omitted). Insofar as the Justice Department during the 1980s took the view that the Constitution is not properly interpreted to protect privacy interests, I did not endorse that view at the time and it is not my present view.

   B. Question: What was the basis for your belief, in 1985, that "the Constitution does not protect a right to an abortion"?

RESPONSE: In the 1985 statement that you cite I was referring to my work in the Solicitor General's office, and in particular, my work on the memorandum that I wrote concerning the Thornburgh case. My view on this question was influenced by Supreme Court opinions criticizing Roe, the most recent of which was Justice O'Connor's dissent in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 452-74 (1983), as well as the scholarly publications to which I referred in footnote 10 of the memorandum that I wrote in the Thornburgh case.

2. **You have been a member of the Federalist Society for 23 years. You highlighted**

your membership in this group when you applied for the 1985 promotion at the Justice Department. The speech you gave to the Federalist Society in 2000 about executive power is now well known, but according to your Senate questionnaire, you have given at least ten other speeches to the Federalist Society over the years.

The Federalist Society's mission statement contains the following assertion: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society."

Question: Do you agree with this mission statement? Please explain your answer with regard to both law schools (you have taught several law school classes and delivered many lectures to law school audiences) and the legal profession.

RESPONSE: It is generally believed that the majority of professors at most law schools would describe their political beliefs as liberal or on the left side of the political spectrum. I do not have an impression about this statement with respect to the legal profession as a whole.

3. **In our discussion about the Establishment Clause, I asked you whether you thought it was appropriate to provide "financial support from a government agency to a school that is a religious school, where the money is used for the purpose of teaching religion or proselytizing." You responded that according to Supreme Court precedents, a government body cannot supply money to a school for the purpose of conducting religious education.**

A. **Question: Consider a situation in which religious or faith-based social service providers as well as non-religious social service providers receive direct government aid to provide services to those in need. In your opinion, is it constitutionally permissible for the government to allow these religious providers to use this aid to subsidize social service programs that include religious instruction, proselytizing, worship or other religious content?**

RESPONSE: Cases presenting questions of this type may come before the Supreme Court in the near future. See, e.g., Freedom From Religion Found. v. Chao, 2006 U.S. App. LEXIS 811 (7th Cir. 2006) (involving a challenge to the "Faith-Based Initiatives" program). The Supreme Court has handed down numerous cases dealing with government aid to religiously affiliated institutions, and I would consult this body of case law if confronted with an issue such as the one presented in the question. Two of the most recent cases in this line are Agostini v. Felton, 521 U.S. 203 (1997), and Mitchell v. Helms, 530 U.S. 793 (2000). In Agostini, the Supreme Court upheld the constitutionality of a program that sent public school teachers into religiously affiliated schools for the purpose of providing remedial education to disadvantaged children. In

an opinion written by Justice O'Connor, the Court held that the requirements of the Lemon test were met in light of the safeguards provided by the program in question. In Mitchell, the Court again applied the Lemon test, as clarified by Agostini, and upheld a program under which the federal government provided funds to state and local government agencies and these agencies in turn loaned educational materials and equipment to religiously affiliated schools. Justice O'Connor's concurrence in Mitchell maintained that "actual diversion of government aid to religious indoctrination" would violate the Establishment Clause. Id. at 840 (O'Connor, J., concurring).

B. **Question:** **In your opinion, is it constitutionally permissible for the government to allow religious social service providers to discriminate on the basis of religion in hiring with respect to jobs funded by direct government aid?**

RESPONSE: Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. See also 42 U.S.C. § 604a(f). In Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987), the Court held that the application of this provision to a religious organization's secular activities did not violate the Establishment Clause. It has been argued, however, that this precedent is not controlling when the government provides funding to religious organizations. See Note, Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation, 37 Harv. C.R. - C. L. Law Rev. 389 (2002). Because this is a question that may well come before the Third Circuit or the Supreme Court, it would be inappropriate to comment further.

C. **Question:** **In a report published by the Department of Justice in 1988, the Reagan Administration suggested that religious institutions that receive government aid have a constitutional right to resist certain regulation that follows the aid when such regulation violates the institutions' religious beliefs. In your opinion, is there any constitutional basis upon which religious institutions could refuse to abide by government regulations that condition the receipt of financial aid provided to those religious institutions? If so, what are the legal reasons?**

RESPONSE: Though the Supreme Court has not directly addressed this question, such cases are pending in the lower federal courts. See, e.g., Teen Ranch v. Udow, 389 F. Supp. 2d 827 (W.D. Mich. 2005) (party argued that the regulations violated the Free Exercise and Free Speech guarantees of the First Amendment). Because these are issues that may well come before my court or the Supreme Court, it would be inappropriate to comment further.

4. **You told Senator Leahy, "I think that the considerations that inform the theory of**

the unitary executive are still important in determining and deciding separation of powers issues that arise in this area." You had an exchange with Senator Grassley that seems somewhat inconsistent with your statement to Senator Leahy. Senator Grassley asked:

> **"But is it not right that you are a person that is bound by the Constitution to only hear cases and controversies that come before the Supreme Court? ... So any theories you might have about - what was it called, unitary executive or something - what's that got to do with your deciding a case?"**

You responded:

> **"Senator, you are exactly right. If cases involving this area of constitutional law come before me, I will look to the precedents of the Supreme Court. And that's what I think I've been trying to emphasize. And there are governing precedents in this area."**

Question: How do you reconcile your statement to Senator Leahy with your statement to Senator Grassley? Will you pledge that you will not apply the unitary executive theory in deciding cases if you are confirmed?

RESPONSE: The answers to the two questions are consistent. In response to Senator Grassley's question, I said that the Supreme Court addresses separation of power issues only in the context of deciding actual cases and controversies and that, if confirmed, I would look to the governing precedents of the Supreme Court in analyzing such cases.

An important precedent of the Court in this area is Morrison v. Olson, 487 U.S. 654 (1988), which recognizes that a law violates separation of powers principles if it "unduly interfer[es] with the role of the Executive Branch." Id. at 693. Similarly, Morrison held, among other things, that separation of powers principles allow Congress to place restrictions on the removal of an executive officer provided that the restrictions do not "impede the President's ability to perform his constitutional duty." Id. at 691. The point that I made in my response to Senator Leahy was that, in following a precedent such as Morrison and in determining whether a law impermissibly interferes with the Executive's ability to carry out its constitutional role, a court should keep in mind the role that the Founders intended for the President to play when they "decid[ed] to vest Executive authority in one person rather than several." Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., dissenting). As Justice Breyer elaborated, the Founders "did so in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability. They also sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many." Id. As I said to Senator Leahy, a separation of powers argument relating to an

alleged infringement of the role of the Executive should be informed by the Founders' reasons for structuring the Executive as they did.

5. **I asked you whether you agreed with Justice Thomas' dissent in *Hamdi v. Rumsfeld*. You told me: "Well, I'm not coming down -- I don't recall that Justice Thomas uses the term of unitary executive in his dissent. It doesn't stick out in my mind that he did. If he did, he's using it there in a sense that's different from the sense in which I was using the term."**

In his *Hamdi* dissent, Justice Thomas said: "The Founders intended that the President have primary responsibility - along with the necessary power - to protect the national security and to conduct the Nation's foreign relations. ... It is crucial to recognize that judicial interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive."

Question: Do you agree with Justice Thomas' *Hamdi* dissent? Do you agree with his interpretation of the unitary executive theory?

RESPONSE: As I explained during the hearings, my understanding of the concept of the unitary executive relates to the question of control over the Executive Branch and not to the scope of the powers possessed by the Executive Branch. In my view, the Framers could have created a unitary executive with only very narrow powers, e.g., a unitary executive whose only power was to act as the ceremonial head of state. By the same token, they could have created a plural executive, headed, for example, by a multi-member council or commission. Thus, to my mind, the concept of the unitary executive relates to the power to control the Executive Branch and not to the scope of the powers held by that branch. If others use the term "unitary executive" in a different way, their views should not be confused with mine. I note that in the talk that I gave in November 2000, I stated expressly that I was not addressing the issue of the scope of the power conferred on the President by the language of Article II, sec. 1, which says that "[t]he Executive power" is vested in the President. Rather, I stated clearly that the only power that I was discussing was the power "to take Care that the Laws be faithfully executed," which is specifically conferred on the President by Art. II, sec. 3.

The question quotes Justice Thomas's statement in his Hamdi dissent that "the Founders intended that the President have primary responsibility – along with the necessary power – to protect the national security and to conduct the Nation's foreign relations." Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2674 (2004) (Thomas, J., dissenting). I understand this conclusion to be based on the powers that the Constitution gives the President – in Justice Thomas's words, the fact that "the Constitution vests in the President '[t]he executive Power,' Art. II, § 1, provides that he 'shall be Commander in Chief of the' armed forces, § 2, and places in him the power to recognize foreign governments, § 3." Hamdi, 124 S.Ct. at 2675 (Thomas, J., dissenting). Justice Thomas does add that the Framers chose to vest these powers in the President because they believed that a unitary executive would be better able than Congress to perform these

functions, id. at 2675, but I do not read Justice Thomas's opinion to mean that the decision to create a unitary, rather than a plural executive, gives rise to the inference that the Framers intended for the executive to have broad war powers. The issue presented in Hamdi is one that may come before the Court and therefore it would not be appropriate for me to comment on any of the opinions in that case.

6. **In response to one of my questions, you stated:**

> **"When I talk about the unitary executive, I'm talking about the president's control over the executive branch, no matter how big or how small, no matter how much power it has or how little power it has. To me, the issue of the scope of executive power is an entirely different question and it goes to what can you read into simply the term executive. That's part of it. Of course, there are some other powers that are given to the president in Article II, commander-in-chief power, for example, and there can be a debate, of course, about the scope of that power, but that doesn't have to do with the unitary executive."**

Question: What specific constitutional provisions grant power to the President? Some scholars argue that the President's powers are limited to those enumerated in Article II, Section II of the Constitution. Do you agree?

RESPONSE: The Supreme Court has sent mixed signals regarding the existence of inherent executive powers. In the seminal case of Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), Justice Black's majority opinion stated that "[t]he President's power, if any, to issue the order [seizing the steel mills] must stem either from an act of Congress or from the Constitution itself." Id. at 585. Given the absence of express statutory or constitutional authorization for the seizure, Justice Black reasoned, President Truman's order was unconstitutional. See id. at 585, 87 (noting that "[t]here is no statute that expressly authorizes the President to take possession of property as he did here," and that "it is not claimed that express constitutional language grants this power to the President"). Justice Jackson's concurring opinion contemplated a less restrictive view of executive power, but he stated that he could not "accept the view that this clause [Art. II, § 1, cl. 1, providing that "[t]he executive power shall be vested in a President of the United States of America"] is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated."). 343 U.S. at 641 (Jackson, J., concurring). See also William Howard Taft, Our Chief Magistrate and His Powers 139-40 (1916) ("The true view of the Executive functions is ... that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power ... either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.").

In other cases, however, the Court has spoken more broadly of presidential power. In United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936), for example, the Court upheld a broad delegation of power to the President to restrict arms sales to two Latin American countries. Explaining its holding, the Court referred in dicta to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." Id. at 319-20. Moreover, the Court noted, "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution ... is categorically true only in respect of our internal affairs." See, e.g., United States v. Belmont, 301 U.S. 324 (1937) (giving effect to an executive agreement between the United States and the Soviet Union even though no constitutional provision expressly authorized the president to enter into non-treaty compacts); see also Laurence Tribe, American Constitutional Law 649-50 (3d ed. 2000) ("If this unenumerated power to enter non-treaty agreements exists within the federal government, it seems clear that it is the President, not Congress, who has the authority to exercise this power on behalf of the nation. ... Because of the broad delegation in Article II, the President is widely thought to have inherent power to perform all executive acts–subject, of course, to the specific limitations of Articles I and II and other constitutional provisions.").

I have not addressed this question in connection with any work that I have done either before or after becoming a judge. If the issue were to come before me, either on the court of appeals or the Supreme Court, if I am confirmed, I would carefully study the briefs and the supporting authorities cited and would reach a conclusion only after fully considering the arguments of counsel and the views of the other judges or justices.

7. **You told Senator Feingold: "the President must take care that the statutes of the United States that are consistent with the Constitution are complied with."**

Some advocates of the unitary executive argue that the "take care" clause of Article II of the Constitution gives the President power to refuse to execute laws that he believes are unconstitutional. However, the non-partisan Congressional Research Service has concluded, "the President's duty under Article II to 'take care' that the laws are faithfully executed vests in him no supervening substantive power."

Question: Do you agree with the Congressional Research Service's conclusion or do you believe the "take care" clause of Article II of the Constitution gives the President power to refuse to execute a law that he believes is unconstitutional?

RESPONSE: Scholars differ sharply on this question, see Dawn E. Johnsen, Presidential Non-enforcement of Constitutionally Objectionable Statutes, 63 SPG Law & Contemp. Probs. 7, 14-23 (2000) (describing controversy), and up to this point, I have not encountered this question in

my work. If the issue is presented in a case that comes before me, either on the court of appeals or the Supreme Court, if I am confirmed, I would carefully study the briefs and the supporting authorities cited and would reach a conclusion only after fully considering the arguments of counsel and the views of the other judges or justices.

8. **In determining whether the President has the authority to refuse to execute a law that believes is unconstitutional, you indicated that you would refer to the three-part framework laid out in Justice Jackson's influential concurring opinion in the *Youngstown Steel* case.**

   A. **Question:** **Would not a case where the President refuses to abide by a law always fall into the third area laid out in Justice Jackson's opinion "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb"?**

RESPONSE: Such a case would fall into category three.

   B. **Question:** **Once you determine that the President's refusal to enforce a law falls into the third area, what analytical framework would you apply in deciding whether the President has such a power? To what constitutional provisions would you refer to answer this question?**

RESPONSE: I would first attempt to ascertain the scope, if any, of the constitutional power claimed by the President and would then inquire whether the statute unconstitutionally infringed on that power.

9. **Senator Hatch asked you how you ruled in *Fatin v. INS*, 12 F.3d 62 (3d Cir. 1993), an asylum case. Senator Hatch asked: "In the landmark case *Fatin v. INS*, this involved Iranian women who refused to conform to their government's gender-specific laws and social norms; whether or not they should be granted asylum in America. How did you rule in that case?"**

You responded:

> **"I think that was one of the first cases in the federal courts to hold that requiring a woman to be returned to a country where she would have to wear a veil and conform to other practices like that would amount to persecution if that was deeply offensive to her, and that subjecting a woman to persecution in Iran or any other country to which she would be returned based on feminism would be persecution on the basis of political opinion."**

Question: **You did not respond to Senator Hatch's question regarding how you ruled in the *Fatin* case. Did you rule for the government or Ms. Fatin, the Iranian woman who sought asylum in this case?**

RESPONSE: Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993), held that the broad category of "gender" could constitute a "particular social group," a statutory requirement for refugee status. Further, the court recognized that a narrowly defined social group, comprised in this case of Iranian women who rejected the social norms and the government's gender-specific laws, could also satisfy the definition of a particular social group. The Fatin court's attempt to understand Ms. Fatin's motives and the social and societal consequences of her conduct was a departure from historically rigid analysis of gender-based asylum claims. See, e.g., Pamela Goldberg, Analytical Approaches in Search of Consistent Application: A Comparative Analysis of the Second Circuit Decisions Addressing Gender in the Asylum Law Context, 66 Brooklyn L. Rev. 309, 330 (2000); John Hans Thomas, Seeing Through a Glass, Darkly: The Social Context of "Particular Social Groups" in Lwin v. INS, 1999 B.Y.U.L. Rev. 799, 817 (1999). The court concluded, however, that Ms. Fatin did not produce enough evidence to qualify for asylum based on either the broader or the narrower definition of social group. Since 1993, it has been argued that, more than any other case in the United States, Fatin supports the claim that gender is a particular social group for purposes of asylum. See, e.g., Anjana Bahl, Home is Where the Brute Lives: Asylum Law & Gender-Based Claims of Persecution, 4 Cardozo Women's L.J. 33, 58-60 (1997).

10. **On January 10, 1986, in your capacity as Deputy Assistant Attorney General of the Justice Department's Office of Legal Counsel, you sent a letter to then-FBI Director William Webster in which you concluded that the Constitution "grants only fundamental rights to illegal aliens within the United States."**

The only case you cited in support of this proposition was *Mathews v. Diaz*, 426 U.S. 67 (1986), which you said suggests that "illegal aliens have no claim to nondiscrimination with respect to nonfundamental rights." *Mathews v. Diaz* held that it does not violate the Due Process Clause to condition an immigrant's eligibility for Medicare on five years of continuous residence in the United States. Justice Steven's opinion, for a unanimous Court, said that all immigrants, legal and illegal, have rights under the Fifth and Fourteenth Amendments, but it did not say or suggest that those are the only rights that immigrants have.

Question: **Did you misinterpret *Mathews v. Diaz* in your letter?**

RESPONSE: The letter in question accurately cited Mathews v. Diaz, 526 U.S. 67, 77 (1976), as "suggesting that illegal aliens have no claim to nondiscrimination with respect to nonfundamental rights." The Court in that case upheld the constitutionality of a provision conditioning an alien's eligibility to participate in a federal medical insurance program on continuous residence in the United States for five years and admission for permanent residence. While stating that illegal aliens have the right not to be deprived of life, liberty, or property

without due process, the opinion also stated that illegal aliens need not be treated the same as citizens or aliens who are in this country legally. See id. at 80, 82. The Court thus held that Congress could constitutionally draw a distinction between the class of aliens made eligible for the program and those, including illegal aliens, who were not.

The letter did not provide a longer and more comprehensive treatment of the issue of the constitutional rights of illegal aliens because it was not necessary in order to answer the question that was submitted to the Office of Legal Counsel. The question submitted was whether it was lawful for the FBI to place fingerprint identification and criminal identification information relating to certain aliens into the Bureau's own files. The letter concluded that the Bureau was authorized by Executive Order and regulation to undertake this activity and that doing so would not be inconsistent with circuit court decisions concerning the dissemination of inaccurate stigmatizing information. In this connection, the letter noted that the information would merely be placed in the Bureau's files and would not be routinely disseminated. In a footnote, the letter provided additional reasons why the proposed actions would not violate the Constitution, namely, that fingerprint identification information is not stigmatizing and that the subjects of the identification were either outside the United States or present in this country illegally. Thus, the issue of the rights of illegal aliens in this country was very much a subsidiary matter, and it was for this reason that the subject was addressed only in passing.

11. **In your January 10, 1986 letter to then-FBI Director Webster, you did not cite *Plyler v. Doe*, 457 U.S. 202 (1982), a case that speaks directly to the issue of nonfundamental rights for illegal aliens. In *Plyler*, the Court held that illegal immigrant children have the constitutional right to an elementary education, even though education is not a fundamental right.**

A. Question: Do you believe that illegal immigrant children have the constitutional right to an elementary education? Should you have cited *Plyer* in your letter?

RESPONSE: Plyler so held, and it is a Supreme Court precedent that has been in force for more than 20 years and is entitled to respect under the doctrine of stare decisis. If the request from the FBI had required a discussion of the constitutional rights of illegal aliens, it would have been appropriate to discuss Plyler. However, for the reasons explained above in response to question 10, there was no need to discuss this issue, and the footnote merely touched on the issue in passing. Under these circumstances, it was not necessary to discuss or cite Plyler.

B. Question: What is your view of *Plyler* today? Is it well-settled law?

RESPONSE: Please see above response to question 11.A.

C. Question: What are your views on the constitutional rights of immigrants, including illegal immigrants?

RESPONSE: The Supreme Court has stated that "the Fourteenth Amendment to the Constitution is not confined to the protection of citizens. ... [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). State laws discriminating against aliens are generally "inherently suspect and subject to close judicial scrutiny." Graham v. Richardson, 403 U.S. 365, 372 (1971) (striking down state law denying welfare benefits to aliens who have not resided in the United States for a specified number of years). This is because "[a]liens as a class are a prime example of a 'discrete and insular minority' for whom heightened judicial solicitude is appropriate.'" Id. (citing United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938)); see also Nyquist v. Mauclet, 432 U.S. 1 (1977) (striking down state law limiting financial aid for higher education to citizens and certain resident aliens); Examining Board v. Flores de Otero, 426 U.S. 572 (1976) (invalidating Puerto Rico law permitting only U.S. citizens to engage in private practice of engineering); Sugarman v. Dougall, 413 U.S. 634 (1973) (invalidating state law preventing aliens from holding civil service jobs); In re Griffiths, 413 U.S. 717 (1973) (holding that state law excluding aliens from being licensed as attorneys was unconstitutional).

Although state discrimination against aliens is generally subject to strict scrutiny, rational basis review applies when alienage classifications relate to self-government and the democratic process. Foley v. Connelie, 435 U.S. 291, 296 (1978) (upholding state law providing that police officers must be citizens). Thus, the Court has permitted states to deny aliens the right to vote or hold political office, see Sugarman v. Dougall, 413 U.S. 634, 647 (1973), to serve on juries, see Perkins v. Smith, 426 U.S. 913 (1976), or to be employed as an elementary or secondary school teacher, see Ambach v. Norwick, 441 U.S. 68 (1979). But rational basis review will not be applied when discrimination on the basis of alienage does not involve the protection of state interests essential to representative government. See Bernal v. Fainter, 467 U.S. 216 (1984) (holding that state law making citizenship a requirement for a person to serve as a notary public violated the equal protection clause).

Because Congress has plenary power to regulate immigration, the Court applies a narrow, deferential standard of review when a federal law discriminates on the basis of alienage. See Mathews v. Diaz, 426 U.S. 67 (1976) (upholding federal statute denying Medicaid benefits to aliens unless they were admitted for permanent residence and lived in the United States for at least five years). But while such review applies to alienage classifications imposed by Congress and the President, it may not apply to distinctions made by federal administrative agencies that are not charged with administering the immigration laws. See Hampton v. Wong, 426 U.S. 88 (1976) (invalidating federal civil service regulation denying employment to aliens).

One of the Court's leading cases on the constitutional rights enjoyed by illegal immigrants is Plyler v. Doe, 457 U.S. 202 (1982), which held that a state statute that withheld from local school districts state funds for the education of children not legally admitted into the United

States, and which authorized local school districts to deny enrollment to such children, violated the Equal Protection Clause of the Fourteenth Amendment. The Court noted that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." Id. at 210.

Response of Judge Samuel A. Alito, Jr.
to the Hearing Question of Senator Russell D. Feingold

Senator Feingold: If you are confirmed to the Supreme Court, how would you analyze a possible recusal motion if an appeal on a case from one of those sitting judges testifying on your behalf were to come before you? Will you have to recuse yourself from any case where one of these judges was involved in the decision?

RESPONSE: I would continue to consider recusal issues very seriously if confirmed to the Supreme Court. As I mentioned in my testimony, the recusal standard for Supreme Court Justices is in some ways different from that for lower court judges. Supreme Court Justices have less latitude to err on the side of recusal, because recusal can lead to decisions that are evenly divided or that involve less than an absolute majority of the Court. Lack of a definitive resolution to a case when the litigants have no higher court that could resolve their cases undermines the judicial process.

If confirmed I would apply the relevant legal and ethical standards of Supreme Court recusal to the facts of each situation that I face. I would scrupulously abide by 28 U.S.C. § 455, which, among other things, requires recusal if the judge's "impartiality might reasonably be questioned." I would also consider past recusal decisions and practice of other Justices, lower court opinions related to recusal, and other relevant ethical standards.

In considering the particular issue that you raised during the hearings, it would be important to determine whether Justices have in the past recused themselves in analogous situations, including cases in which a party was represented by an attorney who testified either in favor of or against the Justice during the Justice's confirmation hearings. I am aware that United States District Judge Walter E. Craig testified on behalf of Chief Justice Rehnquist's 1971 nomination to be an Associate Justice. Shortly thereafter, then-Justice Rehnquist authored United States v. Fuller, 409 U.S. 488 (1973), a 5–4 decision reversing a judgment of Judge Craig. I am not aware of any case in which Chief Justice Rehnquist recused himself from appeals of cases decided by Judge Craig, who served in the District of Arizona until 1986.

A court of appeals judge whose decision is reviewed by the Supreme Court, unlike an attorney representing a party before the Court, has no personal stake in the outcome of the case. Federal judges at all levels know each other very well, and I do not know of a case where friendship between a lower and a higher court judge caused recusal. The Second Circuit rejected the suggestion that circuit judges "would be reluctant to reverse . . . a sentence imposed by a judge who now serves on this Court." United States v. Colon, 961 F.2d 41, 44 (2d Cir. 1992).

Based on what I know at this time, I do not think that the testimony of the court of appeals judges should require me to recuse myself in cases on which they sat, but if confirmed, I would undertake a thorough review of the past practices of Justices in any analogous situations, and if a recusal motion is filed in a case on which one or more of the testifying judges sat, I would carefully consider the arguments presented.

Response of Judge Samuel A. Alito, Jr.
To the Written Question of Senator Edward M. Kennedy

Court records provided to us show that Vanguard entries were made or edited on your recusal list on December 10 and 23, 2003, and January 5, 2004. If you have or can obtain or access any additional records relating to those entries, please provide them to us.

a. In particular, have you searched your own records to see whether you have or can access any records or communications relating to any of the recusal list activity with respect to Vanguard during that period that have not already been provided in full? If not, please do so, and if there are any such materials, please provide them with your response. If there are additional such materials in the possession of the court, please obtain them and provide them to us.

RESPONSE: I have searched my records, and I have not found any additional records relating to recusal list activity with respect to Vanguard during the period in question. As far as I am aware, all information in the possession of the court relating to recusal list activity on my part with respect to Vanguard during this period has been provided to the Committee.

b. Your questionnaire response attached a listing of cases you had been disqualified from with brief explanations as to the reason for each disqualification. Did you determine the reasons yourself, and did you do so based on your copies of your recusal lists or other contemporaneous materials, or did the clerk's office do so, and on what basis? Please provide all materials you or the clerk's office relied on to determine those explanations in each recusal shown as involving "Vanguard."

RESPONSE: I attempted to reconstruct the reasons for recusal in all cases where the recusal was not based on the computerized checking system. The recusals since 2003 in cases involving Vanguard were triggered by the computerized recusal checking system.

In almost all other instances, with the assistance of my clerks, I attempted to ascertain the reason for recusal based on the parties and attorneys in the case. In the great majority of cases, my office records did not contain any information regarding the reason for recusal in particular cases. The clerk's office likewise does not possess such information because, when judges decide to recuse, they rarely inform the clerk's office of the reason for the recusal.

Response of Judge Samuel A. Alito, Jr.
to the Written Question of Senator Patrick J. Leahy

During this week's hearing, you testified that "the considerations that inform the theory of the unitary Executive are still important in determining and deciding separation of powers issues." I attach an article by Professor Steven Calabresi, a former colleague of yours from the Reagan administration. He writes: "My ultimate conclusion is that the changed circumstance of the way in which the incentives created by the electoral system combine with a larger federal pie virtually mandates the creation of a much stronger and more unitary presidency than President Reagan and his legal advisors ever thought to ask for."

Please review this article and tell me whether you agree with the theory of the unitary Executive as set out by Professor Calabresi. To the extent you disagree with any of his conclusions or reasoning, specify which ones and why you disagree.

RESPONSE: As a judge, my approach to separation of powers questions is based on the Constitution and the case law interpreting the Constitution. By contrast, Professor Calabresi's article takes a theoretical approach and does not focus on the Constitution, much less case law. He explains:

> My project in this article is to consider normatively some of the contemporary arguments about how changed circumstances may bear on the case for and against presidential power. That is (*leaving aside what the text of the Constitution actually says about these matters*), do changed circumstances require an increase or decrease in the present scope of presidential entitlements.

Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 29 (1994) (emphasis added). Thus, much of the article is not relevant to my work as a judge and addresses questions that are outside my area of responsibility and expertise.

Part II of the article provides a summary of the Framers' reasons for placing a single officer, the President, at the head of the Executive Branch. I note that Justice Breyer cited this portion of the article in his opinion in Clinton v. Jones, 520 U.S. 681, 712 (1997), and this portion of the article is similar to portions of my talk about the unitary executive in 2000. As I mentioned during the hearings, however, my understanding of the concept of the unitary executive relates solely to the President's control over the Executive Branch and not to the scope of the powers possessed by that branch. If there is any suggestion to the contrary in part II of Professor Calabresi's article, I do not agree with that suggestion.

Part III of Professor Calabresi's article sets out and evaluates the merits of "three possible 'paradigmatic' institutional structures for the execution of the laws in late twentieth century America." Calabresi, supra, at 48-49. These are, first, "America's quasi-parliamentary 'executive,' the congressional committee system," second, "the federal judiciary, when its power is invoked in lawsuits brought, in modern times, by public interest law groups with diverging agendas for law execution," and third, "the traditional, textually mandated, executive structure

headed up, at least nominally, by the President of the United States." Id. at 49. The matters discussed in this part of the article are not matters that I have previously had occasion to consider, and I am not in a position to voice any opinion about them.

Part IV of Professor Calabresi's article applies his normative analysis of the proper scope of presidential power to a number of contemporary issues, including legislative vetoes, line-item vetoes, presidential control over administrative agencies, presidential power in the fields of foreign policy and defense, and law enforcement. Professor Calabresi approaches these issues from a political science, rather than a legal, perspective. For example, in discussing legislative vetoes, he makes no mention of INS v. Chadha, 462 U.S. 919 (1983), and in discussing line-item vetoes, the article is unable to take into account Clinton v. New York, 524 U.S. 417 (1998), which was decided after the article was written. As a member of the judiciary, my approach to issues such as these would necessarily be grounded in case law rather than political science.

Part V discusses the implications of Professor Calabresi's normative analysis for other presidential regimes around the world. This discussion is even farther afield from my areas of responsibilities and expertise. While the discussion is interesting, I do not think it relates to my work, and I am not in a position to evaluate its merits.

Responses of Judge Samuel A. Alito, Jr.
to the Written Questions of Senator Patrick J. Leahy
Submitted on behalf of Senator Carl Levin

1. **According to your Senate Questionnaire, you were interviewed for possible nomination to the Supreme Court at various times by President Bush, Vice President Cheney, Alberto Gonzales, Andrew Card, Harriet Miers, Karl Rove, I. Lewis Libby and Timothy Flanigan.**

   1) **Did you discuss your views on the following subjects with any of those individuals (or other persons who you believed would likely be commenting on your views to the Administration):**

      a. **abortion related issues;**
      b. **powers of the President, including, but not limited to, the President's ability to authorize domestic surveillance;**
      c. **constitutionality of allowing prayer or displays of religious objects in public places;**
      d. **the scope of the right of habeas corpus for prisoners or detainees;**
      e. **the extent of congressional authority under the Commerce Clause of the Constitution;**
      f. **affirmative action; or**
      g. **the constitutionality of "court stripping" legislation aimed at denying Federal courts the power to rule on the constitutionality of specific activities or subject matter.**

   RESPONSE: I did not discuss any of the listed subjects during any of the interviews or with any person whom I believed would likely be commenting on my views to the Administration.

2. **If the answer to Question 1 is yes, did your comments differ from what you told the Senate Judiciary Committee?**

   RESPONSE: Not applicable.

3. **Do you believe that the duty of the Supreme Court is to interpret the words of the Constitution only according to the meaning they had when the Constitution was adopted, when that meaning is ascertainable?**

   RESPONSE: Most of the constitutional questions that arise today fall within areas in which there is a body of case law, and the questions are properly resolved by applying and building upon that body of precedent. When novel questions are presented, all of the members of the Supreme Court customarily consult the original understanding of the

constitutional provisions at issue. See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995). When this is done, however, it is important to note that the original meaning of a broadly worded provision does not necessarily correspond to popular expectations at the time of adoption about the way in which the provision would apply to particular factual situations.

4. **You said in a 1986 memo that the President's understanding of a bill when he signs it "should be just as important as that of the House or Senate." You told the Judiciary Committee that the memo in question was a rough first effort and that the "theoretical issues" involved have yet to be explored.**

What possible theoretical relevance does a President's signing statement have in ascertaining the Congressional intent of legislation?

RESPONSE: A later and much more detailed memorandum prepared by the Office of Legal Counsel addressed this issue and set out the competing theoretical arguments regarding the significance of presidential signing statements in interpreting statutes. Walter Dellinger, Memorandum For Bernard N. Nussbaum Counsel to the President (1993), reprinted in 48 Ark. L. Rev. 333 (1994). The memo states in relevant part:

> We do not attempt finally to decide here whether signing statements may legitimately be used [as an aid in interpreting statutes]. We believe it would be useful, however, to outline the main arguments for and against such use.
>
> In support of the view that signing statements can be used to create a species of legislative history, it can be argued that the President as a matter both of constitutional right and of political reality plays a critical role in the legislative process. The Constitution prescribes that the President "shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const., art. II, s 3, cl. 1. Moreover, before a bill is enacted into law, it must be presented to the President. "If he approve it he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated." U.S. Const., art. I, s 7, cl. 2. Plainly, the Constitution envisages that the President will be an important actor in the legislative process, whether in originating bills, in signing them into law, or in vetoing them. Furthermore, for much of American history the President has de facto been a sort of prime minister or "third House of Congress."
>
> > . . . [H]e is now expected to make detailed recommendations in the form of messages and proposed bills, to watch them closely in their tortuous progress on the floor and in committee in each house, and to use every

> honorable means within his power to persuade . . .
> Congress to give him what he wanted in the first place.

Clinton Rossiter, The American Presidency, 110 (2d ed. 1960). It may therefore be appropriate for the President, when signing legislation, to explain what his (and Congress's) intention was in making the legislation law, particularly if the Administration has played a significant part in moving the legislation through Congress. And in fact several courts of appeals have relied on signing statements when construing legislation. See United States v. Story, 891 F.2d 988, 994 (2d Cir. 1989) (Newman, J.) ("though in some circumstances there is room for doubt as to the weight to be accorded a presidential signing statement in illuminating congressional intent, . . . President Reagan's views are significant here because the Executive Branch participated in the negotiation of the compromise legislation."); Berry v. Department of Justice, 733 F.2d 1343, 1349 -50 (9th Cir. 1984) (citing President Johnson's signing statement on goals of Freedom of Information Act); Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 661- 62 (4th Cir. 1969) (relying on President Truman's description in signing statement of proper legal standard to be used in Portal-to-Portal Act).

On the other side, it can be argued that the President simply cannot speak for Congress, which is an independent constitutional actor and which, moreover, is specifically vested with "[a]ll legislative powers herein granted." U.S. Const., art. I, sec. 1, cl. 1. Congress makes legislative history in committee reports, floor debates and hearings, and nothing that the President says on the occasion of signing on a bill can reinterpret that record: once an enrolled bill has been attested by the Speaker of the House and the President of the Senate and has been presented to the President, the legislative record is closed. See Field v. Clark, 143 U.S. 649, 672 (1892). A signing statement purporting to explain the intent of the legislation is, therefore, entitled at most to the limited consideration accorded to other kinds of post-passage legislative history, such as later floor statements, testimony or affidavits by legislators, or amicus briefs filed on behalf of members of Congress. See Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974)("[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the act's passage. . . . Such statements 'represent only the personal views of these legislators . . . .'"). Finally, it is arguable that "by reinterpreting those parts of congressionally enacted legislation of which he disapproves, the President exercises unconstitutional line-item veto power." Garber and Wimmer, supra, at 376. See also Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. 28, 30 (1985) ("under the system of checks and balances established by the Constitution, the President has the right to

approve or reject a piece of legislation, but not to rewrite it or change the bargain struck by Congress in adopting a particular bill").

48 Ark. L. Rev. 338-41.

The brief 1985 memo that I signed was prepared at the request of a Justice Department Working Group that was given the task of implementing the Reagan Administration's policy of using signing statements and contained a section labeled "Theoretical problems" that outlined some of the same problems set out in Mr. Dellinger's later, more detailed memo. My memo did not attempt to resolve these problems.

5. **You have said that, in analyzing a statute, you would first look to the text of the statute then you would "look to anything that would shed light on the way in which the provision would have been understood by people reading it at the time." You also said that specific provisions of the Constitution are set out in principle, and "then it is up to the judiciary to apply that principle to the facts that arise during different periods in this history of our country."**

In his book, Active Liberty, Justice Breyer states that, "since law is connected to life, judges, in applying a text in light of its purpose, should look to consequences, including 'contemporary conditions, social, industrial, and political, of the community to be affected.'" [emphasis added]

Do you agree with Justice Breyer?

RESPONSE: My statements cited in the question were made with respect to the interpretation of a Constitutional provision in a case of first impression, an event that, as I explained at the hearings, does not occur very often.

I have not read Justice Breyer's book and therefore could not comment in particular on his statement. However, as I explained during the hearing, there are important provisions of the Constitution that are not cast in specific terms. Those provisions set forth broad principles that the judiciary must apply to the facts that arise during different periods in the history of our country. The example I gave was the Fourth Amendment's prohibition against unreasonable searches and seizures. The Framers could not have foreseen the advances in technology that today can have implications under the Fourth Amendment. The Constitution sets forth the principle in the Fourth Amendment and a judge must apply it to contemporary conditions. For example, in determining whether a new type of search is reasonable, the Supreme Court has balanced private and governmental interests as they exist under present conditions in our society. See, e.g., Vernonia School District 47J v. Acton, 515 U.S. 646, 651 (1995); Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 619 (1989); New Jersey v. TLO, 469 U.S. 325, 341 (1985). In other situations, however, the Court has adhered to its

understanding of the original meaning of the Constitution despite the argument that a novel procedure was needed to deal with a new and pressing problem. See, e.g., Bowsher v. Synar, 478 U.S. 714, 736 (1986).

Responses of Judge Samuel A. Alito, Jr.
to the Written Questions of Senator Charles E. Schumer

1. **At your hearing you said the following about your method of constitutional interpretation:**

"In interpreting the Constitution ... I think we should look to the text of the Constitution, and we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption."

a. **Can you please explain why a judge should look to the meaning of the text at the time it was adopted, rather than the meaning of the text as it is understood today?**

b. **When is it appropriate to base an interpretation of the Constitution on the common understanding of the Constitution's text at the time it was adopted?**

c. **Do you believe that considering the original meaning of the Constitution's text is constitutionally required for a judge, or is it a matter of discretion?**

d. **Why is it that you have argued that some ambiguous constitutional phrases, such as "unreasonable search" in the Fourth Amendment, must be understood as they evolve over time, while other ambiguous constitutional phrases, such as "due process," must be understood as they were understood at the time they were written, as you argued in Alexander v. Whitman?**

RESPONSE TO ALL PARTS: In the exchange that is cited in the question, I went on to explain that for many provisions of the Constitution the Founders intentionally used broad language so that the principles could be applied to changing times. I did not suggest that for all provisions of the Constitution, a judge should look solely to the understanding at the time the Constitution was adopted.

In addition, most of the constitutional questions that arise today fall within areas in which there is a body of case law, and the questions are properly resolved by applying and building upon that body of precedent. When novel questions are presented, all of the members of the Supreme Court customarily consult the original understanding of the constitutional provisions at issue. See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995). When the Court does this, it obviously proceeds on the basis of the belief that the provision in question has an enduring meaning. As I noted, it is important to recognize that some provisions of the Constitution set out broad principles that were plainly meant to be applied by the judiciary to new situations that would develop over time.

In my testimony, I never meant to suggest that only the Fourth Amendment should be read broadly. The Due Process clause also uses broad language and has been read as such. In Alexander v. Whitman, 114 F.3d 1392 (1997), the court was presented with the question whether a woman had a substantive right under the Due Process Clause to maintain a state-law tort action for fatal prenatal injuries. The pertinent constitutional standard is whether the claimed right is "deeply rooted in this Nation's history and traditions" and "'implicit in the concept of ordered liberty.'" Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations omitted). In addressing this question in relation to the right claimed in Alexander, my concurrence stated that "our substantive due process inquiry must be informed by history" and that it was "significant that at the time of the adoption of the Fourteenth Amendment and for many years thereafter, the right to recover for injury to a stillborn child was not recognized." 114 F.3d at 1409. This represented a straightforward application of the standard prescribed by the Supreme Court and recognized in Washington v. Glucksberg and prior related cases.

2. **The Eighth Amendment of the Constitution protects against "cruel and unusual punishments." Under your theory that "in interpreting the Constitution ... I think we should look to the text of the Constitution, and we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption," we should look to what someone would have considered cruel and unusual at the time of the adoption of the Eighth Amendment in 1790 in order to understand this term. So please explain the following:**

   a. **In 1790, it was considered acceptable to execute even young minors at common law. Is that therefore Constitutional today?**

RESPONSE: As I stated at the hearing, the Constitution was adopted to endure throughout the history of our country. The Founders recognized that times would change and issues that could not be anticipated would arise. They set forth principles that could be applied to changing circumstances. I provided an example of searches and seizures, but there are of course other examples. The Supreme Court has established that the Eighth Amendment's prohibition of "cruel and unusual punishment" is not confined to the "'barbarous' methods that were generally outlawed in the 18th century," Gregg v. Georgia, 428 U.S. 153, 171 (1976), but calls for the application of a standard that looks to the conception of decency held by modern America as a whole. See, e.g., Hudson v. McMillian, 503 U.S. 1, 6 (1992). The Supreme Court has declared that the forms of punishment described in questions 2.a. and b. are unconstitutional. See, e.g., Roper v. Simmons, 543 U.S. 541 (2005) (Eighth Amendment prohibits execution of persons under eighteen); Thompson v. Oklahoma, 487 U.S. 815 (1988) (Eighth Amendment prohibits execution of persons under sixteen); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (Eighth amendment intended to outlaw "torture(s)" and other "barbar(ous)" methods of punishment) (citations omitted).

b. In 1790, it was considered acceptable to hack off the arms and legs of convicts, and torture prisoners, as a form of punishment at common law. Is that therefore Constitutional today?

RESPONSE: Please see above response to question 2.a.

c. In 1790, it was perfectly acceptable for states (though not the federal government) to declare an official religion. Is that therefore Constitutional today?

RESPONSE: The Establishment Clause originally applied only to the federal government, but now applies to the States as well because the Supreme Court has held it to be incorporated by the Due Process Clause of the Fourteenth Amendment. See Everson v. Bd. of Educ., 330 U.S. 1 (1947).

The Eighth Amendment is not the only Constitutional provision implicated by your interpretive approach. Please respond to the following:

d. According to a famous law review article by Alexander Bickel, a man you described as very influential in your academic awakening to constitutional law, it was acceptable to pass explicit segregationist laws at the time of the adoption of the 14th Amendment. Is that therefore Constitutional today?

RESPONSE: "[E]xplicit segregationist laws" are plainly unconstitutional and violate the fundamental principle embodied in the Equal Protection Clause. Notably, moreover, the historical conclusions reached in Professor Bickel's article have been disputed. See McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947 (1995).

e. For many years, it was argued that the federal government did not have the power to regulate manufacturing practices or agriculture under the Commerce Clause. Are we in Congress therefore prohibited from exercising those powers today?

RESPONSE: In the past, the Supreme Court interpreted "commerce" as including trade but not other commercial activities such as manufacturing and agriculture. See United States v. Morrison, 529 U.S. 598, 642 (2000) (Souter, J., dissenting) (listing various cases). Culminating with several New Deal cases, however, the Court rejected distinctions between categories of commercial activity, instead interpreting commerce as encompassing any activity that "exerts a substantial economic effect on interstate commerce." Wickard v. Filburn, 317 U.S. 111, 125 (1942). The Court continues to follow Wickard. Gonzales v. Raich, 125 S. Ct. 2195 (2005). Under the current standard Congress's power to regulate commerce is quite broad, reflecting the tremendous growth of domestic and foreign economic activity that our society has experienced.

3. **You said at your hearing that your statement in 1985 that the "Constitution does not protect a right to an abortion" was an accurate reflection of your view at the time. You refused, however, to expand on what that meant because you said it was a brief statement that did not contemplate specific situations. I understand that your written statement was brief, but you clearly had a well-formed view at the time, given your involvement in the Thornburgh case. Please elaborate on the contours of your 1985 view and please include responses to the following questions:**

   a. **Under your 1985 view, would the Constitution protect the right to an abortion when the life of the mother is in danger?**

   b. **Under your 1985 view, would the Constitution protect the right to an abortion when the health of the mother is in danger?**

   c. **Under your 1985 view, would the Constitution protect the right to an abortion if the pregnancy was the result of rape? Of incest?**

   d. **Under your 1985 view, would the Constitution protect the right to use the emergency contraception method known as "the morning after pill"? How would you have determined whether the morning after pill falls under the category of Griswold-protected contraception?**

   e. **Under your 1985 view, would the Constitution allow states to criminalize abortion?**

   f. **Under your 1985 view, would the Constitution allow the states to send both women and their doctors to jail for ending a pregnancy?**

   RESPONSE TO ALL PARTS: In the 1985 statement that you cite I was referring to my work in the Solicitor General's office, in particular, my view on this matter in 1985 is set out in the memorandum that I wrote concerning the Thornburgh case. None of the specific issues noted in the question were at issue in Thornburgh, and I had no cause to consider them and did not consider them at the time.

4. **A New York Daily News columnist reported that Justice Scalia said the following in reference to Bush v. Gore during a recent speech:**

   "What did you expect us to do? Turn the case down because it wasn't important enough? Or give the Florida Supreme Court another couple of weeks in which the United States could look ridiculous?"

   a. **Do you agree with Justice Scalia's statement?**

   b. **Should international perception ever be a factor in deciding when to take up a case?**

c. What about perception here at home?

d. What about international perceptions regarding the death penalty? Use of torture?

If you refuse to answer these questions because you believe this issue may come before the Court, please explain in more detail why. The Court itself pointed out that its decision in Bush v. Gore was limited to the specific factual situation presented by that case. The opinion stated explicitly that "our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."

RESPONSE TO ALL PARTS: I understand this question to relate to the standards to be applied by the Supreme Court in deciding whether to "take up a case." This matter is addressed by Supreme Court Rule 10. The Rule states that certiorari is a matter of judicial discretion and that a writ will be granted only for "compelling reasons." The Rule does not set out an exhaustive list of such reasons but notes that certiorari *may* be appropriate where "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by [the Supreme Court], or has decided an important federal question in a way that conflicts with relevant decisions of this Court." If a case presents an unsettled question of federal law that is truly important, whether or not it is generally perceived to be important, the case would appear to fall within the language noted above. A case that does not present such a question but that is inaccurately perceived to be important would not appear to fall within this language, but it bears emphasis that the list of reasons set out in Rule 10 is not exhaustive.

5. **You will recall that earlier this year, during the controversy surrounding the Terri Schiavo case, Congress passed a law specifically creating a federal cause of action for Terri Schiavo's parents. Congress took this action after the claims of Terri Schiavo's parents had been considered and rejected more than a dozen times by state and federal courts.**

a. Was the Schiavo case an example of Congressional overreaching? Was the medical condition of one person the appropriate place for Congress to intervene?

b. Is it a good idea for Congress to write legislation aimed at a specific case, especially after numerous courts have already issued decisions in the matter?

After Congress sent this case back to the 11th Circuit, the court again rejected the claims of Terri Schiavo's parents by a 10-2 vote. And, in a concurring opinion, a Republican-appointed judge criticized President Bush

and Congress for acting "in a manner demonstrably at odds with our founding fathers' blueprint for the governance of a free people" by undermining the separation of powers and the independence of the courts.

c. Do you agree with the sentiment expressed in this opinion? In other words, in your view, did this legislation undermine the independence of the courts?

RESPONSE TO ALL PARTS: I do not think that a judge should generally comment on whether a statute is "appropriate" or a "good idea." Those are considerations for Congress. As a judge, I may be called upon to decide whether a statute is constitutional, but otherwise my role with respect to a statute is simply to interpret and apply it.

Legislation aimed at particular litigation is sometimes challenged under United States v. Klein, 80 U.S. (13 Wall.) (1871), on the theory that the legislation violates Article III of the Constitution by mandating a particular result in that litigation. In Klein, the Court held unconstitutional a federal statute enacted after the Civil War that was designed to prevent pardoned ex-Confederates from reclaiming seized property. The act proclaimed that a presidential pardon constituted conclusive evidence that the pardoned individual had been disloyal to the United States. Id. at 143-44. It also provided that a pardon could not be used as evidence of loyalty in a suit to recover confiscated property from the United States, and directed the Court to dismiss all recovery cases pending on appeal in which a pardoned individual had prevailed. Id. The Court found that in enacting the statute, Congress was attempting to prescribe the rule of decision for pending cases in violation of the separation-of-powers doctrine. Id. at 147.

While the Supreme Court has never determined "the precise scope of Klein," Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995), "later decisions have made clear that its prohibition does not take hold when" Congress merely "amend[s] applicable law." Id. (quoting Robertson v. Seattle Audubon Soc'y, 503 U.S. 419, 441 (1992)). Thus, if a statute "compel[s] changes in the law, not findings or results under old law," it merely amends the underlying law, and is therefore not subject to a Klein challenge. Robertson, 503 U.S. at 438. See Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 187-88 (3d Cir. 1999). These precedents provide a framework for analyzing an Article III challenge to legislation on the ground that it impermissibly targets specific litigation.

6. **We have heard many comparisons of the case of Plessy v. Ferguson with the case of Roe v. Wade. Do you see any appropriate analogy between Plessy – which upheld the principle of separate but equal for black Americans - and Roe – which affirmed a woman's freedom to make reproductive decisions for herself?**

RESPONSE: Plessy v. Ferguson represents one of the Court's worst moments, and it did enormous damage by providing constitutional validation for Jim Crow laws. Plessy arose over a century ago and presented a question under the Equal Protection Clause of the 14th Amendment. Roe v. Wade arose much later and presented a question under the

Due Process Clause of the 14th Amendment. Thus, the cases arose at different times and presented different legal questions.

7. **At her confirmation hearings, when pressed to distinguish the Supreme Court's line of privacy cases – including Roe – from the much-discredited decisions in Dred Scott and Lochner, then-Judge Ginsburg responded as follows:**

"In one case the Court was affirming the right of one man to hold another man in bondage. In the other line of cases, the Court is affirming the right of the individual to be free. So I do see a sharp distinction between the two lines."

Do you – like Justice Ginsburg – see a "sharp distinction" between those two lines of cases?

RESPONSE: As the question notes, Dred Scott and Lochner have been "much-discredited," and are often cited as examples of judicial activism. As I explained during the hearing, I believe that the Fifth and Fourteenth Amendments do protect liberty and agree that there is a substantive component to that protection that protects privacy. There is therefore a clear distinction between the discredited Dred Scott and Lochner lines of cases and the Court's recognition that the Due Process Clauses of the Fifth and Fourteenth Amendments in some circumstances protect privacy interests. Because Roe concerns issues that may well come before the Supreme Court, it would be inappropriate for me to comment directly on it.

8. **Do you agree with the landmark decision in NY Times v. Sullivan (1964), which held that public criticism of public figures is acceptable unless motivated by actual malice? Who do you believe constitutes a public figure under this standard?**

RESPONSE: New York Times v. Sullivan, 376 U.S. 254 (1964), is a venerable precedent that is entitled to respect under the doctrine of stare decisis. The "actual malice" standard applies to "public officials" and "public figures." Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). The Supreme Court has held that the "public official" designation must apply "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (holding that record was inconclusive as to whether county supervisor of recreation area including ski resort was a public official for purposes of the Sullivan rule). A public official thus encompasses anyone holding a government position, elected or non-elected, of such "apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it." Id. at 86. This includes candidates for public office. Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-72 (1971). Lower courts have concluded that the term public official applies to prosecutors, Crane v. Arizona Republic, 972 F.2d 1511 (9th Cir. 1992), school principals, Stevens v. Tillman, 885 F.2d 394 (7th Cir. 1988), and police officers, McKinley v. Baden, 777 F.2d 1017 (5th Cir. 1985), among others.

The Supreme Court has not offered a precise definition of who is a public figure. "For the most part those who attain [the status of public figure] have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Welch, 418 U.S. 323, 345 (1974). The Court has concluded that the term "public figure" encompasses a well-known state university football coach who was employed by a private corporation that administered the school's athletic programs, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), as well as a former army general who, as a private citizen, allegedly led a violent crowd that obstructed federal marshals enforcing a desegregation order, Associated Press v. Walker, 388 U.S. 130 (1967). The Court's cases indicate that a person who does not thrust himself into some public issue will not be deemed a public figure. See Wolston v. Reader's Digest Association, 443 U.S. 157, 168 (1979) (person convicted of contempt for refusing to appear before a grand jury investigating espionage by the Soviet Union was a private figure where he had "not engaged the attention of the public in an attempt to influence the resolution of the issues involved"); Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (person who received substantial federal funding to investigate aggressive monkey behavior was a private figure because he "at no time ... assumed any role of public prominence"); Time v. Firestone, 424 U.S. 448, 453 (1976) (wife of a member of a wealthy family was private figure even though she was prominent in social circles and often mentioned in newspapers, because she "did not assume any role of especial prominence in the affairs of society ... and did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.").

9. **Do you believe the Supreme Court was correct to strike down the Communications Decency Act in Reno v. ACLU (1997) on the grounds that pornography on the Internet is protected by the First Amendment?**

RESPONSE: In Reno v. ACLU, 521 U.S. 844 (1997), the government sought to uphold restrictions that were aimed at reducing the ability of minors to access sexually explicit material on the Internet. The government did not argue that pornography on the Internet categorically lacks constitutional protection, and the Court did not address that argument. Instead, the Court considered whether the restrictions were narrowly tailored to achieve what the parties challenging the statute did not dispute was the government's compelling interest in protecting minors from "indecent" and "patently offensive" speech. Id. at 863 n.30.

The Court concluded, among other things, that the Communications Decency Act burdened too much adult speech to pass constitutional muster, even considering the government's compelling interest in protecting minors from indecent speech. The Court relied on the technology of the Internet at the time, and recognized that it was a rapidly changing medium. Id. at 868–70. Because cases involving the application of the First

Amendment to electronic speech are likely to come before the Supreme Court in the future, it would be inappropriate for me to comment on the correctness of the Court's decision.

10. **At your hearing, I asked you about your reasoning in the Dillinger case, and you said you would have to review the details of the case. Now that you have had a chance to do so, I hope you will be able to address the question I posed.**

To remind you, we had discussed your opinion in Pirolli, in which you would have exercised your discretion to prohibit a mentally retarded harrasment plaintiff who failed to make an argument below from moving forward. We also discussed your opinion in Smith v. Horn in which you excused the government's failure to raise an argument in a habeas case. Finally, I asked you about your opinion in Dillinger, in which you also would have exercised your discretion to excuse a large company sued by an accident victim, where the company failed to make an argument below.

How do you explain the inconsistency in the exercise of your discretion on what appear to be extraordinarily similar procedural questions?

RESPONSE: In Pirolli, the court reversed a grant of summary judgment for the defendant because the record provided evidence of harassment that a reasonable person could find hostile or abusive. I dissented as to this claim because the appellant's brief failed to raise the issue "in a minimally adequate fashion." In Dillinger, the court reversed a jury verdict for the defendant because the trial court admitted evidence of the plaintiff's negligence. Though both the majority and my dissent recognized that the plaintiff "himself voluntarily brought out these facts during his direct examination," the majority deemed the issue waived by the defendant's failure to raise it both at trial and on appeal. I stated:

> As for Caterpillar's failure in its appellate brief to mention plaintiff's direct testimony as a ground for affirmance, I believe this presents what is essentially an issue of sound judicial administration. Specifically, I believe it requires us to balance concern for the efficient disposition of appeals (which may be furthered by insisting that parties comply strictly with the requirements of Fed.R.App.P. 28(a)(5)) against concern for efficiency in the work of the district courts (which is surely not furthered by requiring a district court and jury to retry a case because of a prior evidentiary ruling that was correct). Considering these countervailing concerns, I believe, under the circumstances here, that requiring a retrial is not justified.

Id. at 449 n.2.

The difference between these cases lies not in the nature of the party that failed to raise an issue properly on appeal but in the different considerations that apply when an

appellee as opposed to an *appellant* fails to raise an issue. When the victor in the lower court fails to raise a ground for affirmance, finding the issue waived would "requir[e] a district court and jury to retry a case because of a prior evidentiary ruling that was *correct*." 959 F.2d at 449 n.2. Thus, Dillinger implicated a rule not at issue in Pirolli: "the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'" SEC v. Chenery, 318 U.S. 80, 88 (1943) (quoting Helvering v. Gowran, 302 U.S. 238, 245 (1937)); see also N.L.R.B. v. Kentucky River Community Care, Inc., 532 U.S. 706, 722 n.3 (2001); Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 384 n.12 (1997).

11. **When you wrote in 1985, twelve years after Roe was decided, that "the Constitution does not protect a right to an abortion," on what did you base that opinion? What led you to that conclusion, other than that it was the position of the Reagan Administration for which you worked, remembering that you authored it as a personal legal opinion?**

RESPONSE: In the 1985 statement that you cite I was referring to my work in the Solicitor General's office, and in particular, my work on the memorandum that I wrote concerning the Thornburgh case. My view on this question was influenced by Supreme Court opinions criticizing Roe, the most recent of which had been Justice O'Connor's dissent in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 452-74 (1983), as well as the scholarly publications to which I referred in footnote 10 of the memorandum that I wrote in the Thornburgh case.

12. **When you were in the Solicitor General's office, was it your job to advise your superiors when you thought that a position that the administration had taken was inconsistent with the proper understanding of the Constitution? In other words, do Solicitor General and Department of Justice lawyers have the responsibility to advise the Solicitor General when the President has taken a postition that, in the view of that lawyer, is inconsistent with the guarantees of a statute or the Constitution?**

RESPONSE: When drafting appeal, en banc, certiorari, and amicus recommendations, a lawyer in the Solicitor General's office generally presents an accurate summary of the state of the law and may present arguments that may be advanced on both sides of the questions presented. In addition, insofar as this is possible, a recommendation often includes an assessment of the likely range of possible outcomes of the litigation. A lawyer in the Solicitor General's office should also provide sound and professional advice about the litigation strategy best suited to achieve the legitimate objectives of the government agency or officer involved in the litigation. If it appears that the position advocated by the government agency or officer is inconsistent with the Constitution or another provision of federal law, the Assistant's summary of the state of the law should note this point. No attorney should advance an argument that is frivolous, and attorneys in the Solicitor General's office have always felt that they have a special duty not to

present the Court with inappropriate arguments. However, an advocate may properly advance a reasonable argument, made in good faith, in which the advocate does not personally believe, and in fact may have an ethical obligation to his or her client to do so.

13. **If a President asserted the authority to take all handguns away from Americans, would it be the job of a Department of Justice attorney writing a memo simply to provide the arguments in favor of doing so, or would it also be the job of that attorney to advise the President of the arguments that the President's assertion of authority might violate the Constitution?**

RESPONSE: As noted in response to question 12, a Department of Justice attorney writing a recommendation should provide an accurate summary of the law and the arguments that are likely to be raised on both sides of the question.

14. **In a report in the Washington Post on January 8, 2006, your friend Doug Kmiec is quoted as saying that you have always been particularly fond of Justice Harlan's dissent in Reynolds v. Sims.**

a. **Is that report accurate? If not, in what respect is it inaccurate?**

In that dissent, Justice Harlan argues that the principle of "one person, one vote" has no basis in the Constitution's text or our nation's history.

b. **Did you at any time in your life agree with Justice Harlan's argument that the principle of "one person, one vote" is not supported by constitutional history and text?**

c. **At what point in your life did you conclude that "one person, one vote" was a fundamental part of American constitutional law?**

d. **Had you been on the Court when it decided Reynolds v. Sims, would you have sided with the majority or with Justice Harlan?**

RESPONSE TO ALL PARTS: I have long admired Justice Harlan's legal craftsmanship, which is exhibited in his dissent in Reynolds and in many other opinions, but I do not recall ever sharing his view about the principle of one person, one vote. As far as I can recall, I have always agreed with the principle of one person, one vote. In any event, that is certainly my view today. I explained during the hearings that my concern about reapportionment during my college days related to the application of this principle in later cases to require that all districts be almost exactly equal in population even if this requires disregarding other legitimate factors.

15. **If you were forced to pick one and only one Supreme Court Justice in the last 100 years whose judicial philosophy you believe has been the most influential on the Court, who would it be?**

RESPONSE: In answering this question and question 16, I will limit myself to former members of the Court. Among the most influential Justices of the last century, I would list Chief Justices Earl Warren and William Rehnquist and Justices Frankfurter, Black, and Brennan. This is by no means an exhaustive list, however, and unfortunately, I cannot pick one Justice who has been most influential.

16. **If you were forced to pick one and only one Supreme Court Justice in the last 100 years whose writing style you found most impressive, who would it be?**

RESPONSE: Justice Jackson.

17. **Please name the most poorly reasoned Supreme Court case, in your view, of the last fifty years.**

RESPONSE: In attempting to answer this question, I would have to limit myself to decisions that were handed down within the last 50 years and that relate to matters that are not likely to arise in future litigation. I do not have in mind a list of the opinions that satisfy these criteria, and therefore I am unable to answer the question.

18. **Please name the most influential Supreme Court opinion, in your view, of the last fifty years.**

RESPONSE: While it does not squarely fall within the last fifty years, Brown v. Board of Education.

19. **You spoke a bit at your hearing about the issue of justiciability. Where is the line between questions that are political and questions that are appropriate for a court to decide?**

RESPONSE: Marbury v. Madison, 5 U.S. 137, 177 (1803), set forth the fundamental principle that it is "the province and duty of the judicial department to say what the law is." But Marbury itself recognized that the Constitution submits a narrow band of political questions to the political branches. Id. at 170 ("Questions, in their nature political, or which are by the constitution and laws, submitted to the executive can never be made in this court."). Drawing the line between a justiciable controversy and a nonjusticiable political question requires consideration of whether "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" Nixon v. United States, 606 U.S. 224, 228 (1993) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)). Other relevant factors include whether the case involves a policy question "of a kind clearly for nonjudicial discretion;" whether answering the question

would inappropriately disrespect the other branches; whether there is an "unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker, 369 U.S. at 217.

a. Do you agree, as the Supreme Court held in Baker v. Carr (1962), that courts could appropriately consider the claims of voters who were being underrepresented in the state legislature? Why or why not?

RESPONSE: Yes. Since the issue decided in Baker v. Carr is unlikely to come before either the Third Circuit or the Supreme Court, I feel comfortable expressing my agreement with this case. I share the Court's view that the case did not present a question that the Constitution commits to a coordinate branch, there was no risk of embarrassment abroad or a serious domestic disturbance, and in that case the well-developed standards under the Equal Protection Clause were judicially manageable. See id. at 226.

b. Do you agree, as the Supreme Court held in Powell v. McCormack (1969), that courts could appropriately consider the challenge of a duly-elected member of Congress who was prohibited from taking his seat by other members of that body? Why or why not?

RESPONSE: In Powell v. McCormack, 395 U.S. 486 (1969), the Court applied Baker's framework for determining whether the case presented a nonjusticiable political question. After examining Article I, § 5, it held that this provision is "at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution." Id. at 548. Furthermore, the Court held that since deciding the case required no more than an interpretation of the Constitution's text, the case did not involve the potential embarrassment of a "confrontation between coordinate branches." Id. at 548.

c. Do you agree, as the Supreme Court held in Bush v. Gore (2000), that the Court could appropriately consider a challenge to disputed state election law? Why or why not?

RESPONSE: The Court did not discuss justiciability in Bush v. Gore, but after the Court handed down its decision, some scholars argued that the text of the Twelfth Amendment committed the question to Congress. See, e.g., Laurence Tribe, Erog .v Hsub and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors, 115 Harv. L. Rev. 170, 277-78 (2001). I have not studied this question and am thus not in a position to voice an opinion about it.

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January 16, 2006

Barr Huefner
Hearing Clerk
United States Senate
Committee on the Judiciary
222 Senate Dirksen Building
Washington, D.C.

Dear Mr. Huefner,

I am writing in response to your message conveying questions from Senators Coburn and Kennedy. I have stated the questions below and my responses. Please let me know if I can be of any further assistance.

Senator Coburn's question:
You expressed concern about Judge Alito's deference to executive power. Every time Judge Alito ruled for an immigrant or criminal defendant, Judge Alito was deciding against the executive, correct?

Response
Yes, though Judge Alito's overall record in criminal and immigration cases is very deferential to the executive. In my testimony, I mentioned *Doe v. Groody*, 361 F.3d 232 (3rd Cir. 2004), *cert. denied,* 125 S.Ct. 111 (2004). Judge Alito dissented from a decision that allowed a woman and her 10 year old daughter to receive money damages after they were strip searched by police who were executing a search warrant unrelated to these two individuals. Judge Alito sided with the police and would have precluded any recovery for the injured individuals.

On some occasions, Judge Alito has dissented from *en banc* decisions on his Court protecting individual freedoms from government power. For example, Judge Alito dissented from a 9-2 decision of his court holding that notice must be sent by

mail to the place where a person is being held and from a 10-1 decision that notice must be reasonably calculated to actually reach the person whose property is being seized. *United States v. McGlory*, 202 F.3d 664, 673 (3d Cir. 2000) (en banc); *United States v. One Toshiba Color Television*, 213 F.3d 147 (3d Cir. 2000) (en banc).

There is a clear pattern to Judge Alito's writings, speeches, and judicial opinions: he tends to be very deferential to claims of executive authority.

Senator Kennedy's Questions:

Question 1. In your written testimony, you discussed Judge Alito's endorsement of the theory of the unitary executive. How would you explain that theory in practical terms?

Response: The "unitary executive" is a theory developed by conservatives that all executive power in government must be under the control of the government and that Congress is limited in its ability to restrict how it is exercised. In fact, a leading proponent of the theory has said that it would have a "dramatic" effect. Steven A. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153, 1165-66 (1992). To be specific, under this theory, independent regulatory agencies – like the Securities and Exchange Commission, the Federal Trade Commission, and the Federal Communications Commission – are unconstitutional in that the President cannot, without cause, fire Commissioners. The independent counsel law – which was upheld by the Supreme Court in a 7-1 decision – would have been unconstitutional. Justice Clarence Thomas invoked the unitary executive theory in a dissenting opinion holding that the President can detain American citizens as enemy combatants without statutory authority and without due process. *Hamdi v. Rumsfeld*, 124 S.Ct 2633 (2004) (Thomas, J., dissenting).

Simply stated, the unitary executive theory takes a very expansive view of presidential power and a very narrow view of the ability of other branches to impose checks or limits on executive authority. If adopted by the Supreme Court, it would radically change the nature of American government.

Question 2. You were recently asked on a radio show hosted by Hugh Hewitt whether Judge Alito had ever voted in favor of an African-American, and you indicated that he had. It is my understanding that during the program, you were incorrectly informed that I had stated that Judge Alito had never voted in favor of an African American, although in fact I had stated "Judge Alito has not written one single opinion on the merits in favor of a person of color alleging race discrimination on the job."

a. Do you agree that the actual statement I made above is very different from saying that Judge Alito never voted in favor of an African American?

Response: Yes. I very much appreciate the opportunity to clarify this. Senator Kennedy's statement was misrepresented to me when I was asked about it. Senator Kennedy said that Judge Alito had not *written* any opinion in favor of a person of color alleging race discrimination on the job. This is an accurate statement. But I was asked whether Judge Alito ever had *voted* in favor of a minority in a civil rights case. The answer to that question is yes. But it is a very different point from the one made by Senator Kennedy.

b. Are you aware of any instance in which Judge Alito has written an opinion on the merits of a case in favor of a person of color alleging race discrimination on the job?

Response: I have carefully reviewed Judge Alito's record. I have read over 200 of his opinions, including all I can find in the civil rights area. I can identify no case where he wrote an opinion in favor of a person from a minority race alleging race discrimination on the job.

Please let me know if I can be of further assistance in any way.

Sincerely,

Erwin Chemerinsky

Follow-up Questions of Senator Coburn

Follow-up Question for Laurence Tribe

When answering a question related to the President's executive power, you stated: "But there is no way, consistent with his expressed beliefs, that a Justice Alito could go along with that view; that is, under his view, which would be, I think, quite similar to the view of Justice Thomas dissenting in Hamdi, it is up to the President to decide how he will, through his subordinates in the unitary executive branch, carry out his authority as commander-in-chief, especially given the authorization for the use of military force." Professor Tribe, can you, without a doubt, say that there is "no way" that Judge Alito will rule a certain way on a case, based on a memo that he wrote while serving as an advocate?

Answers to Questions submitted by Senator Coburn

Mr. Lawrence Tribe
Carl M. Loeb University Professor
Harvard Law School
Cambridge, MA 02138

Answer:
In the testimony to which you have referred, "[w]hen answering a question related to the President's executive power," I was not expressing the view that you quoted "based on a memo that [Judge Alito] wrote while serving as an advocate" but based, rather, on the text of a public speech that Judge Alito, speaking on his own behalf, delivered to a meeting of the Federalist Society on November 17, 2000, in which he discussed his continued adherence to a "unitary executive" theory considerably more muscular than the one he appeared to be describing in his testimony before the Senate Judiciary Committee.

In that speech, which was subsequently published in Volume 2 of the journal "Engage" (November 2001), Judge Alito continued to regard the theory developed when he "was in OLC" as the theory that "best captures the meaning of the Constitution's text and structure." He described himself on that occasion as "preaching the gospel according to OLC." He frankly stated in that speech that the Supreme Court had "not exactly adopted the theory of the unitary executive" -- an understatement in light of the Court's rejection of that theory in 1988 in Morrison v. Olson -- but then proceeded to explain how he then believed, not as someone else's counsel but as a sitting federal judge speaking his own mind, the Court's Morrison v. Olson precedent could properly be read to heed "if not the constitutional text that [he] mentioned, at least the objectives for setting up a unitary executive -- namely, energy, faction control, and accountability."

He argued that reading the precedent of the Court this way would permit the conclusion that, if any restriction enacted by Congress "frustrates, or thwarts the President's ability to discharge any of" his executive functions, including the commander-in-chief functions of which Justice Thomas wrote in his Hamdi dissent, "then it would be seen as violating the Morrison test." This is an approach that he acknowledged "could lead to a fairly strong degree of presidential control " even "over the work of the administrative agencies in the area of policy making," and it is an approach that certainly would lead to the invalidation of restrictions, regardless of the non-executive branch from which they emanated, upon the President's ability to conduct the war on terrorist groups, particularly given the Authorization for Use of Military Force ("AUMF"), whether the presidential decision regarding the conduct of that war entails the use of the sort of indefinite detention for purposes of interrogation of American citizens whom he deems enemy combatants that was, at bottom, the concern in Hamdi; or the use of cruel and inhuman techniques of interrogation of such alleged enemy combatants whether or not in compliance with recently enacted and overwhelmingly supported congressional legislation; or the use of warrantless electronic surveillance of American citizens who find themselves swept up in the broad net defined by even the publicly revealed aspects of the NSA program so much

in the news of late, in direct violation of the Foreign Intelligence Surveillance Act of 1978 and well beyond anything arguably authorized by the AUMF of September 2001.

In all of those instances, it would have to be said that the contested action of Congress, as viewed through the distorting lens of the unitary executive philosophy that Judge Alito was proudly and personally defending as his own under the rubric of the "gospel according to OLC" as of the time he served in that office, "frustrates, or thwarts the President's ability to discharge" a core function of the President's office under Article II, notwithstanding the broad Article I powers of Congress to carry into execution its several powers to control the discharge of the functions of the commander in chief through all means "necessary and proper" to that end. I therefore was in no sense projecting Judge Alito's likely approach to the cases that would come before him as Justice Alito "based on a memo that he wrote while serving as an advocate."

SUBMISSIONS FOR THE RECORD

REMARKS of RUGGERO J. ALDISERT

Confirmation Hearings U.S. Senate Judiciary Committee
for
SAMUEL A. ALITO, JR.
January 12, 2006

Mr. Chairman and members of the committee, I thank you for this opportunity to offer my views on my distinguished colleague.

When I first testified before this committee in 1968, I was seeking confirmation of my own nomination to the federal appellate bench. I speak now as the senior judge with the longest record of service on the Third Circuit.

I begin my brief testimony with some personal background. In May 1960 I campaigned with John F. Kennedy and his brother Edward in the critical Presidential primaries of West Virginia. The next year I ran for judge in Pittsburgh on the Democratic ticket for the Court of Common Pleas in Allegheny County and I served for eight years as a state trial judge.

Democratic Senator Joseph Clark of Pennsylvania, was my chief sponsor when President Lyndon B. Johnson nominated me to the Court of Appeals in 1968. Senator Robert F. Kennedy of New York was one of my key supporters.

Yet, political loyalties became irrelevant when I took up my commission as a federal judge. The same has been true in the case of Judge Alito, who served honorably in two Republican administrations before he was appointed to our Court. Judicial independence is simply incompatible with political loyalties, and Judge Alito's judicial record on our Court bears witness to this fundamental truth.

I have been a judge for 45 of my 86 years. Based on my experience, I can represent Judge Alito is among the first rank of the 44 judges with whom I have served on the Third Circuit, . . . and including another 50 judges on five other Courts of Appeals on which I have sat since taking senior status.

Moreover, I have been a long-time student of the judicial process. I have written four books and more than 30 law review articles on the subject. This study required me to study the current work of 22 justices on the U.S. Supreme Court. I have read hundreds of opinions of appellate judges of every federal circuit, every state and every political stripe.

The great Cardozo taught us long ago: "The judge even when he is free, is not wholly free. He is not to innovate at pleasure."1 This means that

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1 Benjamin N. Cardozo, *The Nature of the Judicial Process* 10 (1921)

the crucial values of predictability, reliance and fundamental fairness should be honored.

As his judicial record makes plain, Judge Alito has taken this teaching to heart. He believes that legal outcomes will follow the law as dictated by the facts of the particular case, whether the facts involve commercial interests, governmental regulation, or intimate relationships.

According to these criteria, Judge Alito is already a great judge. We who have heard his probing questions during oral arguments, of being privy to his wise and insightful comments in our private conferences. We who have observed at first hand his impartial approach to decision-making and his thoughtful judicial temperament and know his carefully crafted opinions. We who are his colleagues are convinced that he will also be a great Justice.

If Judge Alito is confirmed, as I believe he deserves to be, he will succeed a Justice who has gained a reputation as a "practical" Justice whose resistance to ideologically-driven solutions has positioned her as a "swing" vote on the Court. Justice O'Connor has described her approach to judging in this way:

Quote: "It cannot be too often stated that the greatest

> threats to our constitutional freedoms come in times of crisis. . . The only way for judges to mediate these conflicting impulses is to do what they should do anyway: stay close to the record in each case that appears before them, and make their judgments based on that alone." End Quote 2

Knowing Sam Alito as I do, I am struck by how accurately these words also describe the way in which he has performed his work as a federal appellate judge. It is why, with utmost enthusiasm, I recommend that he be confirmed as a an Associate Justice on the Supreme Court.

654 words

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2 Justice Sandra Day O'Connor, dissenting in *Vernonia v. Acton*, 515 U.S. 646, 686 (1995).

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January 11, 2006

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

PRESIDENT
NAN ARON
CHAIR
JAMES O. WEILL

Dear Senators Specter and Leahy:

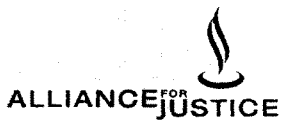
I write on behalf of Alliance for Justice to oppose the nomination of Third Circuit Judge Samuel A. Alito to the United States Supreme Court. As detailed in the attached executive summary to our full report on the Alito nomination, Judge Alito has quietly promoted a jurisprudence that aggrandizes executive authority at the expense of individual liberties, limits Congressional authority to enact legal safeguards, and generally diminishes judicial authority to enforce both statutory and constitutional rights. For further information, please see Alliance for Justice's full report on Judge Alito, which is available at http://www.supremecourtwatch.org/Alitofinal.pdf.

Alliance for Justice is a national association of more than 70 environmental, civil rights, mental health, women's, children's and consumer advocacy organizations. Alliance for Justice's Judicial Selection Project, founded in 1985, has taken a leading role in efforts to ensure a fair and independent federal judiciary. The Project monitors judicial nominations at all levels of the federal bench. The Project promotes support for the nomination and confirmation of highly capable and fair judges who have demonstrated a commitment to equal justice.

Sincerely,

Nan Aron
President

Attachment



II. EXECUTIVE SUMMARY

On October 31, 2005, President Bush nominated Third Circuit Judge Samuel A. Alito to replace retiring Associate Justice Sandra Day O'Connor on the Supreme Court. Harriet Miers, the president's former nominee for Justice O'Connor's seat, had withdrawn from consideration several days before. The same political conservatives who opposed Ms. Miers' nomination as a squandered opportunity immediately embraced the nomination of Judge Alito. Having promoted him for several years in anticipation of a vacancy, they firmly believe, based on his long record, that he will realize their long-deferred hopes of moving the Court and the law dramatically to the right. University of South Carolina law professor Andrew Siegel recently explained why they are correct:

> When confronting [difficult cases like those the Supreme Court handles], judges are forced back – almost inexorably – to their own, often inchoate, ideas about human behavior, social policy, and the judicial role. For most Supreme Court nominees, we need to guess how these "priors" will shape their jurisprudence, but for Alito, we have a long and consistent answer: He will tack hard to the right. ... If you are a fan of the justices who fought throughout the Rehnquist years to pull the Supreme Court to the right, Alito is a home run – a strong consistent conservative with the skill to craft opinions that make radical results appear inevitable.[1]

The findings set forth in this report are consistent with Professor Siegel's observation, which is in turn consistent with how enthusiastically those who opposed Ms. Miers' nomination have received Judge Alito's. In split decisions – the "difficult cases" – the reasoning Judge Alito employs and the results he reaches are not balanced. Rather, to a remarkable degree, they track the staunchly conservative political and legal views he expressed in his 1985 application to be Deputy Assistant Attorney General for the Office of Legal Counsel in President Reagan's Justice Department. As previewed in the application, Judge Alito has quietly promoted a jurisprudence that aggrandizes executive authority at the expense of individual liberties, limits Congressional authority to enact legal safeguards, and generally diminishes judicial authority to enforce both statutory and constitutional rights. Our main findings are as follows:

- In split decisions involving individual rights, Judge Alito has been extraordinarily deferential to the exercise of government power, especially executive branch

[1] Andrew M. Siegel, *Nice Disguise; Alito's frightening geniality*, NEW REPUBLIC, Nov. 14, 2005.

power, except in cases involving alleged infringements on religious expression. Appendix A provides a breakdown of Judge Alito's votes in split decisions in cases pitting an individual against the government or government officials. As reflected in the chart, one can reliably predict his vote in split decisions involving misconduct or error by police, prosecutors, immigration authorities, prison staff, and school and land use officials simply by identifying the parties. Together with earlier speeches and writings, his judicial record strongly suggests that he will not only continue to look past the rights-infringing actions of such officials, but will interpret the Constitution as giving the president greater authority to evade Congressional statutes and constitutional limitations whenever deemed essential to national security.

- While staying his hand in most cases involving alleged misconduct or error by government officials, Judge Alito has indicated a strong belief in deploying judicial power to limit Congressional authority to address issues of national concern, including discrimination, pollution and crime.

- In split decisions on the merits of claims alleging violations of the civil rights of racial minorities, women, seniors and people with disabilities, Judge Alito has almost uniformly ruled with the defendants, often downplaying the importance of circumstantial evidence, including evidence that juries below him found persuasive.

- As Stephen Labaton of the *New York Times* reported, Judge Alito has "reliably favored big business litigants as he has pushed the federal appeals court in Philadelphia in a conservative direction. ... [He is] a jurist deeply skeptical of claims against large corporations."[2] This has proven true not only in split decisions involving the alleged violation of antidiscrimination, labor and environmental laws by corporate actors, but also in several split antitrust and trademark decisions where small businesses alleged that bigger corporations engaged in anti-competitive or unfair practices.

- Judge Alito has not hesitated to challenge circuit court precedents or to "massage" Supreme Court precedents that are inconsistent with his vision of the law.

- On occasion, Judge Alito appears to have adopted a demonstrably results-oriented approach to decision-making. In several cases involving claims disfavored by political conservatives – one for *habeas corpus* relief from a death penalty conviction, one alleging on-the-job same sex sexual harassment and one alleging injury due to a defective product – Judge Alito voted in dissent to deny relief by raising various procedural defenses on his own, without prompting by the defendants. Yet in a case involving a tricky constitutional question about whether

[2] Stephen Labaton, *Court Nominee Has Paper Trail Businesses Like*, N.Y. TIMES, Nov. 5, 2005.

> unidentified school employees violated a public school student's right to express religious views, he did not hesitate to rule in the student's favor on the merits while chastising his colleagues in the majority (10 of the other 11 judges) for finding the matter inadequately presented for adjudication.

While this report addresses unanimously decided cases, it focuses principally on the split decisions in which Judge Alito has participated. In those decisions, Judge Alito has frequently gone to the right of even his Republican-appointed colleagues to find against individuals claiming that government officials or corporations violated the law. To be sure, in the course of the thousands of decisions Judge Alito has authored or joined in 15 years, there are exceptions. But the exceptions arise almost always in cases decided by a unanimous court, where there is little or nothing to suggest that the law might have compelled a different result. In the split decisions, and overall, a pattern of ruling against individuals claiming that large institutions violated their rights is unmistakable.

Other analyses have reached the same conclusion. University of Chicago law professor Cass Sunstein examined Judge Alito's approximately 65 dissents on the theory that "when a judge bothers to dissent from a majority is a good clue to what the judge cares most about."[3] What Professor Sunstein found was "stunning. Ninety-one percent of Alito's dissents take positions more conservative than his colleagues on the appeals court, including colleagues appointed by Presidents Bush and Reagan. ... Alito's conservative dissent rate is far more lopsided than other very conservative judges."[4] Professor Sunstein explained that the dramatically conservative results Judge Alito reaches in "hard cases" favor large, "established institutions," like corporations, universities and the government.[5] Professor Sunstein has concluded that "there is a good chance that Alito will be with Justices Scalia and Thomas in their attempts to move Constitutional law in some respects to what it was a long time ago."[6]

Like Professor Sunstein, Adam Liptak and Jonathan D. Glater of the *New York Times* analyzed Judge Alito's dissents, concluding:

> [H]is dissents are almost always more conservative than the majority's ... He frequently voted in favor of government and corporations ... Academic studies of dissenting opinions generally predict that judges appointed by Republican presidents will dissent more often in cases in which both of the other judges on the three-judge panels were appointed by Democratic presidents. But Judge Alito does not follow that pattern:

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[3] Nina Totenberg, *A Survey Course on Samuel Alito's Legal Views*, MORNING ED, NAT'L PUB. RADIO, Nov. 11, 2005.
[4] *Id.*
[5] Cass Sunstein, *Alito's Deference to Established Institutions*, TNR ONLINE, by subscription at https://ssl.tnr.com/p/docsub.mhtml?i=w051031&s=sunstein110105 (Nov. 1, 2005).
[6] Jennifer Barrett, *A Pattern of Conservatism*, NEWSWEEK, Nov. 4, 2005, available at http://www.msnbc.msn.com/id/9880810/site/newsweek/ (last visited Jan. 3, 2006).

> he dissented in 4 cases in which both of the other judges were appointed by Democrats and in 26 in which they were both appointed by Republicans.[7]

Stephen Henderson and Howard Mintz of the news service Knight Ridder completed a broader survey, examining all 311 of the published opinions Judge Alito has authored. They concluded that he:

> has worked quietly but resolutely to weave a conservative legal agenda into the fabric of the nation's laws. ... Although Alito's opinions are rarely written with obvious ideology, he's seldom sided with a criminal defendant, a foreign national facing deportation, an employee alleging discrimination or consumers suing big business. ... [His] record reveals decisions so consistent that it appears results do matter to him. ... A review of Alito's work on dozens of cases that raised important social issues found that he rarely supports individual rights claims. ... Alito often goes out of his way to narrow the scope of individual rights, sometimes seeking to undo lower court rulings that affirmed those rights.[8]

The upshot of our analysis and these other analyses is that Judge Alito is not simply a judicial conservative. Rather, he is an outlier, "brimming with ideas for pushing the boundaries of existing doctrine to the right in a number of crucial, albeit low-profile areas, such as federal employment discrimination law, search and seizure laws, and the rules governing the susceptibility of public officials to lawsuits."[9] As National Public Radio legal affairs correspondent Nina Totenberg reported, "Conservatives see [Judge Alito's nomination] as their moment to seize the day, to turn legal doctrine dramatically in a different direction."[10] Indeed, many say that by choosing Judge Alito, President Bush has fulfilled a promise to name justices "in the mold" of Justices Thomas and Scalia, the two justices who have tried most determinedly to transform the law.[11] In fact, however, as pointed out in a *Slate* article by Center for American Progress Senior Vice

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[7] Adam Liptak & Jonathan D. Glater, *Alito's Dissents Show Deference to Lower Courts*, N.Y. TIMES, Nov. 3, 2005.

[8] Stephen Henderson and Howard Mintz, *Review of Cases Shows Alito to be Staunch Conservative*, KNIGHT RIDDER, Dec. 1, 2005.

[9] Andrew M. Siegel, *Nice Disguise; Alito's frightening geniality*, NEW REPUBLIC, Nov. 14, 2005.

[10] *Morning Edition: A Survey Course on Samuel Alito's Legal Views*, (NPR radio broadcast, Nov. 11, 2005) *available at* http://www.npr.org/templates/story/story.php?storyId=5008701.

[11] For example, Rick Scarborough, President of the Judeo-Christian Council for Constitutional Restoration said in response to the nomination of Judge Alito: "The president has fulfilled his campaign pledge to appoint Supreme Court justices in the Thomas/Scalia mold." *Judeo-Christian Council Welcomes Alito Nomination*, Oct. 31, 2005 at http://www.visionamerica.us/site/News2?abbr=saj_&page=NewsArticle&id=5150; and the American Center for Law and Justice issued a statement saying that "President Bush promised that he would nominate Justices in the mold of Justices Scalia and Thomas. In choosing Judge Alito for the high court, President Bush has done just that." *Nomination of Judge Samuel Alito to Supreme Court is "Wise" Choice as President Bush Fulfills Promise, at* http://www.aclj.org/news/Read.aspx?ID=1985 (Oct. 31, 2005).

President Robert Gordon, Judge Alito may be even more doctrinaire than Justice Scalia – and thus more like Justice Thomas. Whereas Justice Scalia sometimes has refused to tolerate overreaching by executive branch actors, including the police and the president, and recently has recognized limitations on curbing Congress's legislative authority under the Commerce Clause, Justice Thomas has not. Nor has Judge Alito.[12] As *Slate*'s Dahlia Lithwick concluded, Judge Alito "neatly joins the ranks of right-wing activists in the battle to limit the power of Congress and diminish the efficacy of the judiciary."[13]

CONSTITUTIONAL LAW

Civil Rights and Civil Liberties under the Fourth Amendment. The Fourth Amendment has gotten increased attention in the wake of revelations that President Bush ordered the warrantless wiretapping of American citizens for national security purposes. Judge Alito's record indicates that he does believe the Fourth Amendment provides meaningful protection against government intrusion. He provided an early glimpse into his views in a 1984 Justice Department memo, concluding that it was constitutional for a police officer to shoot and kill a visibly unarmed, fleeing fifteen-year-old thief simply to prevent escape. The Supreme Court rejected that position 6-3, with all nine Justices disagreeing with the suggestion, advanced by Judge Alito in the memo, that the shooting did not even constitute a "seizure" implicating the Fourth Amendment; much less reflect conduct violating it. Judge Alito's judicial record mirrors the position he took in the memo. In 14 split decisions involving the Fourth Amendment – seven in civil rights cases, seven in criminal cases – he has never taken a position more protective of Fourth Amendment rights than his colleagues. For instance:

- Dissenting from the majority opinion of now-Homeland Security Secretary and long-time federal prosecutor Michael Chertoff, he voted to uphold the strip-search of a mother and her 10-year-old daughter, even though neither was a criminal suspect or named in the search warrant.

- He voted in dissent to keep a jury from hearing whether a police supervisor unlawfully allowed his officers to handcuff, hold at gunpoint and search a woman and her teenage children who, by happenstance, walked up to visit the home of a family member in the midst of a raid.

- Three years later, trying to distinguish that precedent, he held that marshals could engage in similar conduct while effecting a civil eviction.

- He upheld the around-the-clock, warrantless electronic surveillance of a suspect's hotel room on the grounds that government agents said they knew to activate the equipment only when the law let them do so – i.e., when a cooperating witness,

[12] Robert Gordon, *Alito or Scalito?*, SLATE, *at* http://www.slate.com/id/219107 (Nov. 1, 2005).
[13] Dahlia Lithwick, *Trick and Treat*, SLATE, *at* http://www.slate.com/id/2129106/ (Oct. 31, 2005).

who had consented to the monitoring, was in the room. Calling the situation "Orwellian," the dissenting judge wrote: "I can not endorse my colleague's willingness to entrust the fundamental right of privacy to law enforcement's discretion."[14]

Congressional Authority to Pass Nationwide Protections. In his 1985 job application, Judge Alito stated that he "believes very strongly in ... federalism."[15] In the job that he landed after submitting the application, he urged President Reagan to veto a consumer protection law regulating odometer tampering, saying that it "violates the principles of federalism supported by this administration."[16] The veto message, which Judge Alito approved and transmitted to the White House, asserted that "[a]fter all, it is the states, and not the federal government, that are charged with protecting the health, safety and welfare of their citizens."[17]

As noted by George Washington University Professor Jeffrey Rosen, who supported the nomination of John Roberts, Judge Alito has carried these sentiments with him to the bench, showing himself to be "a conservative activist who [is] determined to use the courts to strike at the heart of the regulatory state ... [and whose] lack of deference to Congress is unsettling."[18]

- In *United States v. Rybar*,[19] Judge Alito wrote a dissent invalidating the federal law banning machine gun possession, saying it exceeded Congress' authority under the Commerce Clause, which is the constitutional underpinning for numerous worker, consumer, civil rights and public health and safety protections. His reasoning was not only rejected by his own colleagues – who accused him of disrespecting Congress by requiring it to "play Show and Tell with the federal courts"[20] – but had previously been rejected by each of the other five appeals courts that had considered the law in the wake of *United States v. Lopez*, the 1995 Supreme Court decision on which he relied. Every court to have looked at the machine gun law since then has similarly rejected Judge Alito's position, except one, and the Supreme Court vacated that ruling after finding earlier this year that Congress had the authority to proscribe the personal use of marijuana for medicinal purposes as part of a larger scheme to prohibit illicit drug trafficking.

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[14] *United States v. Lee*, 359 F.3d 194 (3d Cir.), *cert. denied*, 125 S.Ct. 408 (2004).
[15] Memorandum from Mark Sullivan, Associate Director, Presidential Personnel, to Mark Levin, Associate Deputy Attorney General, re: Samuel A. Alito, Jr., Deputy Assistant Attorney General, SES I (Dec. 12, 1985) (on file with Alliance for Justice).
[16] Memorandum from Samuel A. Alito, Jr., to Peter J. Wallison, Counsel to the President, re: Enrolled Bill S.475 (Oct. 27, 1986) (on file with Alliance for Justice).
[17] *Id.*
[18] Jeffrey Rosen, *How to Judge*, NEW REPUBLIC, Nov. 29, 2004, at 18.
[19] 103 F.3d 273 (3d Cir. 1996).
[20] *Id.* at 282.

- In *Chittister v. Department of Community and Economic Development*,[21] Judge Alito held that Congress does not have the authority to give the country's nearly five million state employees the right to sue their employers for damages for violating the Family and Medical Leave Act's guarantee of unpaid sick leave. Facing a similar challenge in *Nevada v. Hibbs*,[22] the Supreme Court later found that a state employee can enforce his or her rights under the part of the law requiring employers to provide for family leave. Chief Justice Rehnquist's majority opinion in *Hibbs* rejected one of Judge Alito's key arguments – i.e., that the FMLA is a "substantive entitlement program"[23] that exceeds Congress' constitutional authority to remedy a history of sex discrimination by state employers.

Executive Power. Judge Alito has dealt with one case involving conflicts between the executive branch and Congress, a question regarding whether the indictment of a member of Congress violated the Speech or Debate Clause of the Constitution. He has not dealt with cases involving questions such as whether the president can invoke what he says is his inherent constitutional authority to order warrantless domestic surveillance of American citizens in violation of the Foreign Intelligence Service Act. In speeches and memoranda, however, Judge Alito has indicated support for expanding executive authority vis-à-vis the other branches of government. He has embraced the "unitary executive" theory, which holds that congressionally-established independent agencies may not exercise discretionary executive power, even if Congress mandates that they remain free of presidential control. Consistent with this view, he has lauded Justice Scalia's lone dissent and criticized the majority's holding in a significant 1988 case, *Morrison v. Olson*,[24] which upheld the now-lapsed independent counsel law against the claim that it unlawfully enabled a judicially-appointed prosecutor, outside the control of the president, to bring charges against high-ranking government officials. As a Justice Department official, Judge Alito also argued that when signing legislation, the president should issue statements aimed at molding the meaning of often flexible statutory language, something usually believed to be within Congress' exclusive power (through the issuance of committee reports and the like). In another Justice Department memo, Judge Alito asserted that the Attorney General should enjoy absolute immunity from lawsuits claiming that he authorized the illegal, warrantless wiretapping of American citizens thought to present domestic threats to national security. Together with the extraordinary deference that Judge Alito has shown executive branch officials in cases involving civil liberties, criminal law, prisoners' rights and immigration, these disparate materials suggest that Judge Alito has been chosen because he favors "ever more

[21] 226 F.3d 223 (3d Cir. 2000).
[22] 538 U.S. 721 (2003).
[23] *Id.* at 734.
[24] 487 U.S. 654 (1988).

aggressive assertions of executive power uncheckable by either Congress or the judiciary," in the words of University of Texas law professor Sanford Levinson.[25]

Due Process Protections. The due process clauses of the Constitution protect against unwarranted and arbitrary government actions, particularly those intruding on intensely personal decisions like whom to marry, where to send one's children to school, and whether to use contraception. Like Justice Scalia, Judge Alito appears to embrace a conception of due process dictated exclusively by historical traditions, under which few if any rights not expressly enumerated in the Constitution would be recognized. Based on this narrow view, Judge Alito worked diligently to undo a line of Third Circuit due process precedents prohibiting arbitrary actions (including arbitrary land use decisions) resulting from the improper motives, bad faith or bias of government officials. He first argued that the precedents should be re-examined in 1995. Two years later, he issued a lone dissent from a 12-1 *en banc* decision making the same argument. Finally, in 2003, he convinced a judge from another court to join him – over a vigorous dissent by a Third Circuit Reagan appointee – in finding that an intervening Supreme Court ruling dictated the result he sought. Most other circuit courts continue to adhere to due process precedents similar to the one Judge Alito overturned. Overall, in nine of ten split decisions involving alleged due process violations, Judge Alito has ruled in favor of the government.

Reproductive Freedom. In his 1985 job application, Judge Alito referred to his work in the Reagan administration's Solicitor General's office by asserting that "it has been a source of personal satisfaction for me ... to help advance legal positions in which I personally believe very strongly. I am particularly proud of my contributions to recent cases in which the government has argued in the Supreme Court that ... the Constitution does not protect a right to an abortion."[26] The "contributions" to which Alito was referring were: (a) his assistance with the *amicus* brief in *Thornburgh v. American College of Obstetricians and Gynecologists*,[27] where the Reagan administration argued for overturning *Roe v. Wade*[28] and defended a number of abortion restrictions that the Supreme Court ultimately invalidated; and (b) a 17-page memorandum to the Solicitor General explaining how, beginning with *Thornburgh*, the Reagan administration could "advance the goals of bringing about the eventual overturning of *Roe v. Wade* and, in the meantime, of mitigating its effects."[29] As a judge, in the only case in which he participated that presented an open question on reproductive rights, Judge Alito voted in

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[25] Sandy Levinson, *Judge Alito and Executive Power*, BALKINIZATION, *at* http://balkin.blogspot.com/2005/12/judge-alito-and-executive-power.html (Dec. 29, 2005).

[26] Memorandum from Mark Sullivan, Associate Director, Presidential Personnel, to Mark Levin, Associate Deputy Attorney General, re: Samuel A. Alito, Jr., Deputy Assistant Attorney General, SES I (Dec. 12, 1985) (on file with Alliance for Justice).

[27] 476 U.S. 747 (1986).

[28] 410 U.S. 113 (1973).

[29] Memorandum from Samuel A. Alito, Assistant to the Solicitor General, to Charles Fried, Acting Solicitor General, re: *Thornburgh v. American College of Obstetricians and Gynecologists* (May 30, 1985) (on file with Alliance for Justice).

dissent to uphold a law requiring a woman, except in limited circumstances, to notify her husband before obtaining an abortion. The Supreme Court, including Justice O'Connor, rejected that view, saying that "women do not lose their constitutionally protected liberty when they marry."[30]

Religion. In his 1985 job application, Judge Alito said that one of the things that animated his interest in constitutional law was his "disagreement" with Warren Court decisions regarding "the Establishment Clause."[31] Greg Stohr at Bloomberg News has reported that, consistent with that view, Judge Alito's opinions have "lower[ed] the barrier between church and state," and that "like justices Antonin Scalia and Clarence Thomas," Judge Alito appears poised to "limit the scope of the constitutional ban on establishment of religion."[32] Judge Alito has found on several occasions that government conduct impermissibly discriminated against an individual's religious practices or beliefs. He has never found, however, that a government-sponsored practice violated the principle of church-state separation. In one case, decided *en banc*, Judge Alito joined a dissent arguing that a public school board could get around an earlier Supreme Court ruling that barred school-approved, clergy-led prayers at graduation ceremonies, by allowing students to approve student-led prayers. The Supreme Court rejected that dissenting view in a subsequent case. In another case, over a strong dissent criticizing Judge Alito for a "constitutional about-face ... [that] strikes to the core of the legitimacy of our jurisprudence,"[33] Judge Alito expressly disregarded language from a prior panel in the same matter to hold that the unconstitutionality of a religiously-motivated holiday display could be cured by the addition of a few secular symbols. A subsequent Supreme Court ruling, with Justice O'Connor casting the deciding vote, effectively disagreed.[34] In a third case, decided *en banc*, Judge Alito's dissent, joined by only one other judge, and chided the 10-member majority for remanding – on "a spurious procedural ground" – a claim that a student's drawing of Jesus had been removed from, then replaced to a less prominent location in, a school's hallway display.[35]

Freedom of Speech and Association. In split decisions, Judge Alito has shown less sympathy for First Amendment claims involving speech and association than for those involving religion. In one case, which the Supreme Court recently decided to review, he ruled that prison officials could bar certain inmates from having printed material, like newspapers and photographs, beyond legal mail and religious texts. In another case, he disagreed with five other circuits, held that a plurality opinion of the Supreme Court regarding restrictions on political campaign signage was not binding, and

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[30] *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992).

[31] Memorandum from Mark Sullivan, Associate Director, Presidential Personnel, to Mark Levin, Associate Deputy Attorney General, re: Samuel A. Alito, Jr., Deputy Assistant Attorney General, SES I (Dec. 12, 1985) (on file with Alliance for Justice).

[32] Greg Stohr, *Alito Would Likely be Religion's Best Friend on the Court*, BLOOMBERG NEWS, Dec. 21, 2005 *available at* http://www.bloomberg.com/apps/news?pid=10000103&sid=aUiUufH8pEPg&refer=us.

[33] *ACLU v. Schundler*, 168 F.3d 92, 114 (3d Cir. 1999) (Nygaard, J., dissenting).

[34] *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005).

[35] *C.H. v. Oliva*, 226 F.3d 198, 203 (3d Cir. 2000), *cert. denied*, 533 U.S. 915 (2001).

adopted a new standard upholding state and local regulations. In one split decision where he found a First Amendment violation, he issued an extraordinary order barring a civil conspiracy case from proceeding to trial, ruling that a trial on allegations that an asbestos manufacturer was conspiring with a trade association to conceal the dangers of asbestos and reduce the costs of asbestos cleanup placed too great a burden on the manufacturer's First Amendment right to associate with the trade organization. In unanimously decided cases, Judge Alito has ruled that the following restrictions violated the First Amendment's free speech and association guarantees: a school anti-harassment policy that would have forbidden evangelical Christians from speaking out against homosexuality, a ban on paid liquor advertisements in school newspapers, and prior-approval requirements for police officers who sought to offer expert testimony.

STATUTORY PROTECTIONS

Civil Rights. Judge Alito's record in split decisions in cases addressing the merits of claims brought under civil rights laws is stark. In 15 such decisions, he has sided with the defendant 13 times. His only votes for a plaintiff came in: (1) a 12-1 *en banc* decision in a case involving disability discrimination, where the sole dissenter took a position rejected by every other circuit to have examined the issue; and (2) an 8-4 *en banc* decision where he sided with a white teacher challenging a school district's affirmative action decision. Judge Alito has never voted in dissent to side with an employee on the merits of a discrimination claim and has dissented six times in favor of employers defending against such claims.

In split decisions, as noted by both commentators and his Third Circuit colleagues, Judge Alito "has tended to embrace narrow readings of important federal anti-discrimination laws."[36] He has argued in favor of throwing out jury verdicts favoring discrimination plaintiffs, keeping other cases from ever going to trial and excusing lower courts' erroneous exclusion of important evidence. In cases in which he and his colleagues disagreed, Judge Alito often tried to make it more difficult to prove claims of discrimination, especially those relying on circumstantial evidence, which is almost always the only kind of evidence available in civil rights cases. In one case, all 10 of his colleagues rejected Judge Alito's lone dissent, which would have nullified a jury verdict in favor of a worker claiming gender discrimination. In another case, the majority asserted that "Title VII would be eviscerated if our analysis were to end where [Judge Alito] suggests."[37] In a third case involving disability rights, the majority observed that "few if any Rehabilitation Act cases would survive summary judgment" were Judge Alito's approach to prevail.[38] And in a criminal case where Judge Alito ridiculed the salience of statistical evidence suggesting that the prosecutor's office had engaged in a pattern of excluding black jurors from murder trials, including the defendant's, the majority accused him of "minimiz[ing] the history of racial discrimination against

[36] Editorial, *Judge Alito on Civil Rights*, WASH. POST, Dec. 18, 2005.
[37] *Bray v. Marriot Hotels*, 110 F.3d 986, 993 (3d Cir. 1997).
[38] *Nathanson v. Med. College of Pa.*, 926 F2d 1368, 1387 (3d Cir. 1991).

prospective black jurors and black defendants."[39] Conservative legal scholar Bruce Fein, a colleague of Judge Alito's in the Reagan Justice Department, has acknowledged that Judge Alito's confirmation would shift the Supreme Court's civil rights jurisprudence to the right.[40]

Environmental Protections. Environmental organizations like the Sierra Club, Friends of the Earth and Earthjustice have opposed Judge Alito's nomination. Arguably the most important issues regarding environmental protections are whether Congress has the constitutional authority under the Commerce Clause to enact them and whether plaintiffs can get into court to enforce them. As to the first issue, in *United States v. Rybar* (mentioned above), Judge Alito articulated a limited – and now rejected – view of Congress' Commerce Clause authority which, if adopted, could weaken environmental safeguards, possibly including the wetlands protections whose legality the Supreme Court will address this term. As to the second issue, Judge Alito joined a 2-1 opinion making it harder than Congress intended for individuals to establish standing to sue under the Clean Water Act, voting to wipe out a $2.625 million fine against a company that violated its discharge permit 150 times. Three years later, the Supreme Court rejected Judge Alito's position by a 7-2 vote, with only Justices Scalia and Thomas dissenting. While Judge Alito has often voted to enforce environmental laws in straightforward, unanimously decided cases, in two split decisions he has rejected the government's enforcement efforts. In one, Judge Alito voted over dissent to reject specific measures the Environmental Protection Agency ordered a corporation to adopt to clean up an ammonia plume it had released into a large city's supply of drinking water.

Worker Protections. The AFL-CIO, the Change To Win federation, and several of their constituent unions have announced their opposition to Judge Alito. As noted in an AFL-CIO report, in unanimous, majority and dissenting workers' rights opinions that Judge Alito authored, he sided against workers in 16 of 20 cases. He has sided against workers in ten of sixteen split decisions in which he participated. In a dissent in *Reich v. Gateway Press, Inc.*,[41] he disagreed with the Department of Labor and argued for a narrow reading of the Fair Labor Standards Act that would have denied reporters the right to overtime wages. In another dissent in *RNS Services, Inc. v. Secretary of Labor*,[42] he also disagreed with the Department of Labor and would not have applied mine safety rules to an area of a defunct mine from which the company was still extracting materials to process into energy.

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[39] *Riley v. Taylor*, 277 F.3d 261, 292 (3d Cir. 2001).
[40] *See* Amy Goldstein and Jo Becker, *Critics See Ammunition in Alito's Rights Record*, WASH. POST, Nov. 3, 2005.
[41] 13 F.3d 685 (3d Cir. 1994).
[42] 115 F.3d 182 (3d Cir. 1997).

CRIMINAL LAW

In his 1985 job application, Judge Alito wrote that he developed an interest in constitutional law, in part, because of his disagreement with Warren Court decisions in the area of criminal procedure. Such decisions established, among others things, freedom from intrusion into private communications, an indigent defendant's right to counsel, *Miranda* warnings and the exclusionary rule. Judge Alito's 15-year record on the bench is remarkably consistent with what he wrote in his job application. He has participated in 45 split criminal law decisions. In 40 of the 45, he took a position more favorable to the government than at least one of his colleagues. Of the five split decisions where he favored the defendant's position more than the government's, two resulted in sentencing remands favored by 12-1 and 11-2 majorities; one involved civil forfeiture where the dissent would have affirmed two of four summary judgment rulings in favor of the government, rather than one of four, like Judge Alito; and one involved a question of appellate jurisdiction to review a mid-trial evidentiary ruling, decided 12-1. Only one, an unpublished decision, involved reversing a conviction. While Judge Alito dissented in the government's favor in 12 split decisions, he did not once vote in dissent in favor of a criminal defendant. In all five split decisions he participated in involving the death penalty, he ruled in favor of the government. Analyzing the death penalty rulings – two in dissent, a third overturned by the Supreme Court – U.C. Berkeley law professor Goodwin Liu observed "a troubling tendency to tolerate serious errors in capital proceedings."[43]

Throughout the split criminal law decisions in which he has participated, Judge Alito has excused or refused to recognize constitutional errors arising from the inadequate performance of defense counsel, the denial of counsel during police interrogations, racial discrimination in jury selection, prosecutorial misconduct, faulty jury instructions and improper searches and seizures. In contrast to his often narrow interpretations of constitutional and other statutory provisions, he has broadly interpreted criminal statutes to cover conduct that, in the eyes of his colleagues, Congress did not intend to criminalize. In split decisions involving the ineffective assistance of counsel and prosecutorial misconduct, Judge Alito has been castigated by his colleagues for trying to hollow out on-point Supreme Court precedent. In one of those cases, a death penalty case involving defense counsel's failure to investigate important evidence, the Supreme Court reversed him, relying on the very same precedent his dissenting Third Circuit colleague said he tried to elide. The Supreme Court has rejected Judge Alito's views favoring the government two other times – once regarding the interpretation of the Continuing Criminal Enterprise statute and once regarding whether a state could continue to incarcerate an individual after the state's supreme court later ruled, in a related case, that what the individual was convicted of was not actually a crime.

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[43] Goodwin Liu, *Life and Death and Samuel Alito*, L. A. TIMES, Nov. 27, 2005.

IMMIGRATION LAW

In immigration cases, Judge Alito has been extremely deferential to government authorities and immigration judges, despite what other "federal appeals court judges ... call a pattern of biased and incoherent decisions in asylum cases," according to the *New York Times*.[44] He participated in eight split decisions involving the merits of claims by asylum-seekers and individuals attempting to avoid deportation. He voted against individuals and for the government in seven of the eight cases. In five of these cases, he cast a dissenting vote, three of them from panels where both colleagues were also Republican appointees. In one case, the majority wrote that Judge Alito's view would "gut the statutory standard" and "ignore our precedent."[45] In another case, the majority felt that Judge Alito's interpretation of legislative intent was grounded in "speculation" that contradicted the "well-recognized rules of statutory construction."[46] In a third case, *Sandoval v. Reno*,[47] involving jurisdiction to hear a case rather than the case's merits, Judge Alito cast another dissenting vote in favor of the government, arguing that the Antiterrorism and Effective Death Penalty Act stripped federal courts of their authority to entertain certain *habeas corpus* claims made by undocumented immigrants facing deportation. The Supreme Court later rejected Judge Alito's view.

ACCESS TO COURTS

In split decisions, Judge Alito's record regarding whether litigants may bring suit, as opposed to whether they should prevail on the merits of the case, tilts in favor of defendants. In 16 of 24 cases, he has voted to deny aggrieved parties the right to bring suit. As described above, in one environmental ruling, later rejected 7-2 by the Supreme Court, Judge Alito found that environmental plaintiffs lacked standing to sue a company for repeated violations of the Clean Water Act. In another ruling also described above, and also rejected by the Supreme Court, Judge Alito held that a new law barred an immigrant from seeking relief from a deportation order in *habeas corpus* proceedings. Judge Alito also ruled, over a heated dissent, that an individual claiming that her disability benefits were denied due to the impermissible racial bias of an administrative law judge had no right to challenge the judge's bias in court. And in two cases where the government failed to deliver actual notice to a prisoner about property forfeiture proceedings against him, Judge Alito dissented – once alone against 10 others, once in a 10-2 ruling – to find that the government's efforts did not violate the prisoner's rights to challenge the forfeitures. In other split decisions, however, Judge Alito has ruled in favor of granting aggrieved parties access to the federal courts. In two cases alleging discrimination, for instance, he has ruled that statutes of limitations did not bar the plaintiffs from filing their cases. In one of those cases, the Supreme Court unanimously agreed with him.

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[44] Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005.
[45] *Dia v. Ashcroft*, 353 F.3d 228, 251 (3d Cir. 2003).
[46] *Lee v. Ashcroft*, 368 F.3d 218, 225 n.11 (3d Cir. 2004).
[47] 166 F.3d 225 (3d Cir.), *withdrawn by the court* (Nov. 20, 2000).

Perhaps most noteworthy about Judge Alito's record on access to courts is that he dissented in several cases to deny access on procedural grounds never advanced by the defendants, but also dissented from a 10-2 *en banc* decision to grant access to a boy who claimed that unidentified officials at his school discriminated against his religious views by removing, and then replacing in a less prominent position, his poster of Jesus on a bulletin board. Among the cases where he voted in dissent to deny access:

- In a death penalty case where two other Republican-appointed judges voted to reverse the conviction, Judge Alito would have sent the case back to the trial court to consider whether the claim warranting reversal was procedurally barred from consideration, even though the state never raised the procedural defenses at the district court or on appeal. The majority accused him of violating the principle of judicial restraint and of "com[ing] dangerously close to acting as [an] advocate for the state rather than as [an] impartial magistrate[]."[48]

- In a case where a worker claimed that a defective truck part caused a debilitating injury, Judge Alito again drew sharp criticism from two Republican appointees by finding that the worker had waived his objection to clearly inadmissible evidence, despite the defendant's failure to make that procedural argument.[49]

- In a third case involving a person with mental disabilities who claimed repeated sexual harassment by his co-workers, Judge Alito would have refused to hear the appeal because of sloppy brief writing, even though the trial court below had ruled on the specific claim at issue and the defendants responded to that specific claim on appeal. The majority asserted that it was compelled to rule because of "the fact that no prejudice would result to defendants by our entertaining appellate jurisdiction, that the briefs are adequate to present the critical issues, that the case potentially involves issues important in the administration of [job discrimination law], and that 'the error is so 'plain' that manifest injustice would otherwise result.'"[50]

[48] *Smith v. Horn*, 120 F.3d 400, 409 (3d Cir. 1997).
[49] *Dillinger v. Caterpillar, Inc*, 959 F.2d 430 (3d Cir. 1992).
[50] No. 99-2043, slip op. at 4 (3d Cir. Mar. 12, 2001).



Appendix A. Split Decisions in Cases Pitting Individuals Against the Government

Issue Area	On the Issue Dividing the Court, Judge Alito Sides with		On the Issue Dividing the Court, the Majority Sides with		Total
	Government	Individual	Government	Individual	
Access to Courts	8	5	6	7	13
Benefits	2	3	1	4	5
Civil Rights/Discrimination	5	1	5	1	6
Civil Rights/Liberties	7		5	2	7
Criminal	40	5	28	17	45
Federalism/Separation of Powers	1	1	2		2
Freedom of Speech and Association	3	1	2	2	4
Free Exercise Clause	1		1		1
Establishment Clause	2		1	1	2
Immigration	7	1	3	5	8
Prisoner Rights	4		2	2	4
Reproductive Rights	1			1	1
Substantive Due Process/Equal Protection	8	2	4	6	10
Grand Total	**89**	**19**	**60**	**48**	**108**
Percentages	**82.4%**	**17.6%**	**55.6%**	**44.4%**	**100.0%**



January 11, 2006

The Honorable Arlen Specter, Chair
The Honorable Patrick J. Leahy, Ranking Member
Senate Committee on the Judiciary
Dirksen Senate Office Building
Room SD-224
Washington, DC 20510

Re: Nomination of Judge Samuel A. Alito, Jr., as Associate Justice of the Supreme Court of the United States

Dear Chairman Specter and Senator Leahy:

The American Association for Affirmative Action (AAAA), an association of equal employment opportunity (EEO), diversity and affirmative action professionals founded in 1974, respectfully urges you to oppose the nomination of Judge Samuel Alito, nominated to serve as Associate Justice of the U.S. Supreme Court.

AAAA has reached this conclusion based on Judge Alito's very troubling record on equal employment opportunity and affirmative action. In his 1985 application to be the Reagan Administration's Deputy Assistant Attorney General in the Office of Legal Counsel, Samuel Alito expressed his support of the "same philosophical views" that he believed were central to the Administration. In this application, Alito highlighted his work as Assistant Solicitor General on affirmative action and reportedly wrote that he was "particularly proud" of his "contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed …." To use Judge Alito's "Hank Aaron" analogy, affirmative action requires not moving the fence in but opening the gate. After that, it is up to the player to demonstrate his or her abilities. Whoever selected Hank Aaron, Secretary Rice or Justice O'Connor understood that the essence of affirmative action is *opportunity*, not favoritism or quotas.

Judge Alito's application described the efforts of the Reagan Justice Department to restrict affirmative action and court-awarded remedies for discrimination as "quota" litigation. In one such case, Alito signed a brief arguing for restricting affirmative action remedies, even in cases where discrimination was intentional, egregious, and long-standing. In *Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC,* the Solicitor General's brief advanced the extraordinary theory that relief in Title VII cases

could be granted only to "identifiable victims of discrimination," contradicting an earlier view of the EEOC itself. The Supreme Court rejected this argument.

In *Local Number 93, International Association of Firefighters, AFL-CIO v. City of Cleveland*, Alito signed on to an *amicus* brief seeking to reverse a consent decree that included numerical goals for the promotion of black firemen. By a 6-3 vote, the Supreme Court again rejected the Solicitor General's argument and upheld the affirmative action plan.

In the months before Alito applied for a job with Attorney General Edwin Meese, Meese waged a fierce campaign to have President Reagan abolish Executive Order 11246, signed by President Lyndon Johnson in 1965. The Order requires that federal contractors not discriminate in employment and that they use affirmative action. Ultimately, two-thirds of the Reagan cabinet repudiated the extreme views of the Justice Department and a coalition of corporations, members of Congress and civil rights organizations successfully defeated Meese's campaign against affirmative action.

There is nothing subsequent to Mr. Alito's tenure in the Reagan Administration *or his testimony before the Senate Judiciary Committee* to suggest persuasively that he has moderated his views on equal opportunity law enforcement. In civil rights cases he has often argued for higher barriers that victims of employment discrimination would have to overcome to secure remedies for such discrimination. For example, in *Bray v. Marriott Hotels*, Judge Alito's colleagues said Title VII of the Civil Rights Act of 1964 "would be eviscerated" if Judge Alito's approach were followed. In *Nathanson v. Medical College of Pennsylvania*, Judge Alito dissented in a disability rights case where the majority said: "Few if any Rehabilitation Act cases would survive" if Judge Alito's view were the law." And in *Sheridan v. DuPont*, he was the only one of 11 judges on the court who would apply a higher standard of proof in a sex discrimination case.

According to a report of the NAACP Legal Defense and Educational Fund, Inc., Judge Alito has almost never ruled for an African-American plaintiff in employment discrimination cases and has never written a majority opinion for the Third Circuit in favor of an African-American plaintiff on the merits of a claim of race discrimination in employment. In each majority opinion authored by Judge Alito and addressing such a claim, he has ruled against the African-American plaintiff.

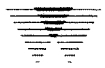
This is not the time for the Judiciary, a longstanding refuge for victims of discrimination, to reverse fifty years of progress. The record emerging suggests that Judge Samuel Alito is not prepared to interpret the laws on behalf of *all* Americans.

Sincerely,

Shirley J. Wilcher

Shirley J. Wilcher
Interim Executive Director

888 16th Street, NW, Suite 800 * Washington, D.C. 20006 *202-349-9855 ex 1857 * Fax: 202-355-1399 * www.affirmativeaction.org



AMERICAN
ASSOCIATION OF
UNIVERSITY
WOMEN

January 9, 2006

The Honorable Arlen Specter, Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy, Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators:

On behalf of the more than 100,000 bipartisan members of the American Association of University Women (AAUW), we write to express our opposition to the confirmation of Third Circuit Court of Appeals Judge Samuel A. Alito, Jr. to be associate justice of the United States Supreme Court. As the Senate Judiciary Committee opens its confirmation hearings today, you will be faced with critical questions and, ultimately, a critical decision that will affect the balance of the nation's highest court – which will in turn impact the everyday lives of generations to come.

After a careful review of Judge Alito's record, including 15 years of appellate opinions, AAUW finds him to be a troubling choice with red flags in areas critical to our mission and membership, including workplace discrimination, reproductive choice, and affirmative action. Judge Alito's appellate judgments provide little reassurance that he would apply the law in ways that would uphold fundamental civil and women's rights precedents should he ascend to the highest court in the land. Indeed, taken as a whole, his publicly available record – both from his government service and his tenure on the Third Circuit – illustrate a judicial philosophy at odds with AAUW's Public Policy Program.[i] For all these reasons, AAUW has opposed the confirmation of Judge Alito to the U.S. Supreme Court.[ii]

AAUW believes it is more important than ever to ensure the moderate balance of the U.S. Supreme Court by confirming a justice who reflects mainstream America. Decades of progress for women and girls hang in the balance. Further, given that Judge Alito has been nominated to replace the often-deciding vote of Justice Sandra Day O'Connor, this nomination has much at stake. AAUW is concerned that the confirmation of a potentially extremist justice would turn back the clock on decades of progress for women and girls. Two key areas in particular have led to AAUW's opposition to Judge Alito's confirmation:

Equal opportunity and legal protections against discrimination: Judge Alito has a troubling record on a range of civil rights issues, revealing a philosophy that would weaken workplace protections that are central to addressing discrimination against women. A number of Judge Alito's opinions would make it harder for employees to win their suits or even get their case to trial. Judge Alito has also demonstrated opposition towards affirmative action, dismissed constitutional protections against sexual harassment in schools, and aggressively sought to curb congressional authority to legislate on issues such as family and

medical leave. In several of these cases, U.S. Supreme Court decisions have later espoused views opposite to those put forward by Judge Alito, showing him to be far outside the mainstream.

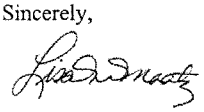
Reproductive rights and approach to precedent: Judge Alito has actively rejected a woman's constitutional right to choose, supported limits on abortion, and consistently upheld limits to this fundamental right. While Judge Alito has been careful to stress the importance of *stare decisis*, his recognition of the importance of precedent is not a predictor that he would follow the principle if confirmed. As a member of the nation's highest court, the obligation to follow settled law is different. Since Judge Alito helped develop the strategy for undermining women's reproductive rights,[iii] it stands to reason that *Roe v. Wade* and related cases maintaining the right to privacy could fall within the exceptions Judge Alito has set for himself regarding adherence to *stare decisis*.

As you know, the Senate has few constitutional duties more significant than that of advising on and consenting to U.S. Supreme Court nominations. AAUW believes you should confirm only a nominee that exhibits the impartiality and independence that are so critical to this third, co-equal branch of our government.

No nominee is presumptively entitled to confirmation. After a thoughtful review of his well-established judicial philosophy, AAUW cannot conclude that Judge Samuel A. Alito, Jr. is the appropriate choice for a lifetime position on the U.S. Supreme Court. AAUW urges senators to reject Alito's nomination and let their votes be a true measure of their commitment to equity for women and girls

If you have any questions, please do not hesitate to contact me at 202/785-7720, or Meghan Kissell, Field Director at 202/785-7704.

Sincerely,



Lisa M. Maatz
Director, Public Policy and Government Relations

CC: Senate Judiciary Committee

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[i] AAUW's Public Policy Program establishes the federal action priorities on which AAUW members across the country will focus their advocacy efforts and guides the work of the national staff. The strength of the two-year AAUW Public Policy Program is that it originates and ends with the membership. The adoption of the Association's two-year Public Policy Program at each national convention is the culmination of a process involving AAUW members nationwide. The 2005-2007 Public Policy Program was adopted in June 2005 at AAUW's National Convention in Washington, DC; a complete copy is available at http://www.aauw.org/issue_advocacy/principles_priorities.cfm.

[ii] AAUW's full position paper on the Alito nomination can be found at http://www.aauw.org/issue_advocacy/actionpages/judicialnoms_alito.cfm.

[iii] Memorandum from Samuel A. Alito, Assistant to the Solicitor General, to Charles Fried, Acting Solicitor General, re *Thornburgh v. American College of Obstetricians & Gynecologists* (June 3, 1985).

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AMERICAN BAR ASSOCIATION

Standing Committee on Federal Judiciary
740 Fifteenth Street, NW
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BY FACSIMILE AND MAIL

January 4, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Honorable Samuel A. Alito, Jr.
Associate Justice of the United States Supreme Court

Dear Senator Specter:

By this letter we transmit for your consideration this Committee's evaluation pertaining to the nomination of **Judge Samuel A. Alito, Jr.** as **Associate Justice of the United States Supreme Court.**

It is a pleasure to report that as a result of our investigation, the Committee is of the unanimous opinion that **Judge Samuel A. Alito, Jr.** is **Well Qualified** for appointment as **Associate Justice of the United States Supreme Court**. There was one recusal.

A copy of this letter has been sent to Judge Alito for his information.

Yours very truly,

Stephen L. Tober
Chair

SLT/sst
cc: Judge Samuel A. Alito, Jr.
Harriet Miers, Esq.
Rachel Brand, Esq.
ABA Standing Committee on Federal Judiciary
Denise A. Cardman, Esq.

This letter was sent to the following members of the Committee on the Judiciary, United States Senate, 224 Dirksen Senate Office Building, Washington, D.C. 20510-6275

Majority:	Hon. Arlen Specter, Chairman
	Hon. Orrin G. Hatch
	Hon. Charles E. Grassley
	Hon. Jon Kyl
	Hon. Mike DeWine
	Hon. Jeff Sessions
	Hon. Lindsey Graham
	Hon. John Cornyn
	Hon. Sam Brownback
	Hon. Tom Coburn
Minority:	Hon. Patrick J. Leahy
	Hon. Edward M. Kennedy
	Hon. Joseph R. Biden, Jr.
	Hon. Herbert H. Kohl
	Hon. Dianne Feinstein
	Hon. Russell D. Feingold
	Hon. Charles E. Schumer
	Hon. Richard Durbin

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January 9, 2006

The Honorable Arlen Specter
Chair, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

This correspondence is submitted in response to the invitation from the Senate Committee on the Judiciary to the American Bar Association Standing Committee on Federal Judiciary (hereinafter "Standing Committee"), to present its report concerning the President's nomination of the Honorable Samuel A. Alito, Jr., to be Associate Justice of the United States Supreme Court.

The Standing Committee's evaluation of Judge Alito—and indeed, every other Federal judicial nominee—is based upon a comprehensive, non-partisan, non-ideological peer review of the professional qualifications of the nominee. In so doing, the Standing Committee uses well-established, well-defined, objective standards that measure the nominee's integrity, professional competence, and judicial temperament. As has long been recognized,

> (T)he selection of a member of the Supreme Court involves many other factors of a broad political and ideological nature within the discretion of the President and the Senate but beyond the special

> competence of the (Standing Committee). Accordingly, the opinion of the (Standing Committee) is limited to the areas of its investigation.[1]

Consistent with that limitation, the Standing Committee did not investigate or consider Judge Alito's ideology or political views during the course of its evaluation, nor did it examine what Judge Alito's views might be on any issues that may potentially come before him, either on the Supreme Court or on the Court of Appeals for the Third Circuit.

President Bush announced his intention to nominate Judge Alito for Associate Justice on October 31, 2005. The Standing Committee began its evaluation the next day, and continued its work over the course of the next several weeks. This correspondence shall endeavor to detail the nature, scope, and findings of that effort.

Evaluation of Judge Alito's Professional Qualifications to Serve as Associate Justice of the Supreme Court

The Process

To merit the Standing Committee's evaluation of "*Well Qualified*" or "*Qualified*," a Supreme Court nominee must have standing at the top of the legal profession, demonstrate outstanding legal ability and exceptional breadth of experience, and meet the highest standards of integrity, professional competence, and judicial temperament. The evaluation of "*Well Qualified*" is reserved for those found to merit the Standing Committee's strongest affirmative endorsement.

Over the course of the last several weeks the members of the Standing Committee reached out to well over 2000 individuals across the nation through written correspondence,

[1] Correspondence from Lawrence E. Walsh, Chair, ABA Standing Committee on Federal Judiciary, to the Honorable James O. Eastland, Chair, United States Senate Judiciary Committee, January 26, 1970.

phone calls, and personal contact. Those contacts cut across virtually every demographic consideration, including individuals from varying and different political, racial, ethnic and gender backgrounds. Judges, lawyers, legal scholars, bar leaders (both traditional and non-traditional), community leaders and citizens were contacted, all in an effort to identify and interview as many individuals as possible with personal knowledge of Judge Alito. As a result, 13 members[2] of the Standing Committee subsequently interviewed more than 300 people from all Federal circuits who knew, had worked with, or had substantial knowledge of the nominee. Of that number over 130 were Federal judges, including all members of the Supreme Court of the United States, members of the United States Courts of Appeals,[3] members of the United States District Courts, United States Magistrate Judges, and United States Bankruptcy Judges.

In addition, scores of state judges were interviewed, along with lawyers who had been opposing counsel, co-counsel, colleagues, or advocates who had appeared before the nominee since he became a Federal judge. Law school deans, faculty, and other legal scholars throughout the United States were also included, as were non-lawyers from several walks-of-life. All interviews regarding the nominee were, in conformity with long-established practice, fully confidential to assure the most candid of assessments.

Judge Alito had been evaluated by the Standing Committee once before, back in 1990, and was found to be unanimously "*Well Qualified.*" The present Standing Committee reviewed that earlier report as part of its evaluation, and had the benefit of its findings and insight.

Finally, it has been the practice of the Standing Committee to ask distinguished legal scholars and practitioners to form "reading groups," and to conduct an independent and detailed

[2] Roberta D. Liebenberg, the Third Circuit representative who would normally have been the lead investigator, recused herself from the outset of this nomination under established Standing Committee practice, since she is counsel in a matter previously heard by a panel that included Judge Alito. That matter was argued prior to the announcement of his nomination, and the decision is still pending. John Payton shared responsibility for the Third Circuit investigation with Marna Tucker.

[3] The Standing Committee's investigation included interviews with virtually all of Judge Alito's colleagues on the United States Court of Appeals for the Third Circuit.

review of the nominee's written opinions and other legal writings. The reading groups, guided by the same standards that are applied by the Standing Committee, assist in evaluating the nominee's analytical skills, knowledge of the law, application of the facts to the law, and the ability to communicate effectively. For this nominee there were three reading groups, all working collaboratively to read and independently evaluate nearly 350 published opinions, several dozen unpublished opinions, a number of his Supreme Court oral argument transcripts and corresponding briefs, and several other articles and legal memos.[4] The reading groups that evaluated this nominee's writings were:

- A reading group of distinguished law professors from Syracuse University College of Law, chaired by Lisa A. Dolak, Professor of Law and Senior Associate Dean for Academic Affairs. This reading group consisted of ten members of the Syracuse law school's faculty, chosen for their expertise and diversity in a wide array of substantive areas of the law.
- A reading group of distinguished law professors from Georgetown University Law Center, chaired by Cornelia T.L. Pillard, Professor of Law. This reading group consisted of eleven members of the Georgetown Law Center's faculty, chosen for their substantial depth of knowledge and extensive experience in legal academia.
- A reading group of distinguished practitioners, chaired by John J. Curtin, Jr., Esq., of Bingham McCutchen in Boston, Massachusetts. This reading group consisted of six highly-skilled lawyers intimately familiar with the demands of appellate

[4] Judge Alito, along with Chief Justice John Roberts and Harriet Miers, are truly the first Supreme Court nominees in the "internet era." As a result, and with the generous assistance of Georgetown University and its library staff, all reading group members were provided access to the nominee's writings via a Georgetown web site that categorized his published (and unpublished) writings by subject matter, and provided comprehensive links to his full opinions, briefs, and commentary by topic and subtopic.

practice at the highest level, and with diverse backgrounds and a depth of legal experience.

The professors and lawyers who participated in these reading groups are listed in Exhibits A, B, and C, appended to this correspondence. The members of the Standing Committee wish to publicly thank the members of the respective reading groups for their thoughtful, insightful, and professional reviews of Judge Alito's writings. Their contributions are invaluable.

The three reading groups provided the Standing Committee with detailed, written independent analyses of Judge Alito's numerous opinions, briefs and writings, and these analyses were carefully considered by the Standing Committee members as part of their individual assessments of the nominee's professional qualifications. In addition, members of the Standing Committee have also reviewed other records written by the nominee as they have been released either by him (as appendices to his answers to the Senate Questionnaire, for example) or by Presidential libraries or the National Archives on-line in Washington.

Finally, three members of the Standing Committee personally interviewed Judge Alito at the U.S. Courthouse in the District of Columbia: Marna S. Tucker (D.C. Circuit representative); John Payton (Federal Circuit representative); and the Chair.

Evaluation

1. Integrity

The matter of integrity is self-defining. A nominee's character and general reputation in the legal community are investigated, as are his or her industry and diligence.

Judge Alito enjoys an excellent reputation for integrity and character, notwithstanding a widespread awareness of the *Vanguard* and *Smith Barney* recusal issues.[5] During his personal interview with us, Judge Alito was asked about the recusal matter in detail, and he acknowledged at length that he takes the matter of recusal "very seriously," and that the cases had "slipped through" the court screening process. He explained the following to us:

The *Vanguard* matter. In 2002 Judge Alito sat on a *pro se* panel in *Monga v. Ottenberg*, an unreported decision. He told us that the Circuit's conflict screening system is not used for *pro se* cases, and while *Vanguard* is identified in the caption of the case, by 2002 for reasons unknown to him, Vanguard was no longer on the permanent recusal list that would have been picked up by "automatic screening." Judge Alito acknowledged to us that, consistent with his earlier response to the Judiciary Chairman's letter of November 10, 2005, "Due to an oversight, it did not occur to me that Vanguard's status in the matter might call for my recusal."

Judge Alito wrote the opinion that affirmed the dismissal of the underlying action, which was issued in July 2002. The Supreme Court denied *certiorari* in April 2003. Thereafter the plaintiff filed a motion to vacate, claiming that Judge Alito was an owner/investor in some of the Vanguard funds. As a result, Judge Alito took steps to notify the Chief Judge of the Circuit that he was disqualifying himself from the case even though he did not believe that he was required to do so, and further requested that a new panel of judges be appointed to rehear the matter. A new panel was indeed appointed which heard the matter on the pleadings and affirmed the decision of the trial court dismissing the case.

The *Smith Barney* matter. In 1997 Judge Alito participated on a panel in *Johnston v. HBO Film Management.* Smith Barney is identified in the caption of the case. Apparently no

[5] *Monga v. Ottenberg,* 43 Fed. Appx. 523 (2002) (Vanguard); *Johnston v. HBO Film Management,* 129 F.3d 1255 (1997) (Smith Barney). A third matter, *Midlantic National Bank v. Hansen,* 48 F.3d 693 (1995) involved a matter handled by a law firm subsequently joined by the nominee's sister at the rehearing stage.

party or anyone else made an issue of Judge Alito's involvement at any time during the adjudication of the case. He told us that once again this case had "slipped by" and it was unclear to him why the screening system had not picked it up. He also told us, as he did in reply to the Judiciary Chairman, that he does not believe that the Judicial Code of Conduct or other parallel statutory language required him to be disqualified. Nonetheless, he did not seek to avoid responsibility for the concern that may have been created.

The *Midlantic* matter. The original case in *Midlantic National Bank v. Hansen* was heard by a three-judge panel. At that time Judge Alito's sister, who is a practicing lawyer and who (along with her firm) is on his permanent recusal list, was not with the law firm that was involved in the case. She joined that firm at the rehearing stage, but was not a participant in the rehearing. Judge Alito did not participate in the panel decision, but during the rehearing phase his vote was counted on the rehearing petition because his vote was registered by default rather than by an affirmative announcement, pursuant to established Circuit court practice. He told us he did not believe that the screening system is used for rehearings, although it had been used for the original hearing, and that he simply "missed it" when he let his vote be recorded on rehearing.

The nominee's answers to the 2005 Senate Questionnaire make it clear that, aside from these identified instances, a considerable number of matters are caught in the conflicts screen—many in the categories in question. Judge Alito explained to the satisfaction of the Standing Committee the special circumstances that resulted in the screen not working or otherwise not being applied in these limited matters, and he further accepted responsibility for the errors. We accept his explanation and do not believe these matters reflect adversely on him.

To the contrary, consistent and virtually unanimous comments from those interviewed include:

"He has the utmost integrity. He is a straight-shooter, very honest, (and) calls them as he sees them."

"His reputation is impeccable."

"You could find no one with better integrity."

"His integrity and character (are) of the highest caliber."

"He is completely forthright and honest."

"His integrity is absolutely unquestionable."

"He is a man of great integrity."

On the basis of our interviews with Judge Alito and with well over 300 judges, lawyers, and members of the legal community nationwide, all of whom know Judge Alito professionally, the Standing Committee concluded that Judge Alito is an individual of excellent integrity.

2. Professional Competence

Professional competence encompasses such qualities as intellectual capacity, judgment, writing and analytical ability, knowledge of the law, and breadth of professional experience.

Judge Alito enjoys an excellent educational background that brought him first to the practice of law and then to the Federal bench. He attended public high school in New Jersey and was, as he told us in his interview, the first student from that high school to enroll in Princeton University. He graduated from Princeton in 1972, where he was a member of *Phi Beta Kappa* and a Scholar of the Woodrow Wilson School of Public and International Affairs. He then graduated from Yale Law School in 1975, receiving awards for both the best moot court argument and for the best contribution to the Yale Law Journal.

After law school he worked briefly for a law firm in Trenton, New Jersey, and then as a law clerk to Judge Leonard Garth on the U.S. Court of Appeals for the Third Circuit (Judge Alito would later become a colleague of Judge Garth). His professional path from that point forward

has been dedicated to service on behalf of the Federal government: Assistant U.S. Attorney in New Jersey; Assistant to the U.S. Solicitor General; Deputy Assistant U.S. Attorney General; U.S. Attorney in New Jersey; and most recently as a member of the Third Circuit Court of Appeals.

Throughout his career, Judge Alito has had a significant appellate litigation practice, including having argued twelve cases before the U.S. Supreme Court. He prevailed in ten of those cases.

Judge Alito has also authored a significant number of decisions, briefs, and articles over the course of thirty years. He was praised uniformly in interviews as an excellent and unusually clear writer who combines with that skill exceptional intellectual legal abilities.

> "(His opinions) are very carefully drawn. He is very thorough and misses nothing."
>
> "He is a superb craftsman."
>
> "Judge Alito is gifted with profound analytical powers, coupled with the ability to write well."
>
> "His trademark is a clear explanation of position and views."
>
> "He is extraordinarily focused and his opinions show it. He is regarded as a 'judge's judge.'"

The comprehensive reports submitted to the Standing Committee by the three reading groups further support the quality of the nominee's scholarship and writing abilities. The chair of one reading group summarized colleagues' assessments of Judge Alito's opinions and writings as follows:

> Our review shows Judge Alito to be a conscientious judge with outstanding professional qualifications. As one reviewer aptly summed it up: "There is no question that, in terms of intellect, Judge Alito is highly qualified for the Supreme Court. His decisions consistently exhibit a complete mastery of the legal materials, a capacity for thinking at an extremely elevated theoretical level, and the ability to communicate about complex matters with exceptional clarity."

Members of another reading group had similar comments:

> "I have concluded that Judge Alito is a skilled jurist with a sharp analytical mind. His written opinions are clear, well-organized, and logical. His opinions demonstrate significant knowledge and understanding of federal procedural law and federal and state substantive law in a number of different areas."
>
> "[Judge Alito's opinions evidence] a deep dedication to precedent, a commitment to reasoned presentation of his views, a respect for the opinions of others (including those in conflict with his own), [and] a powerful mind that structures arguments with a virtuosity . . ."
>
> "Judge Alito displays first-rate analytical skills and awareness of substantive law and of the legal process. There seems here no reason to doubt his ability to think and write at the highest levels of judicial craftsmanship."

And from the chair of a third reading group:

> "I found Judge Alito's opinions to be well-written and clear, demonstrating intellectual vigor and ability to explain his position in persuasive terms. There seems to be no dispute among the reviewers about those characteristics in Judge Alito's opinions."

From intellectual capacity to judgment to writing and analytical ability; from knowledge of the law to breadth of professional experience, Judge Alito has demonstrated the highest level of professional competence consonant with qualification to serve on the U.S. Supreme Court.

3. <u>Judicial Temperament</u>

In investigating judicial temperament, the Standing Committee considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law.

Comments gleaned from interviews and from the collective wisdom of our reading groups identified three potential general areas of concern regarding the nominee's judicial temperament. They are: (1) an occasional tendency for strident tones to enter into the nominee's written decisions; (2) a concern that the nominee's personal beliefs have entered into his judicial decision-making; and (3) a concern about whether or not the results of the nominee's judicial

decision-making tend to favor identifiable categories of litigants and reflect a particular bias. For the reasons that follow, the Standing Committee determined that these concerns—both individually and collectively—do not have overriding significance in understanding Judge Alito and his otherwise demonstrated capacity for exemplary judicial temperament.

First, with respect to a tendency for strident tones in his written opinions. Two or three members of our reading groups voiced this concern.[6] Judge Alito was asked about this tendency in his personal interview, and he acknowledged that on occasion he may have been "caught up in the rhetoric," particularly in his dissents. He further explained that he customarily tries to avoid such rhetoric by carefully reviewing his opinions before they are released, fully recognizing that the judges and lawyers below (and before him) are proceeding in good faith. On occasion some strident language has remained, he acknowledged, although it is something he continually seeks to avoid.

Beyond the occasional written word, comments about Judge Alito and his interpersonal relations create a very different impression:

> "He has an even temperament and a nice sense of humor."
>
> "He is never disrespectful of attorneys. . . .He is a great colleague."
>
> "(Judge Alito) has a restrained and polite temperament."
>
> "He is a shy person who tries to do what he believes to be fair within what the law allows him to do."
>
> "He is very patient with attorneys."
>
> "Alito is as mild mannered as you can get. He never raises his voice . . . When he disagrees he does so in a soft manner."

[6] However, several other reading group members disagreed, finding his writings to be quite appropriate in tone. For example, and with a particular focus on dissents, one wrote: "(His dissents) set out the major points advanced by the majority, conceding the accuracy of those opinions where necessary, harmonizing the language where possible, and focusing on a process of narrowing the bases of disagreement. There is neither diatribe nor sarcasm. The opinions evince collegiality and respectful disagreement."

"He is an empathetic person by nature. Very tolerant. Salt of the earth. And genuinely humble"

Next, with respect to concern that the nominee's personal beliefs have entered into his judicial decision-making. This concern arises from the release of information surrounding the nominee's 1985 application for employment in the Reagan administration and, in particular, from a statement written by the nominee as part of that application.[7] In that statement Judge Alito indicated in 1985 that (1) he believed "very strongly in . . . the supremacy of the elected branches of government;" (2) he was a member of the Concerned Alumni of Princeton University; and (3) he disagreed with Supreme Court decisions in specifically-identified areas of law. In order, those statements presented questions about the nominee's adherence to a co-equal and independent judiciary; about membership in a group that was perceived in the media to have been formed to exclude diversity on the Princeton campus; and about the nominee's degree of respect for precedent and the application of *stare decisis*.

When colleagues and others with knowledge of Judge Alito were asked during their interviews about this 1985 statement, a majority of them reacted the same way: "I'm surprised." Few if any who have worked with or have known Judge Alito over the course of his last 15 years on the bench recognized those sentiments as his.

"I am aware of the press stories regarding the 1985 job application. That is not the person I see (on this court)."

"(I have) seen 'none of that' from Alito as a judge. (He) has grown as a judge and I am sure his views would be different today."

"(I have) seen no evidence of Alito having any agenda."

"His experience on the bench shows that he does not have fixed ideas."

"What is in the application is not consistent with Alito's judicial stewardship over the last fifteen years."

[7] White House PPO Non-Career Appointment Form.

> "As a judge you have to consider both sides of an issue. Alito brings a sense of justice to his role as a judge. He does not bring an agenda to it."
>
> "We have to keep in mind that we all mature and we all learn. No one is the same person they were in 1985."
>
> "I am confident (the nominee) has no political agenda. Alito's agenda is fairness and justice. He really wants to do the right thing and will not follow his personal views."

In our personal interview with Judge Alito, we inquired at length about his responses on the 1985 application. He reaffirmed his commitment to the equality and independence of the third branch of government, explaining that his 1985 reference to "supreme" branches was not carefully written and did not reflect his beliefs today. He further explained that his membership in the Concerned Alumni of Princeton (in which he said he was not active) was motivated only by his deep respect for ROTC, which was under threat of being barred from the Princeton campus. And he repeated his respect for precedent, referring to his Senate Questionnaire answer where he characterized *stare decisis* as supplying "essential stability to the law and is a fundamental feature of our legal system."[8] He asked the Standing Committee to consider him in light of his last fifteen years of service on the Federal bench, which, he urged, would be a more accurate measure of his professional qualifications.

Finally, with respect to the concern over whether the nominee's judicial decision-making tended to favor identifiable categories of litigants, thereby reflecting bias. This concern was raised in an isolated number of interviews, and in analyses offered by a few members of our reading groups. The former tended to be anecdotal, while the latter created differences of opinion and ultimately led to inconclusive findings.

---

[8] One reading group chair noted, in language similar to that offered by the other two reading group chairs as well: "As for adherence to precedent, Judge Alito has generally shown the willingness to follow precedent of his own circuit and the Supreme Court that is fitting for a court of appeals judge. One committee member emphasized: 'I saw no examples where he used precedent creatively to reach a particular policy (or justice) outcome or looked to the policy behind the law when there was not controlling precedent on point.' A few readers noted that Judge Alito sometimes stated that he personally disagreed with the outcome in a case, but supported it nonetheless because he saw himself to be constrained by circuit or Supreme Court precedent."

The chair of one reading group wrote:

> More generally, dividing up opinions among many readers made it unlikely that we would discern overall trends and patterns . . . Despite the methodological limitations of our review, we did encounter opinions that raise concerns about Judge Alito's evenhandedness. Several readers independently noted uneven deference to agencies' legal interpretations,[9] while others observed an inconsistency in adherence to text over other indicators of congressional intent. . . .After we completed our individual reviews, we discussed whether we discerned any troubling patterns in these respects. That discussion was inconclusive. We flag this issue for your consideration in your review of a broader range of materials and reports.
>
> The cases also suggested to some readers a disturbing tendency to place greater obstacles in the way of discrimination plaintiffs than is warranted by the Federal Rules of Civil Procedure and Supreme Court precedent. Although we are not, at this stage, able to reach firm conclusions as to this issue, we believe that further review of Judge Alito's opinions would be warranted . . .

And a member of another reading group wrote:

> (In immigration cases, he) shows little empathy for the applicants, except for Soltane, and he excuses what he views as insignificant errors of procedure by agencies operating with expertise in the subject area.

However, a member of yet a third reading group, referring to the nominee's consumer protection decisions, noted:

> Judge Alito appears to be 'an impartial dispenser of justice.' (His) opinions are 'proportional, favoring neither the consumer nor the defendant,' dispensing justice impartially based on the law and facts unique to each case

And further, this from a second reading group chair:

> And one reviewer, who described his specific attention to the issue of a potential anti-defense bias in criminal cases, ultimately reported: "(E)ven within the opinions which raised questions for me about his anti-defense predispositions, I found evidence that Judge Alito listened to all arguments and considered them fairly." He also wrote: "(D)efendants had some success in persuading Judge Alito of the merits of their arguments in 5 out of 13 cases—a percentage surely much higher than the success rate for all criminal appellants before all judges in most Circuits."

When reading group writings from the twenty-seven readers are taken as a whole, no clear, overarching pattern of bias for or against certain classes or parties arises. In fact, one

[9] Compare, however, the comments of yet another member of a different reading group: "(T)he opinions as a group do not demonstrate a clear deference to agency determinations, either agency adjudications or agency interpretations of rules . . .."

reading group member who reviewed the nominee's opinions for evidence of partiality reflected the comments of others when he concluded that he did not attribute any leanings to personal bias, but rather to a likely concern with pragmatic considerations.[10] The inconclusive findings that resulted from our reading groups on this one issue did not, in the opinion of the Standing Committee, establish bias or a lack of open-mindedness on the part of the nominee.

The comments of those we interviewed must also be fully considered regarding this issue, and on that front the opinions were far more uniform.

> "Whether he agrees or disagrees with you, Alito always has a thoughtful reason for his views and is always willing to listen, discuss, and modify his views if appropriate."
>
> "He is a judge's judge. He does not let his views get in the way."
>
> "He enjoys brainstorming and is very good at looking at all sides of an issue."
>
> "His temperament is balanced and dignified. He is quiet and fair."
>
> "He takes judging seriously as a craft. He would not impose his personal views."
>
> "(Judge Alito) is fair, listens to everything carefully, and makes decisions on the facts and the law. He provides honest assessments on the merits of the case."
>
> "(His) judicial temperament and demeanor is thoughtful, evenly balanced, and very analytical."
>
> "(Judge Alito is) open minded (to) everyone's point of view, and (is) not in any way dogmatic."
>
> "He is thoughtful, judicious, works both sides of the cases and does not let his feelings dictate either left or right."
>
> "He is a fair-minded person personally committed to the deliberative process. He is thoughtful and deliberative to an extreme. (I have) great confidence in Judge Alito's fair-mindedness."

[10] That conclusion is bolstered by the nature of the discussion we had with Judge Alito during his personal interview, when we discussed his approach to decision-making. The process he described to us that he employs, including ultimately looking back from a proposed result to see that he has not misapplied the law and created an unjust outcome, is consistent with notions of judicial pragmatism.

The Standing Committee is satisfied that Judge Alito's judicial temperament meets the highest standards for appointment to the Supreme Court of the United States.

Conclusion

Judge Samuel Alito has, over the course of his career, created a substantial and perhaps even enormous record. Both as a lawyer and a judge he has dealt with a wide spectrum of issues and has distinguished himself at virtually every turn. It is clear that he sees majesty in the law, and remains a student of it to this day.

Through the outreach of its members, the Standing Committee has interviewed hundreds of individuals who know the nominee. With the assistance of our reading groups, the Standing Committee has reviewed the written record of the nominee in detail. And with his full cooperation, members of the Standing Committee conducted an extensive personal interview. His professional and judicial profiles are clearly in view.

Concerns have been raised and reviewed in detail. None of those concerns rises to a level that overrides what the nominee has demonstrated in a decade and a half of public service on the Federal bench. To the contrary, Judge Alito's integrity, professional competence, and judicial temperament are of the highest standing. It is the unanimous opinion of the Standing Committee[11] that Judge Alito is *"Well Qualified"* to serve as Associate Justice of the United States Supreme Court.

Fifty years ago a Supreme Court justice wrote of the traits of character necessary to serve well on the Supreme Court. He referred to the ability to put one's passion behind one's

[11] With one recusal. *See supra* note 2.

judgment instead of in front of it, and to demonstrate what he called "dominating humility."[12] It is the belief of the Standing Committee that Judge Samuel Alito possesses those same qualities.

Consistent with our longstanding practice, the Standing Committee will review this report at the conclusion of the public hearing, and notify you should there be any circumstances that would require a modification of these views.

On behalf of the Standing Committee, I wish to thank you and the Members of your Committee for the opportunity to participate in the confirmation hearing on the nomination of the Honorable Samuel A. Alito, Jr., to be Associate Justice of the United States Supreme Court. We are pleased to be able to work with you to assure the appointment of the highest quality of judges to the Federal bench for the American people.

Respectfully submitted,



Stephen L. Tober, Chair

cc: Members, Committee on the Judiciary, United States Senate
Michael S. Greco, President, American Bar Association
Members, American Bar Association Standing Committee on Federal Judiciary

[12] Hon. Felix Frankfurter, "Foreword," 55 *Columbia Law Review* 435, 436 (April 1955).

Exhibit A

Reading Group: Syracuse University College of Law

Lisa A. Dolak, Chair, Professor of Law, Senior Associate Dean for Academic Affairs (intellectual property, procedure, internet law and policy)

Aviva Abramovsky, Assistant Professor of Law (commercial transactions, insurance law, ERISA, contracts and remedies)

Hannah R. Arterian, Dean and Professor of Law (constitutional law, employment and labor law)

William C. Banks, Board of Advisors Professor of Law, Laura J. & L. Douglas Meredith Professor (constitutional law, national security law)

Peter A. Bell, Professor of Law (substantive criminal law, health law, tort law)

Sanjay Chhablani, Assistant Professor of Law (criminal law and procedure)

David M. Driesen, Angela R. Cooney Professor of Law (environmental law, administrative law, structural constitutional law)

Margaret M. Harding, Professor of Law (arbitration law and practice, securities law, tort law)

Janis L. McDonald, Associate Professor of Law (employment discrimination law, civil rights and constitutional law [individual rights and liberties])

William M. Wiecek, Congdon Professor of Public Law & Legislation, Professor of History (constitutional law and history, law and religion, federal jurisdiction, civil rights history, property)

* * * * *

Professor Thomas R. French, Director, H. Douglas Barclay Law Library

Exhibit B

Reading Group: Georgetown University Law Center

Cornelia T.L. Pillard, Chair, Professor of Law (constitutional law, civil procedure, employment, civil rights, Supreme Court practice)

Hope M. Babcock, Professor of Law (environmental law, natural resources law)

Sherman L. Cohn, Professor of Law (civil procedure, legal ethics, appellate practice)

James V. Feinerman, James M. Morita Professor of Asian Legal Studies (international law, corporate finance)

Michael Gottesman, Professor of Law (labor and employment law, constitutional law, civil rights, torts, Supreme Court practice)

Emma Coleman Jordan, Professor of Law (race and gender discrimination, law and economics, commercial law--payments and secured transactions, banking)

Gregory Klass, Associate Professor of Law (contracts, legal theory)

Naomi Mezey, Professor of Law (civil procedure, legal process, legislation, law and culture, jurisprudence)

John Mikhail, Associate Professor of Law (torts, legal theory)

Julia L. Ross, Professor of Legal Research and Writing (legal research and writing, civil litigation, entertainment law, copyright and trademark law, appellate practice)

William T. Vukowich, Professor of Law (commercial law, contracts, bankruptcy, consumer protection)

* * * * *

Duncan Alford, Head of Reference, Georgetown Law Library

Exhibit C

Reading Group: Practitioners

John J. Curtin, Jr., Bingham McCutchen LLP, Boston, Massachusetts

Ralph I. Lancaster, Jr., Pierce Atwood LLP, Portland, Maine

Nory Miller, Dechert LLP, Philadelphia, Pennsylvania

Martin F. Murphy, Foley Hoag LLP, Boston, Massachusetts

Roscoe Trimmier, Jr., Ropes & Gray LLP, Boston, Massachusetts

Steven M. Zager, Akin, Gump, Strauss, Hauer & Feld, Houston, Texas



Because Freedom Can't Protect Itself
www.aclu.org

ACLU Announces Opposition to Alito Nomination

Group Cites Rising Concerns Over Unchecked Executive Power and Alito's Troubling Civil Liberties Record

FOR IMMEDIATE RELEASE
January 9, 2006

CONTACT: Emily Whitfield, ACLU National Office, (212) 549-2666 or media@aclu.org
Shin Inouye, ACLU Washington Legislative Office (202) 675-2312

NEW YORK -- The American Civil Liberties Union announced today that it will oppose the nomination of Judge Samuel A. Alito, Jr. to replace Justice Sandra Day O'Connor on the United States Supreme Court.

"At a time when our president has claimed unprecedented authority to spy on Americans and jail terrorism suspects indefinitely, America needs a Supreme Court justice who will uphold our precious civil liberties," said ACLU Executive Director Anthony D. Romero. "Unfortunately, Judge Alito's record shows a willingness to support government actions that abridge individual freedoms."

Throughout his career, Judge Alito has promoted an expansive view of executive authority and a limited view of the judicial role in curbing abuses of that authority. Two years ago, Justice O'Connor eloquently expressed what is at stake in these critical times when she wrote: "A state of war is not a blank check for the president when it comes to the rights of the nation's citizens."

Romero also noted that Judge Alito has written a series of troubling decisions on race, religion, and reproductive rights while sitting on the federal appeals court. These are precisely the issues in which Justice O'Connor often cast a critical swing vote on a closely divided Supreme Court.

The ACLU vote came after a special meeting of its 83-member national board this weekend, which has voted to oppose only two nominees in its 86-year history: Justice

William Rehnquist (in his initial nomination to the Court) and former Solicitor General and law professor Robert Bork.

In December, the ACLU issued a 68-page report summarizing Judge Alito's record on civil liberties and civil rights. The ACLU sent the report along with a letter expressing "deep concern" to Senate Judiciary Committee Chairman Arlen Specter and Ranking Member Patrick Leahy, urging the committee to conduct a thorough review of Judge Alito's record.

"Judge Alito has all too often taken a hostile position toward our fundamental civil liberties and civil rights," said Caroline Fredrickson, Director of the ACLU Washington Legislative Office. "The Supreme Court is the final guardian of our liberties, and Judge Alito has shown that he lacks the dedication to that commitment. Recent revelations about White House-sanctioned domestic spying, in defiance of the law, make it clear that the Senate cannot, and must not, approve this nominee."

The ACLU, founded in 1920, participates in more cases before the Supreme Court than anyone besides the U.S. government itself.

The ACLU's report on Judge Alito is online at
www.aclu.org/images/asset_upload_file130_23216.pdf

The ACLU's letter to the Senate Judiciary Committee is online at
www.aclu.org/scotus/2005/23217leg20051222.html

The ACLU's advertisements calling for a special counsel to investigate the President's illegal surveillance of U.S. citizens are online at www.aclu.org/safefree/spying/

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TREASURER

Testimony of the American Civil Liberties Union on the Nomination of Judge Samuel A. Alito, Jr. as Associate Justice to the United States Supreme Court

Before the Senate Judiciary Committee

Submitted by

Anthony D. Romero
Executive Director

January 18, 2006

American Civil Liberties Union
Testimony Before the Senate Judiciary Committee on the Nomination of
Judge Samuel A. Alito, Jr. as Associate Justice to the United States Supreme Court
Submitted by
Anthony D. Romero, Executive Director

January 18, 2006

Chairman Specter, Ranking Member Leahy, and members of the Committee:

On behalf of the American Civil Liberties Union, a non-partisan, non-profit organization and its nearly 600,000 members, I welcome this opportunity to submit this statement in opposition to the confirmation of Judge Samuel A. Alito, Jr. to the United States Supreme Court.[1]

The ACLU does not make the decision to oppose Alito lightly. Only twice in the ACLU's 86 year history has our Board voted to oppose Supreme Court nominees – that of Chief Justice William Rehnquist, in his initial nomination to the Court, and Judge Robert Bork. But this is a momentous time in history, and Alito's confirmation to the Supreme Court would have significant impact on the American people. A nominee with Alito's history of deference to executive authority and support for government power would strike a blow to basic freedoms. In this high-stakes climate for civil liberties and civil rights, the Supreme Court must be a bulwark against incursions on our fundamental freedoms. If confirmed as the next Associate Justice of the Supreme Court, Alito could dramatically change the direction of the Supreme Court by tipping the balance from the moderate position of Justice O'Connor, whom he would be replacing, to a position hostile to civil liberties and civil rights. He could thereby change the country for years to come.

We are witnesses to an extraordinary time in history when our executive branch is trying to centralize power and bypass other branches of government. At a time when our President has claimed unprecedented authority to spy on our own people and jail people indefinitely without trial, America needs a Supreme Court justice who will uphold our precious civil liberties, staying true to the balance of powers envisioned by our Founders. But confirming Alito, someone with a proven record of undue deference to executive powers, could dangerously upset that balance of powers.

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[1] The ACLU has earlier submitted to the Senate Judiciary Committee a comprehensive report summarizing the judicial record of Alito. *See* ACLU, Report of the American Civil Liberties Union on the Nomination of Third Circuit Court Judge Samuel A. Alito, Jr. to be Associate Justice on the United States Supreme Court (Dec. 9, 2005), available at http://www.aclu.org/scotus/2005/23216res20051222.html.

ALITO HAS SHOWN AN ALARMING DEFERENCE TO THE POWER OF THE EXECUTIVE BRANCH.

It is of special concern that Alito will be replacing Justice Sandra Day O'Connor who has been a critical swing vote on issues relating to reproductive freedom, religion, employment discrimination, affirmative action, and civil rights. She has also exhibited the caution and courage necessary in times of war to protect civil liberties. We are deeply concerned that Alito would not bring the same balance and moderation to the Court.

Two years ago, Justice O'Connor eloquently expressed what is at stake in these critical times when she wrote that it is "clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[2] Having justices on the Supreme Court adhering to this viewpoint is critical now more than ever given the various issues the Court may consider, such as the constitutional limits of the Patriot Act and the President's authorization of warrantless spying on Americans. Throughout his career, Alito has promoted an expansive view of executive authority and a limited view of the congressional and judicial roles in curbing abuses of that authority.

His own record and public statements have led us to this conclusion. As an adherent to the "unitary executive theory," Alito and others working in the Office of Legal Counsel (OLC) in the Reagan Justice Department, advocated this theory to support an aggressive expansion of the recognized powers of the President. For example, in a 2000 speech to the Federalist Society, Alito stated that "I thought then, and I still think, that this [unitary executive] theory best captures the meaning of the Constitution's text and structure."[3] He said that under this theory, "the president has not just some executive powers, but *the* executive power – the whole thing."[4] Moreover, in a recently released 1986 document from Alito's time with the OLC, Alito recommended the increased use of presidential signing statements – a statement issued by the President setting forth his interpretation of the law – in order to trump congressional intent and legislative history. Alito recommended such a proposal in order to "increase the power of the Executive to shape the law."[5]

It is this unitary executive theory, to which Alito adheres, that has become the foundation for much of the Bush Administration's troubling behavior, including the now infamous torture memo and the jailing of U.S. citizens as enemy combatants without

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[2] *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (citing *Youngstown Sheet v. Tube Co.*, 343 U.S. 579, 587 (1952)).

[3] Judge Samuel Alito, Third Circuit Court of Appeals, Administrative Law and Regulation: Presidential Oversight and the Administrative State, Panelist Address before the Federalist Society (Nov. 2000), *in* 2 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS, Nov. 2001, at 12).

[4] *Id.* (emphasis in the original).

[5] Memorandum from Samuel A. Alito, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, to The Litigation Strategy Working Group, Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law 2 (Feb. 5, 1986) (hereafter Signing Statement Memo).

charging them.[6] And, just as Alito once advocated, this Administration has used the unitary executive theory to attempt to trump congressional interpretation of statutes through the use of presidential signing statements. For example, President Bush recently used this exact process to undermine the Senate's anti-torture legislation. Late last year, in a vote of 90 to 9, the Senate passed an amendment, sponsored by Senator John McCain, to ban the use of torture at home and abroad. While the White House threatened to veto the legislation, Senator McCain convinced the President to approve the anti-torture law. When the President signed the law, however, he issued a signing statement setting forth, in part, that "[t]he executive branch shall construe [the law], relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief. . . ."[7] The signing statement undermined his commitment to ban torture and set forth a presidential claim that he can authorize torture regardless of Congress' intent and in contravention of the plain language of the statute.

The fact that Alito has advocated that courts give a president's signing statement great deference in determining the meaning and intent of the law is particularly problematic at a time when the executive branch is trying to usurp power in a way we have not seen since the Nixon Administration. We know that Alito has advocated the use of presidential signing statements in order to curb what he saw as abuses by Congress by providing the President with the "last word" on statutory interpretation.[8] That should be particularly problematic to the Senate since giving deference to such authority means that the intent of Congress may be circumvented. If confirmed, Alito would now be in the position of reviewing the type of troublesome presidential action he himself helped to foster.

There are more examples of Alito's undue deference to the executive branch. While in the Solicitor General's office, in a brief before the Supreme Court in *Mitchell v. Forsyth*, Alito advocated that the Attorney General, who had authorized illegal wiretaps of Americans, was entitled to absolute immunity for any personal liability.[9] In a recently released 1984 memo, he had earlier advised arguing for qualified, rather than absolute immunity, for fear of losing the case at the Supreme Court, but he made clear that he personally believed that officials should have absolute immunity with regard to such behavior.[10] Alito stated: "I do not question that the Attorney General should have

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[6] For example, Justice Thomas recently referred to the unitary executive in dissenting from the Court's decision to restrict Presidential power to unilaterally detain U.S. citizens as enemy combatants in *Hamdi v. Rumsfeld. See Hamdi,* 542 U.S. at 580-81. (Thomas, J., dissenting).

[7] Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005).

[8] Signing Statement Memo, *supra* note 5, at 2.

[9] Questionnaire of Samuel A. Alito, Jr. of New Jersey, Nominee to the Supreme Court of the United States 33 (2005). The Supreme Court ultimately rejected this approach. *See Mitchell v. Forsyth,* 472 U.S. 511 (1985).

[10] Memorandum from Samuel A. Alito to the Solicitor General, re: *Forsyth v. Kleindienst* 5 (June 12, 1984).

[absolute] immunity, but for tactical reasons I would not raise the issue here."[11] This is certainly a dismaying revelation considering the fact that at the highest levels, this Administration has authorized and conducted spying on U.S. citizens. If confirmed, these issues are almost certain to come before Alito as a justice.

In addition to the extremely broad view of executive authority taken in his earlier writings, Alito has also taken a narrow view on congressional power in his judicial opinions. For example, in *United States v. Rybar*, Alito argued in dissent that Congress had exceeded its power under the Commerce Clause by making it a federal crime to possess a submachine gun, despite the federal government's long history of regulating firearms.[12] Although it is only one example, the significance of *Rybar* should not be understated. The Commerce Clause is the basis for numerous congressional statutes protecting many individual rights, including civil rights and the health and safety of Americans.

In another example of ruling to limit congressional authority, Alito wrote the majority opinion in *Chittister v. Department of Community & Economic Development.*[13] In that case, Alito held that a provision of the Family Medical Leave Act (FMLA) entitling employees to leave when they or family members are seriously ill could not be applied against the states. Doing so, he wrote, exceeded Congress' authority under the Fourteenth Amendment.[14] Alito reasoned that Congress had purported to abrogate sovereign immunity under the FMLA in order to prevent employment discrimination on the basis of gender and that Congress' findings focused on: 1) the importance of both men and women caring for young children and family members with serious health conditions, and 2) the disproportionate burden family caretaking imposes on women.[15] Instead, he found "[n]otably absent . . . any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause" or such evidence in the legislation record.[16] His opinion cut further into congressional authority to protect civil rights by holding:

> [E]ven if there were relevant findings or evidence, the FMLA provisions at issue here would not be congruent or proportional. Unlike the Equal Protection Clause, which the FMLA is said to enforce, the FMLA does much more than require nondiscriminatory sick leave practices; it creates a substantive entitlement to leave. This is 'disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act.'[17]

Alito's position on the FMLA was later implicitly rejected by the Supreme Court in a similar case. Three years later, in *Nevada Department of Human Resources v. Hibbs*,

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[11] *Id.*
[12] 103 F.3d 273, 286 (3d Cir. 1996) (Alito, J., dissenting).
[13] 226 F.3d 223 (3d. Cir. 2000).
[14] *Id.* at 229.
[15] *Id.* at 228.
[16] *Id.* at 228-29.
[17] *Id.* at 229 (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 63 (2000)).

the Supreme Court held, in a decision written by Chief Justice Rehnquist, that states could be required by FMLA to provide employees with leave to care for an ill family member.[18] The Court held "that Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' but may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'"[19]

There is every indication from Alito's record that his confirmation to the Supreme Court would tip the Court away from a balancing of powers toward undue deference to presidential and executive power. The basic civics lesson here is that there are three co-equal branches of government that should provide checks and balances to the others. This concept is being fundamentally rejected by this Administration, the same Administration that now has nominated a jurist to the Supreme Court who not only agrees with its philosophy, but also has been instrumental in developing this approach.

THE ALITO NOMINATION THREATENS THE LEGACY OF JUSTICE SANDRA DAY O'CONNOR.

Replacing Justice O'Connor on the Supreme Court has the possibility of dramatic changes in many areas of constitutional law. It is, therefore, not enough to evaluate Alito's record in a vacuum. It must be considered in light of the Justice whom he will be replacing on the Court, if confirmed. Indeed, Justice O'Connor has often been in the 5-4 majority of decisions to protect individual rights. Her opinions took into account the real life impact of her decisions – whether they were, for example, considering the burden on women of restrictions on their reproductive lives or recognizing the value of diversity in higher education. Unfortunately, in addition to raising dramatic presidential and executive authority concerns, Alito has repeatedly advocated against our fundamental civil rights and civil liberties.

Perhaps the best description of Alito's overall philosophy in these critical areas was provided by Alito himself in 1985, when he submitted a now well-publicized letter to the Reagan Administration seeking a position with the Justice Department's Office of Legal Counsel. "I am and always have been a conservative and an adherent to the same philosophical views that I believe are central to this Administration," he wrote.[20] Alito then went on to explain that he had been inspired to attend law school by his disagreement with the decisions of the Warren Court, "particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment."[21] He also expressed particular pride in the role he had played in the Solicitor General's Office in helping to craft Supreme Court briefs arguing "that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion."[22] Finally, his

[18] 538 U.S. 721 (2003).
[19] *Id.* at 737 (quoting *Kimel*, 528 U.S. at 81).
[20] Application of Samuel A. Alito, Jr. for Deputy Assistant Attorney General in the Office of Legal Counsel (Nov. 15, 1985).
[21] *Id.*
[22] *Id.*

letter proclaimed, in stark contrast to the position taken by Chief Justice Roberts during his recent confirmation hearings, that these were positions "in which I personally believe very strongly."[23]

These remarks, made two decades ago, would be easier to discount if they were not largely consistent with positions that Alito has taken during his fifteen years on the United States Court of Appeals for the Third Circuit. This is particularly worrisome because his remarks involve a series of issues – racial justice, religion, and reproductive rights – in which Justice O'Connor has played a critical role on the Supreme Court as an often-decisive swing vote.

ALITO HAS REPEATEDLY ADVOCATED AGAINST OUR FUNDAMENTAL CIVIL RIGHTS AND CIVIL LIBERTIES.

Alito's judicial philosophy raises serious questions about his commitment to preserving our fundamental constitutional freedoms and civil rights. Alito has an extensive public record accumulated over a quarter century as a federal prosecutor, Justice Department attorney, and federal judge. His intellectual qualifications are not in doubt. But credentials alone do not warrant elevation to the Supreme Court; one's judicial philosophy is paramount. There is often considerable room to interpret Supreme Court decisions and congressional statutes, and Alito has regularly used that room as an opportunity to narrow and restrict civil rights and civil liberties protections. For example, Alito:

- Wrote a dissent in *Planned Parenthood v. Casey* arguing that a state's spousal notification requirement did not unduly burden a woman's right to privacy, a position later rejected by the Supreme Court;
- Joined a dissent arguing that a student-led prayer at a high school graduation ceremony did not violate the Establishment Clause;
- Wrote several dissents arguing for higher standards for plaintiffs seeking trial on their race, gender and disability discrimination claims;
- Dissented from a decision ruling that the strip search of a suspect's wife and ten-year-old daughter exceeded the scope of the search warrant and was therefore unconstitutional;
- Rejected a death row inmate's ineffective assistance of counsel claim where the trial counsel had failed to uncover substantial mitigating evidence – a decision later reversed by the Supreme Court;
- Dissented from an *en banc* ruling in a death penalty case arguing that the prosecution had unconstitutionally used its peremptory challenges to exclude all the black prospective jurors;

[23] *Id.*

- Wrote a dissent arguing that a policy prohibiting all prisoners in long-term segregation from possessing newspapers, magazines or photographs unless they were religious or legal did not violate the First Amendment.

It is, of course, impossible to summarize a fifteen-year judicial career in a few bullet points or with a few cases. But it is also fair to say that these highlighted decisions illustrate a broader pattern of judicial decision-making privileging governmental power over individual rights. What is critically important to remember is that while Alito may state that he would be guided by *stare decisis* – the principle of following prior case law – as a Supreme Court Justice, unlike a court of appeals judge, Alito would *create* precedent according to his own interpretations, not be *bound* by it.

Recent revelations about presidential authorization of domestic spying, in defiance of the law, make it clear that the Senate cannot, and must not, approve a nominee who has little regard for the constitutional system of checks and balances. The Supreme Court is the final guardian of our liberties, and Alito has all too often taken a hostile position toward our fundamental civil liberties and civil rights. At a time in our history when so many are worried about an administration that thinks it is above the law, now is not the time to approve any nominee who gives undue deference to the executive branch. We urge the Senate to reject the nomination of Samuel A. Alito to the Supreme Court.

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December 14, 2005

Dear Senator:

The AFL-CIO, a federation of 53 national and international unions representing over nine million working women and men, has reviewed Judge Samuel Alito's record on the U.S. Court of Appeals for the Third Circuit in cases of importance to working families. Based on this review, we are compelled to oppose his nomination to be an Associate Justice on the United States Supreme Court.

As the enclosed memorandum explains more fully, Judge Alito's decisions and dissents show a disturbing tendency to take an extremely narrow and restrictive view of laws passed by Congress to protect workers' rights, resulting in workers being deprived of wage and hour, health and safety, anti-discrimination, pension, and other important protections. On a number of occasions, Judge Alito's colleagues on the Third Circuit have criticized his opinions for their excessively narrow view of worker protection and civil rights statutes. Judge Alito holds federal agencies to an unrealistically high standard when they seek to enforce worker protection laws, often reversing them on hypertechnical grounds and depriving workers of important protections as a result.

We are also very concerned about Judge Alito's views on the scope of Congressional power, given some of his rulings in this area, and his views about voting rights, given his criticism of the Warren Court and its reapportionment decisions. It is critical that Senators explore these and other areas thoroughly at Judge Alito's upcoming confirmation hearings in order to understand his views and his judicial philosophy on these important issues.

Working families are struggling mightily against an assault on our hard-won gains in the legislative arena and at the bargaining table. Wages are being cut, pensions and health benefits are being drastically reduced or eliminated, and job security is vanishing. Now more than ever, workers need the protections offered to them under the laws passed by Congress to protect their pay, benefits, retirement security, and health. Working families need and deserve Supreme Court justices who understand and respect the

importance of our hard-fought rights and protections, not justices who take an unduly narrow view of the law, and of our rights. Judge Alito's judicial philosophy is one that appears to be at odds with workers' interests. Given the current composition of the Supreme Court, and the absence of even a single justice with a worker advocacy background, we cannot afford to have the Court further skewed against working families' interests.

In recent years, many cases have been decided in the Supreme Court by a one-vote margin. The Supreme Court decided, by one-vote margins, two cases involving the question of whether certain groups of workers were protected under the National Labor Relations Act. Millions of state employees were deprived of their ability to seek relief in court under the Fair Labor Standards Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act because of decisions decided by a one-vote margin. The Court issued a decision restricting states in their ability to adopt their own workplace safety laws, again by a one -vote margin. By a one-vote margin, the Supreme Court excused employers from having to pay back pay when they are found to have discriminated against union supporters who happen to be undocumented workers. The importance of this nomination to the rights and protections of working families is clear.

The AFL-CIO urges you to oppose Judge Alito's nomination and to insist on a more moderate nominee with a record demonstrating greater respect for workers' rights.

Sincerely,

John J. Sweeney

John J. Sweeney
President

Enclosure
cc: All national and international union affiliates

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American Federation of State, County and Municipal Employees, AFL-CIO

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December 19, 2005

Dear Senator:

On behalf of the 1.7 million members of the American Federation of State, County and Municipal Employees (AFSCME), I am writing to announce our opposition to the nomination of Judge Samuel Alito to be an Associate Justice on the U.S. Supreme Court. We have reviewed his record and determined that his views are far too extreme and out of the mainstream of judicial philosophy. His presence on the Supreme Court therefore would further divide the country and disenfranchise even more average citizens and working Americans.

We believe that working people who are already seeing their rights and protections under attack would not fare well if Judge Alito was elevated to the Supreme Court. Judge Alito has authored a number of decisions and dissenting opinions contrary to the rights of employees and individuals. Of particular concern to our members is Judge Alito's established practice of "closing the court-room door" to victims of civil rights violations by substantially increasing the burden of proof placed on plaintiffs prior to their cases ever getting to a jury of his or her peers. In evaluating plaintiffs' discrimination claims, he has also repeatedly taken a high-handed approach in dismissing the merit and weight of their evidence and has been chastised by his colleagues on the Third Circuit for doing so.

As a judge on the 3rd Circuit Court of Appeals in Philadelphia, Alito's extreme views can be seen in his rulings where he consistently limits Congress' authority to enact laws that protect the rights of workers and individuals, including the Americans with Disabilities Act (ADA) and the National Labor Relations Act. And, although the majority of his fellow judges disagreed with him, Alito set a standard so high that victims of sex discrimination would find it virtually impossible to prove their case. In one such case, Alito denied a female police officer's sexual harassment claims despite overwhelming evidence that she had indeed been victimized.

Public employees also have not been spared under Judge Alito. He wrote an opinion in a Pennsylvania case where he stated that the Family and Medical Leave Act (FMLA) did not apply to state employees. Rightfully so, the Supreme Court ruled in disagreement with Alito, upholding the family care provision of the FMLA. Several courts since then, including the very conservative Fourth Circuit Court of Appeals, have concluded that state employees should have access to the entire range or protections under the FMLA, thus rejecting Alito's earlier ruling.

Perhaps most disturbing about Judge Alito's judicial philosophy is his narrow reading of our civil rights laws, notably Title VII of the Civil Right Act of 1964, which bars various forms of discrimination in employment. Even when plaintiffs in these cases come forward with substantial evidence of Title VII violation, Judge Alito voted—often in dissent—to deny relief without even letting juries decide whether discrimination occurred. In addition, in

reviewing a plaintiff's evidence, he has on several occasions improperly assumed the role of jury or trial judge by casting judgment on the weight and merits of the evidence and the credibility of a witness' testimony.

As U.S. citizens, we are concerned on several other fronts as well. Alito consistently ruled against victims of discrimination based on a disability. His philosophy would restrict Congress' power to enact disability rights laws and few if any such cases would survive under Judge Alito. Also, he ruled to significantly reduce the ability of citizens to bring suit against polluters under the Clean Air Act.

While Alito's 15 years as a Judge raises major concerns, the time he spent as a Presidential appointee in the Reagan White House is equally disturbing. When Alito was a Justice Department lawyer in the 1980s he urged President Reagan to veto legislation that would have protected consumers from crooked car dealers by making odometer fraud more difficult. Alito wrote that protecting Americans is not the federal government's job. He said in his memo, "After all, it is the states, and not the federal government, that are charged with protecting the health, safety, and welfare of their citizens." This philosophy is extremely harmful to state employees who deserve to have federal worker protections apply to them as well.

Judge Alito clearly is a staunch advocate of the federalism movement which poses a tremendous threat to employees of state governments. State and local governments, like private sector companies and non-profit organizations, are also employers. And, as employers they should be required to adhere to the same laws and regulations that all other employers are subject to. Unfortunately, Judge Alito and the federalism movement seek to limit the power of the federal government to protect individuals who happen to be employees of state governments, in effect, making state employees second class citizens.

We strongly urge the Senate to insist that all of the relevant information about Judge Alito be released, particularly the Solicitor General and the Office of Legal Counsel memoranda. We believe that there are underlying reasons why the Administration continues to resist releasing this vital information.

Judge Alito's record is extremely troubling to AFSCME and the workers we represent. He is one of the most extreme federal judges in the whole country. If confirmed, Alito would tilt the court further to the right and place in jeopardy decades of progress protecting individual rights and freedoms.

For the forgoing reasons, AFSCME strongly urges the Senate to reject Judge Alito's nomination. President Bush should nominate an individual that does not pose such an enormous threat to the rights and freedoms of working men and women.

Sincerely,

Gerald W. McEntee

GERALD W. McENTEE
International President

AMERICANS UNITED
for Separation of Church and State

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January 10, 2006

The Honorable Arlen Specter
Chairman,
Committee on the Judiciary
United States Senate
711 Hart Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member,
Committee on the Judiciary
United States Senate
433 Russell Office Building
Washington, D.C. 20510

Dear Chairman Specter and Ranking Member Leahy:

Americans United for Separation of Church and State urges you to oppose the confirmation of Judge Samuel A. Alito, Jr. to be Associate Justice of the Supreme Court of the United States. Americans United for Separation of Church and State represents more than 75,000 individual members and 9,500 clergy nationwide, as well as cooperating houses of worship and other religious bodies committed to the preservation of religious liberty. We oppose the confirmation of Judge Alito to the Supreme Court because his record demonstrates that he would fundamentally alter First Amendment law and immediately put at risk many of the crucial protections for religious minorities that the Supreme Court has recognized and consistently enforced over the past sixty years.

Legal scholars have understood the First Amendment's religion clauses as striking a balance between the religious and political rights of individuals and groups within our society. There is a necessary tension between the Free Exercise Clause and the Establishment Clause, which serves to balance the sometimes competing interests of individuals' freedom of conscience against the requirement that the state be neutral with respect to religious viewpoints. Justice O'Connor has been successful in ensuring that public expression did not turn into government favoritism or state coercion of religious beliefs.

During his fifteen year tenure on the United States Court of Appeals for the Third Circuit, however, Judge Alito has shown himself to have a view of the First Amendment, particularly of the Establishment Clause, that differs dramatically from both Justice O'Connor's judicial philosophy and the settled understanding of fundamental Establishment Clause principles that has guided the Supreme Court's decisions for at least six decades. Indeed, early on, Judge Alito acknowledged his disagreement with the Supreme Court on its Establishment Clause jurisprudence. When applying for a position in the Reagan Administration Department of Justice, Judge Alito declared that his "deep interest in constitutional law [was] motivated in large part by disagreement with the Warren Court decisions, particularly in areas [such as] the Establishment Clause . . . ." As evidenced by his longstanding appeals court record, we remain concerned that such a motivation taints his view today.

There is much at stake for the future of religious liberty as a result of Justice O'Connor's retirement and Judge Alito's nomination to take her place on the Supreme Court. As Justice O'Connor has recognized, it is vital that our longstanding Establishment Clause protections remain in place:

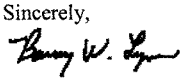
> At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly? (*McCreary County, Kentucky v. ACLU of Kentucky*, 125 S. Ct. 2722, 2746 (O'Connor, J., concurring)).

In the Establishment Clause area, replacing Justice O'Connor with Judge Alito likely would have a profound effect on the religious freedoms that our dual constitutional commitments to free exercise and separation of church and state have long ensured. Both the straightforward holdings and the underlying tenor of Judge Alito's decisions in Establishment Clause cases contrast sharply with Justice O'Connor's views. Throughout her career on the Court, Justice O'Connor has been keenly attuned to the plight of religious minorities in society as a whole, and most especially in the public schools. But Judge Alito's focus has been elsewhere: on religious majorities' ability to express their views through governmental instrumentalities, at government owned facilities, and in government-organized enterprises like the public schools. Judge Alito has given broad license to religious majorities to use the public schools and other official settings to broadcast their religious messages without regard for the competing rights and interests of religious minorities.

Because Judge Alito has not extended the same protections to all Americans that he has granted to politically powerful religious majorities, the Senate should decline to confirm his appointment as an associate justice of the U.S. Supreme Court.

If you have any questions on Americans United's position on this nomination, please contact Aaron D. Schuham, Legislative Director, at (202) 466-3234.

Sincerely,



Rev. Barry W. Lynn
Executive Director

ADAWatch

National Coalition for Disability Rights

Executive Committee Members:

Ron Bassman
National Association of Rights Protection and Advocacy

Robert Bernstein
Judge David Bazelon Center for Mental Health Law

Curt Decker
National Disability Rights Network

Janine Bertram Kemp
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January 10, 2006

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
224 Dirksen Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member, Judiciary Committee
152 Dirksen Building
Washington, DC 20510

Via Facsimile

Dear Senators Specter and Leahy:

On behalf of the ADA Watch/NCDR Board of Directors, I write to inform you of our coalition's opposition to the nomination of Judge Samuel Alito to a lifetime seat on the U.S. Supreme Court.

Following extensive research, we have concluded that Judge Alito's confirmation would put at risk the Americans with Disabilities Act (ADA), *Olmstead*, Section 504 of the Rehabilitation Act, the Fair Housing Amendments Act, the Family and Medical Leave Act (FMLA), and other laws and precedents of great importance to people with disabilities.

ADA Watch/NCDR is a nonpartisan alliance of hundreds of national, state and local disability, civil rights and social justice organizations united to protect and promote the human rights of children and adults with physical, mental, cognitive and developmental disabilities.

While not all of our members take positions on judicial nominees, dozens of our coalition partners opposed to the confirmation of Judge Alito include ADAPT, Association of Programs for Rural Independent Living, Disability Rights Education and Defense Fund, Judge David Bazelon Center for Mental Health Law, Disabled Action Committee, National Association of People with AIDS, National Association of Rights Protection and Advocacy, National Council on Independent Living, The Polio Society, World Association of Persons with Disabilities and many more.

The fact that the next Supreme Court Justice will be filling the seat of Justice Sandra Day O'Connor is of particular concern to the disability community. While Justice O'Connor did not take the side of persons with disabilities in all cases, she was the swing vote in a number of important 5-4 disability rights decisions.

With the selection of Judge Samuel Alito, President Bush is making good on his stated intention to fill a Supreme Court vacancy with a nominee in the mold of Justices Scalia or Thomas – Justices who consistently ruled against people with disabilities in these narrowly decided landmark cases. If Judge Alito is confirmed, such 5-4 decisions would certainly go in the other direction and reverse the historic gains of people with disabilities.

Our opinion is not just that of staunch disability rights advocates. In *Nathanson v. Medical College of Pennsylvania*, for instance, Alito's *fellow judges* said that the standard for proving disability-based discrimination articulated in Alito's dissent was so restrictive that "few if any cases would survive summary judgment."

Judge Alito's record is filled with cases relying on a cramped interpretation of the authority of Congress to pass legislation protecting the rights of everyday American citizens. As such, he has been an active participant in the wave of judicial activism that, from the lower courts on up to the Supreme Court, has ignored the intent of Congress and weakened protections for people with disabilities among others.

Referring to the landmark *Garrett* case which significantly weakened the ADA, Senator DeWine stated, "When the court considered the ADA in the *Garrett* case, however, it ignored the act's broad support, cast aside the legislative record and struck down a portion of the law. In such a difficult case, where the Constitution does not clearly support the majority's decision, the proper response is not to strike down the law. In such a case, the court should defer to the will of the people."

Judge Alito's record is replete with an adherence to an ideological outcome that ignores both the intent of Congress and the extensive factual record of discrimination and abuse experienced by people with disabilities in the United States. It is our conclusion that Judge Alito will not "defer to the will off the people;" will ignore the substantial legislative record underpinning the ADA; and will not provide equal justice for people with disabilities.

Judge Alito's indifference to injustices suffered by people with disabilities is graphically illustrated his 1999 dissent from an opinion reinstating the claims of an employee with developmental disabilities who was subjected to repeated cruel assaults. The man's coworkers forcibly sodomized him with a broom, stuffed him into a garbage can, beat him, and made humiliating comments about his mental disability. Shockingly, Judge Alito would have dismissed the man's claims simply because he did not use the right language in his brief. (1999 WL 1065214 [E.D. Pa. Nov. 23, 1999]).

We call your attention to numerous cases where Judge Alito has disregarded the claims of Americans with disabilities in favor of ideology and powerful special interests including: *Chittister v. Department of Community & Economic Development, Nevada Department of Human Resources v. Hibbs, Helen L. v. DiDario, Sabree v. Houstoun, ADAPT v. United States Dep't of Housing & Urban Development, Doe v. National Board of Medical Examiners, Three Rivers Center for Independent Living v. Housing Authority of Pittsburgh, Katekovich v. Team Rent A Car of Pittsburgh, Inc.* and more.

The Americans with Disabilities Act (ADA) was passed with broad bipartisan support and signed into law by Republican President George H.W. Bush in 1990. Fifteen years after this historic event, people with disabilities find little to celebrate as this landmark civil rights legislation is being decimated in the courts. On behalf of the many millions of Americans citizens with disabilities, we ask that you vote against confirmation of Judge Alito to a lifetime seat on the Supreme Court and call for a nominee who will uphold our civil rights – and those of all Americans.

Respectfully,

Jim Ward
President, ADA Watch/NCDR



ADVANCING EQUALITY

January 10, 2006

The Honorable Arlen Specter, Chairman
The Honorable Patrick J. Leahy, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy:

On behalf of the Asian American Justice Center (formerly National Asian Pacific American Legal Consortium), a national civil rights organization dedicated to advancing and defending the civil rights of Asian Americans, we are writing to express our concern opposition to the nomination of Judge Samuel Alito to be Associate Justice of the Supreme Court of the United States. Judge Alito's record demonstrates hostility and poses grave risks to constitutional and legal rights and protections that are core to the advancement of the communities we represent.

Supreme Court decisions continue to have an immense impact on the lives of Asian Americans, ranging from *Gong Lum v. Rice* (1927), an unsuccessful challenge to school segregation that would later be overturned by *Brown v Board of Education* in 1954, to *United States v. Korematsu* (1944), where the Court upheld the internment of Japanese Americans. Often, cases where the rights and liberties of minorities are at question are decided by a very narrow 5-4 margin. Based upon materials produced by Judge Alito as well as his judicial record, we believe that he would fail to demonstrate a clear understanding of key issues important to the civil rights communities.

In 1986 Alito wrote a letter in his capacity as Deputy Assistant Attorney General to former FBI Director William Webster in which he suggested that "illegal aliens have no claim to nondiscrimination with respect to nonfundamental rights," and that the Constitution "grants only fundamental rights to illegal aliens within the United States." Alito makes no mention of *Plyer v Doe* in this letter, which ruled that a state could not discriminate against undocumented children in public education, even though education is not considered a fundamental constitutional right. This raises questions about whether he would adequately protect undocumented immigrants from unconstitutional forms of discrimination.

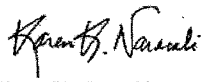
Judge Alito's opinions in cases involving racial discrimination and voting rights lead us to believe that he will fail to champion civil rights in a manner that would ensure that all communities will be full participants in the rights and liberties that our constitution promises. For example, in *Bray v. Marriot Hotels*, a racial discrimination case, the majority concluded that Alito's dissenting view would protect employers from suit even where the employer's belief that it had selected the best candidate "was the result of a conscious racial bias." As the majority pointed out, "Title VII would be eviscerated if out analysis were to halt where the dissent suggest." In his 1985 application to the

Department of Justice's Office if Legal Counsel, Judge Alito raised opposition to the Supreme Court decisions that first articulated the fundamental civil rights principle of "one person, one vote." Those decisions later paved the way for major strides in the effort to secure equal voting rights for all Americans and greater representation of racial and ethnic minorities at all levels of government.

Of great concern to us is Judge Alito's record on immigration law. In asylum cases, it appears that Judge Alito has a tendency to rule against individuals who are seeking protection in the United States, even where evidence show that they have been or would have been persecuted in their own countries. In *Chang v. INS*, Judge Alito disagreed with the court's decision to grant asylum despite the fact that Chang had presented evidence that his wife and son already faced persecution and he was threatened with prison if he returned to China. In *Dia v. Ashcroft*, Judge Alito dissented from a majority opinion granting asylum to an immigrant from the Republic of Guinea whose house was burned down and wife raped in retaliation for his opposition to the government.

For the above reasons, we must oppose his confirmation as Associate Justice. We appreciate your consideration of our views. If you have any questions, please feel free to contact AAJC Deputy Director Vincent A. Eng at (202) 296-2300, x121 or AAJC Director of Programs Aimee J. Baldillo at (202) 296-2300, x 112. We look forward to working with you.

Sincerely,



Karen K. Narasaki
President and Executive Director

A Communication from the Chief Legal Officers
Of the Following States:

Alabama ♦ Alaska ♦ Colorado ♦ Florida ♦ Hawaii ♦ Idaho ♦ Indiana ♦ Kansas
Michigan ♦ Nebraska ♦ Nevada ♦ North Dakota ♦ Ohio ♦ Pennsylvania
South Carolina ♦ Texas ♦ South Dakota ♦ Utah ♦ Virginia ♦ Washington

January 6, 2006

The Honorable Bill Frist
Majority Leader
United States Senate
509 Hart Senate Office Building
Washington, DC 20510

The Honorable Harry Reid
Minority Leader
United States Senate
528 Hart Senate Office Building
Washington, DC 20510

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
711 Hart Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Re: Judicial Confirmation of Judge Samuel A. Alito, Jr., to the Supreme Court of the United States.

Dear Majority Leader Frist, Minority Leader Reid, Chairman Specter, and Ranking Member Leahy:

We, the undersigned Attorneys General of our respective states, are writing in support of the confirmation of Judge Samuel A. Alito, Jr., to serve as an Associate Justice on the Supreme Court of the United States

We are confident that Judge Alito will bring to the Court not only years of legal experience and judicial temperament, but also modesty and great personal character.

We reflect diverse views and constituencies and are united in our belief that Judge Alito will be an outstanding Supreme Court Justice and should be confirmed by the United States Senate.

As the Senate prepares for the confirmation process of Judge Alito, it is important to look beyond partisan politics and ideology and focus on the judicial experience of this extremely well qualified nominee. Judge Alito has served the United States as an Assistant to the Solicitor General, as a United States Attorney, and for the past 15 years, as a Judge on the Third Circuit Court of Appeals.

Judge Alito's record on the Third Circuit Court of Appeals demonstrates judicial restraint. He has proven that he seeks to apply the law and does not legislate from the bench. Judge Alito's judgments while on the bench have relied on legal precedent and current law, and he has a long-standing reputation for being both tough and fair. In short, Judge Alito represents the best of the federal bench and we believe he will be an excellent Supreme Court Justice.

We urge the Senate to hold an up or down vote and confirm Judge Alito.

Sincerely,

John W. Suthers
Attorney General of Colorado

Tom Corbett
Attorney General of Pennsylvania

Troy King
Attorney General of Alabama

David W. Márquez
Attorney General of Alaska

Charlie Crist
Attorney General of Florida

Mark J. Bennett
Attorney General of Hawaii

Lawrence Wasden
Attorney General of Idaho

Stephen Carter
Attorney General of Indiana

Phill Kline
Attorney General of Kansas

Michael A. Cox
Attorney General of Michigan

Jon Bruning
Attorney General of Nebraska

George Chanos
Attorney General of Nevada

Wayne Stenehjem
Attorney General of North Dakota

Jim Petro
Attorney General of Ohio

Henry McMaster
Attorney General of South Carolina

Greg Abbott
Attorney General of Texas

Lawrence Long
Attorney General of South Dakota

Mark Shurtleff
Attorney General of Utah

Judith Williams Jagdmann
Attorney General of Virginia

Rob McKenna
Attorney General of Washington

Statement of Edna Ball Axelrod, Esq.,
South Orange, New Jersey

Hearing on the Nomination of Samuel A. Alito, Jr.

Mr. Chairman and Members of the Committee. I appreciate the opportunity to appear here today to testify in support of the nomination of Judge Samuel Alito. I am a former Chief of the Appeals Division at the U.S. Attorney's Office for the District of New Jersey, and for the past eleven 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 that he served as U.S. Attorney for the District of New Jersey.

I first met Judge Alito when I joined the U.S. 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 General's Office, he returned in 1987 as United States

Attorney. Shortly after his arrival, he began selecting the supervisory staff who would assist him during his tenure, and after reviewing my work in the Appeals Division, he asked me to serve as Chief of Appeals. This was particularly meaningful to me for two reasons. First, Judge Alito's estimable reputation as an appellate and Supreme Court advocate had preceded him, and the importance that he placed upon the appellate process was well-known. Second, in 1987, it was still unusual for women to be elevated to positions of authority in either government or private offices, and I was gratified to see that Judge Alito's appointments were based on merit, not gender.

As a member of the supervisory staff, I met frequently with Judge Alito, sometimes alone but usually with other division chiefs, to discuss ongoing significant criminal prosecutions, appeals and investigative initiatives. During these meetings he openly invited the thoughts and input of everyone, asking subtle questions to guide the discussion to areas where he had concerns. Although it was clear that in the end he would make up his own mind, it was equally clear that there was no danger in advocating a position that he might ultimately reject. His goal was to get as much information as possible so that his decisions could be firmly grounded in a comprehensive understanding of the law and the facts.

Consistent with this approach, his stewardship of the office was grounded in a quiet confidence; his decisions and actions were measured and thoughtful – never impulsive or purely reactive. Although it is possible for U.S. Attorneys to use their offices as showcases for themselves and their further aspirations, to enjoy and employ the limelight, this was never Judge Alito's way. It was always the work, not the image, that came first.

It is a well-known motto of federal prosecutors – one most often heard on those occasions when they suffer a defeat – that "the United States wins when justice is done." Under the leadership of Judge Alito, that was more than a catch-phrase - it was the office policy. Judge Alito expected the Assistants in his office to work hard to achieve and preserve convictions where the evidence supported guilt, but he also demanded that they remain ever mindful of the very great power they wielded as federal prosecutors and the need to use that power with appropriate discretion. Based on my experience in that office, I am confident that Judge Alito would approach the power of being on the Supreme Court with an equal if not heightened sense of responsibility and care.

As I noted earlier, I am presently a criminal defense attorney, and I am also a life-long Democrat. As such, I might be expected to have concerns about Judge Alito's nomination because of his admittedly more

conservative political views. However, in supporting his nomination, I am actually representative of a large number of former colleagues of Judge Alito of all political stripes who support his nomination because they know first-hand what kind of man he is. Those of us who know him know that he is not an ideologue and that he does not use his position to pursue personal agendas. We have seen his profound respect for the law and precedent, and his unfailingly respect for all participants in the criminal justice system, prosecutor, defense counsel and defendant alike. We know him to be a man of unquestionable ability and integrity, one who has approaches each case in an open-minded way, seeking to apply the law fairly.

The appointment of Sandra Day O'Connor to the Supreme Court in 1981 was an event of special importance to me. At the time I thought that the most significant fact was that she was the first woman on the Court – and of course, that was truly ground-breaking. But in time I have come to appreciate that, more than her gender, it is her extraordinary mixture of character and intellect that has most profited our country. As a person of both great character and great intellect, Samuel Alito would be a worthy successor to Justice O'Connor. I hope that he will be speedily confirmed.



THE BAR ASSOCIATION OF SAN FRANCISCO

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Martha Z. Whetstone

January 10, 2006

Senator Diane Feinstein
United States Senate
331 Hart Senate Office Bldg.
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Senator Barbara Boxer
United States Senate
112 Hart Senate Office Bldg.
Washington, DC 20510

Senator Arlen Specter
United States Senate
711 Hart Senate Office Bldg.
Washington, DC 20510

Senator Patrick Leahy
United States Senate
433 Russell Senate Office Bldg.
Washington, DC 20510

Dear Senators,

The Bar Association of San Francisco (BASF) is one of the largest and most recognized metropolitan bar associations in the United States. Consistent with its By-Laws, BASF historically has addressed issues of legal and social significance to its membership. The appointment of a Supreme Court Justice to replace Justice Sandra Day O'Connor has substantial potential to alter the course of jurisprudence in the United States on issues of great significance to members of the BASF. Accordingly, the Board of BASF has commissioned a careful review of the writings and public statements of the person that the President has nominated to fill this crucial position on the Court. BASF has endeavored to assess whether Judge Samuel Alito possesses the qualities necessary to provide assurance to members of this Association that he will interpret the Constitution and other acts of Congress in a manner that is faithful to and consistent with core values contained in the Constitution.

Judge Alito has served on the Court of Appeals for the Third Circuit for fifteen years, during which time he has issued a substantial number of opinions regarding issues of Constitutional law and national significance. Judge Alito has demonstrated strong legal ability, extensive experience and knowledge in law, as well as substantial intellectual and analytical skills. All of these are important factors in assessing the merits of a candidate for the United States Supreme Court. In addition to these factors, however, it is particularly important when evaluating a nominee for the Supreme Court to consider whether the nominee satisfies standards unique to the position of being the final arbiter of the meaning of the Constitution with ultimate authority to refuse to effectuate acts of Congress. These factors include an understanding of the Court's role under the Constitution to protect the personal rights of individuals and a respect for and sensitivity to the respective powers and reciprocal responsibilities of the Congress, the Court, and the Executive, federal-state relations, and limits on governmental power.

[illegible]



In both his public statements and his opinions on the Third Circuit, Judge Alito has taken positions that are contrary to the long-established tenets of Constitutional interpretation adopted by BASF. Several of these differences involve core values - fundamental understandings about the rights and responsibilities of citizens and the powers and obligations of government. Because decisions of the Supreme Court are not reviewable and - once final - will determine the course of interpretation for all lower federal courts and state courts interpreting federal law, BASF believes it is important that any Justice serving on the Court respect certain basic principles of constitutional law and interpretation established in prior decisions of the Court. If Judge Alito continued to adopt the same contrary approaches and positions as a member of the Supreme Court, his vote would likely tip the balance away from the decisions of prior courts in a manner that would limit individual rights and expand Executive powers. Such decisions would be incompatible with existing precedents and, by degrees, may deviate from faithful application of core tenets of the Constitution recognized by this Association. Accordingly, to the extent Judge Alito's views run contrary to those expressed by this Bar Association, it is important to determine whether he has nonetheless demonstrated respect for certain core doctrines and has an open mind in his approach to these issues.

BASF is principally concerned about Judge Alito's position concerning the following areas:

1. Reproductive Freedom and Privacy: Judge Alito's dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, his comment in concurrence in *Alexander v. Whitman*, and the strong opinions expressed in his 1985 Justice Department job application, indicate that he does not agree with the fundamental holding in *Roe v. Wade* that the Constitution guarantees to individuals the right to reproductive privacy which includes the qualified right to terminate a pregnancy. His opinions indicate that he would likely vote to overrule this core principle of *Roe v. Wade*, or would otherwise support substantial burdens on a woman's' right to choose. Such a position would be incompatible with the fundamental obligation to adhere to precedent and to faithfully respect and protect individual rights embodied in the Constitution. His approach to *Roe v. Wade* is inconsistent with the positions taken by Justice O'Connor and would thus potentially alter the outcome of Court decisions. It is also inconsistent with prior resolutions of BASF.

2. Civil Rights and Discrimination: In decisions such as *Sheridan v. E.I. Dupont*, *Bray v. Marriott Hotels*, and *Nathanson v. Medical College of Pennsylvania*, among others, Judge Alito urged a very narrow reading of civil rights laws, notably Title VII of the Civil Rights Act of 1964, particularly with respect to claims based on race, gender, age and disability. He has also demonstrated a lack of sympathy to individuals alleging race discrimination in jury selection in such decisions as *Ramseur v. Beyer* and *Riley v. Taylor*. Based on these decisions, it appears that Judge Alito would permit federal civil rights legislation and current interpretations of the Constitution's guarantee of equal protection to be compromised, potentially allowing unchecked prejudice and discrimination to limit the opportunity of Americans. Although Justice O'Connor's decisions in the area of civil rights and discrimination varied at times from those principles articulated by BASF, her opinions reflected both a cautious sensitivity to the grave risks of discrimination and fell within the range of reasonable debate on these issues. Judge Alito's views by contrast fall outside of that range.

3. Separation of Church and State: In cases such as *A.C.L.U. (N.J) v. Black Horse Pike Regional Board of Education*, *Child Evangelism Fellowship v. Stafford Township School District*, *A.C.L.U. (N.J) v. Township of Wall*, Judge Alito has consistently ruled that various public displays of and public support for religious activities do not offend the Establishment Clause and he has supported claims of groups or individuals (excepting prisoners) that their right to the free exercise of religion has been improperly limited. BASF notes with concern the contrast between Judge Alito's solicitude to plaintiffs' claiming

to engage government resources in defense of their private religious activities and his approach toward parties seeking to engage government resources to protect them from bias on the basis of race, gender, and age or disability discrimination. Judge Alito appears unduly inclined to allow government entanglement in issues of religion well beyond that countenanced by the First Amendment or the Supreme Court's Lemon test. This position is in marked contrast to that of Justice O'Connor and to BASF's commitments to First Amendment principles. It would appear that Judge Alito's decision would have the capacity to tip the balance away from a strict separation of church and state.

4. Civil Liberties: In his rulings, Judge Alito has been conspicuously deferential to law enforcement and has ruled consistently against those alleging that law enforcement officials exceeded or abused their power. In the relatively few instances where he has found that constitutional violations occurred, he has routinely denied any relief for those constitutional violations (e.g., *United States v. Zimmerman*, *Brosius v. Warden*; *Baker v. Monroe Township*; *Doe v. Groody*). BASF has long been concerned with the protection of individual freedom and civil liberties, and the decisions of Judge Alito are overall not consistent with a commitment to protection of individuals against government excesses.

5. Limitations on Congressional Power: Judge Alito's decisions in *United States v. Rybar* and *Chittister v. Dept. of Community and Economic Development*, have been noted as reflecting insights into Judge Alito's approach to issues of restricting Congress' power. In both of these cases, Judge Alito took a very narrow view of Congressional power under the Commerce Clause and voted to overturn Congressional enactments which he believed were in excess of its power. Rybar involved a ban against possession or transfer of machine guns, and Chittister involved an Eleventh Amendment challenge to the application of the Family and Medical Leave Act to state employees. BASF has supported strongly the right of the federal government to enact laws consistent with its Commerce Clause power and to protect public safety from dangerous weapons. Judge Alito's views in Rybar were inconsistent with the range of reasoned debate about the scope of the Commerce Clause power and were rejected by numerous jurists, including Justice O'Connor. Likewise, Judge Alito's position regarding sovereign immunity was outside the range of views regarding the limited scope of that Amendment. As such, his decision is incompatible with core Constitutional principles requiring deference to the legitimate authority of the Congress, which has long been recognized by the courts as well as BASF.

In analyzing these particular areas, BASF notes that this appears to be consistent with a broader pattern of doctrinal interpretation. Judge Alito has also often voted in ways that would result in limiting citizens' access to the courts and which substantially restrict due process to individuals claiming a violation of their rights. In particular, Judge Alito has been consistently unsympathetic to defendants' rights in capital appeals, often dissenting from opinions by conservative jurists. Judge Alito's public statements are also consistent with this judicial record. For example, he is on record in a job application stating that he believed *Roe v. Wade* should be overruled. Based upon the consistency of his positions in a range of contexts over two decades, it appears reasonable to conclude that Judge Alito would bring this same approach as a member of the Supreme Court.

The membership of The Bar Association of San Francisco reflects a range of views, including some that vary from adopted positions on the foregoing issues, and thus in reviewing the record of a particular candidate some allowance must be made for a range of debate about the scope of certain core rights. Judge Alito's apparent rejection of the core right of reproductive privacy falls outside of that range. Likewise, with respect to his positions on other topics identified as vital by the Bar Association, his views generally fall outside the range of debate that is consistent with the fundamental constitutional tenet. It is notable that Judge Alito has frequently stood alone, even among conservative jurists in defending his positions. As noted, in *United States v. Rybar*, Judge Alito dissented from the majori-

ty holding that Congress had the power to regulate machine guns. Judge Alito purported to be following Supreme Court precedent. However, in addition to the majority in Rybar, eight of nine other Circuits disagreed with Judge Alito, seven of them unanimously. The only decision agreeing with his dissent was vacated by the Supreme Court. Perhaps more significantly, the majority in Rybar was critical not only of Judge Alito's conclusion, but also of his underlying analysis of the Commerce Clause in reaching that conclusion.

Similarly, in *Sheridan v. E.I. Dupont*, Judge Alito was the only judge who dissented from an en banc decision reversing a grant of summary judgment against a sex discrimination claimant. The ten judges who joined the majority opinion pointed out that their holding was supported by three Third Circuit precedents and seven other Circuits' interpretations of the Supreme Court's approach on the issue. In two other discrimination cases, **Bray v. Marriott Hotels** and *Nathanson v. Medical College of Pennsylvania*, Judge Alito dissented on grounds that were sharply criticized by the majority. In Bray, Judge Alito's view of Title VII was characterized as "tightly constricted" and in Nathanson the majority asserted that few disability cases would survive summary judgment if Judge Alito's analysis were applied. In both cases, the majority also criticized Judge Alito for overstepping his appellate role and acting as a fact finder.

In *Baker v. Monroe Township*, and *Doe v. Groody*, claims involving Fourth Amendment violations and allegations of abuse of police power, Judge Alito dissented, contending in Baker that the police were justified in strip searching a woman and her ten year old daughter who happened to be visiting premises that were being searched under a warrant, even though the warrant did not authorize such a search. Judge Alito's dissent caused his then-colleague on the Third Circuit, and now-Director of Homeland Security, Hon. Michael Chertoff, to characterize the effect of Judge Alito's approach as one that would "transform the judicial officer into little more than a cliché 'rubber stamp.'"

Finally, we note with concern that Judge Alito's ideology appears to affect his judgment about the scope of appellate review. With respect to interpretation of facts, a review of Judge Alito's dissenting opinions is instructive, particularly because dissenting opinions often indicate the types of issues and matters upon which a judge has sufficiently strong feelings to formally explain why he or she parts company with judicial colleagues. In these instances, the Bar Association observed several analytical concerns. These include adopting a questionable and inconsistent allocation of the burden of proof in scrutinizing the basis for governmental action. For example, in both Rybar and Chittister, Judge Alito was unwilling to accept Congressional determinations to uphold legislation. In Rybar, Judge Alito placed great weight on the fact that Congress had failed to provide "empirical support" for its determination that interstate commerce was affected, and had instead relied upon theoretical connections. This approach was criticized by the Rybar majority for violating the separation of powers, and requiring Congress to "play show and tell with the federal courts."

In contrast, where the Pennsylvania legislature passed restrictions on a woman's right to obtain an abortion, including the requirement that a married women secure her husband's consent, Alito's dissent required no empirical support. Rather, Judge Alito offered his own perspectives regarding the likely burden on the recognized constitutional right, and offered reasons for the legislature's determination that had no nexus to the legislative record. Likewise, in *Banks v. Beard* Judge Alito dissented and would have upheld a prison regulation denying prisoners newspapers and photographs of their family even in the absence of any empirical support. Although the majority correctly observed that the Department of Corrections had offered no evidence that the rule was rationally related to any rehabilitative purpose, Judge Alito would have upheld it based upon deference to the judgment of prison officials acting without any supporting evidence.

A careful review of Judge Alito's opinions reveals numerous other instances in which Judge Alito has raised factual issues or strict technical interpretations in a manner that reduces access to procedure by individuals seeking to



vindicate individual rights except in the context of promoting religious expression. For example, in *A.C.L.U. (NJ) v. Wall*, Judge Alito issued an opinion rejecting the standing of citizens to challenge a religious display on public property where, based on prior precedent in a virtually identical case, it was evident that the challenge would have been meritorious. By contrast, in cases involving claims by religious advocates, Judge Alito has parted company with the vast majority of his Court in objecting to technical or factual principles that prevented the Court from reaching the merits. Thus, in *C.H. v. Oliva*, Judge Alito accused the nine-judge majority of wrongly avoiding the issue of whether the movement of a first-grader's picture to a less prominent area of an exhibit was motivated by discrimination against the picture's religious theme.

Finally, the perception that Judge Alito's consideration of the merits of a case may be affected by ideological judgments is presented squarely in his decision in *Smith v. Horn*. There, the majority (two former prosecutors appointed to the bench by President Reagan) had invalidated a first-degree murder conviction based on erroneous and misleading instructions. In dissent, Judge Alito characterized the majority decision as "shocking" and "dangerous." He argued not only that the instruction was not necessarily misleading, but also further that the Court should not have reached the issue because the defendant had, in Judge Alito's view, defaulted any claim by not previously objecting to the instructions in state proceedings. A review of the record demonstrated that the state itself had not raised this issue either previously to, or in front of, the Third Circuit. Rather, Judge Alito had apparently reviewed the record himself and discovered violations of state procedural rules that were not sufficiently important to be raised as concerns by the state itself. As the majority observed:

> "...where the state has never raised the issue at all in any court, raising the issue sua sponte puts us in the untenable position of ferreting out defenses upon which the state has never sought to rely. When we do so, we come dangerously close to acting as advocates of the state rather than impartial magistrates."

Based on the foregoing considerations, BASF believes that a review of Judge Alito's opinions in areas of Constitutional law reveals that his approach is in opposition to important principles recognized by the membership of the BASF. Judge Alito's approach to resolving issues in these areas is of particular concern given that Judge Alito would be replacing a Justice who has provided a critical fifth vote protecting key precedents underlying these principles. In light of the consistency of his positions on these issues implicating individual rights, the power of Congress, and the separation of church and state, and his apparent reliance on factual or interpretive standards that support achievement of these positions, BASF is not able to conclude that he has demonstrated that he will interpret the Constitution and other acts of Congress in a manner that is faithful to and consistent with core values contained in the Constitution..

For the foregoing reasons, The Bar Association of San Francisco opposes the confirmation of Judge Samuel Alito to serve as an Associate Justice of the United States Supreme Court pursuant to section 4.13 (a) of the By-Laws of The Bar Association of San Francisco. The position taken in this resolution is that of the Board. Twenty-three (23) directors voted in favor of the resolution. Two (2) opposed and one (1) abstained, with two non-votes.

Very truly yours,

Joan Mei Haratani

Joan Haratani
President, The Bar Association of San Francisco



January 9, 2006

Via Facsimile

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
224 Dirksen Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Judiciary Committee
152 Dirksen Building
Washington, D.C. 20510

Dear Senators Specter and Leahy:

I write as the Executive Director of the Judge David L. Bazelon Center for Mental Health Law to express the Center's opposition to the nomination of Samuel Alito to the United States Supreme Court. The Bazelon Center is a national nonprofit organization that advocates for the rights of individuals with mental disabilities through litigation, policy advocacy, education and training.

The positions taken by Judge Alito during his long tenure as a federal appeals court judge indicate that, if Judge Alito is confirmed, many needed protections for people with disabilities will likely be eliminated. It is clear to us that, were he to replace Justice O'Connor, we would see a significant retrenchment in the Supreme Court's protection of the rights of people with disabilities. Thus, we are compelled to oppose his nomination.

Congress's Power to Pass the ADA

Judge Alito's opinions demonstrate his belief that Congress has very limited authority to pass civil rights laws using either the Commerce Clause or the Fourteenth Amendment. Congress relied on these two powers in passing the ADA, and Judge Alito's cramped reading of these powers strongly suggests that he would find many important parts of the ADA to be beyond Congress's power and thus completely invalid.

Judge Alito's dissent in *U.S. v. Rybar*[1] embraced a view of Congress's power to regulate interstate commerce so restrictive that it would strip Congress of the power to enact many of the important protections contained in the ADA and other disability rights laws. It would leave Congress powerless to require accommodations to enable people with disabilities to enter public buildings and to prohibit the warehousing of people with disabilities in institutions when they are capable of living in the community, as long as the discrimination did not involve the crossing of state lines. Indeed, the Supreme Court squarely rejected this restrictive reading in its *Gonzales v. Raich*[2] decision.

Judge Alito also has an extremely restrictive view of Congress's power to legislate under

[1] 103 F.3d 273 (3d Cir. 1996).

[2] 125 S.Ct. 2195 (2005).

HIV if the discrimination is based on the person's real or perceived ability to transmit the disease to others. Alito staunchly defended the views expressed in the memo in the face of criticism.

These positions are merely a few highlights of a long record that indicates a willingness to roll back the rights of people with disabilities.[8] Judge Alito's cramped readings of Congress's power to protect people with disabilities, and of the laws that Congress has enacted, convince us that he would vote to eliminate many critical protections. These decisions have a very real impact on the everyday lives of many people with disabilities. We hope that you will not confirm a Supreme Court Justice who will roll back the rights that people with disabilities worked hard to obtain.

Very truly yours,

Robert Bernstein
Executive Director
Bazelon Center for Mental Health Law

[8] Additional concerns about Judge Alito's record are discussed on our website, www.bazelon.org.

STATEMENT OF JUDGE EDWARD R. BECKER TO THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY JANUARY 12, 2006

Sam Alito became my colleague when he joined our Court in 1990. Since that time we have sat on over a thousand cases together, and I have therefore come to know him well as a judge and as a human being. Many do not fully understand the intensity of the intellectual and personal relationship among appellate judges. We sit together in panels of three and, in the course of deciding and writing up cases, engage in the most rigorous dialogue with each other. The great violinist Isaac Stern, describing an afternoon of chamber music, once opined that, after such a session, one knows his fellow quartet members better than a man knows his wife after 30 years of marriage. This analogy, hyperbole aside, vividly describes the intense relationship among appellate judges. I therefore believe myself to be a good judge of the four matters that, I think, are the central focus of the Committee as it decides whether to consent to this nomination: Sam Alito's temperament; his integrity; his intellect; and his approach to the law. My time is brief and I will cover each point succinctly.

First: Temperament. Sam Alito is a wonderful human being. He is gentle, considerate, unfailingly polite, decent, kind, patient, and generous. He is modest and self-effacing. He shuns praise. When he had completed his tenth year of service on our Court Sam declined my offer, extended as Chief Judge, to arrange the usual party to observe ten-year anniversaries. Sam was uncomfortable at the prospect of encomiums to his service. Sam has never succumbed to the lure of big city lights. He has a sense of place, which, for him, is not nearby New York City but New Jersey, which has always been home. Finally, there is an aspect of appellate judging that no one gets to see but the judges themselves – how they behave in conference after oral argument, at

which point the case is decided. In hundreds of conferences, I have never once heard Sam raise his voice, express anger or sarcasm, or try to proselytize. Rather he expresses his views in measured and temperate tones.

Second: Integrity. Sam Alito is the soul of honor. I have never seen a chink in the armor of his integrity, which I view as total. That opinion is not undermined by the furor over the Vanguard issue, by which I remain baffled. My wife holds Vanguard mutual fund shares, which I report on my Financial Disclosure Form. However, I do not identify Vanguard on my recusal list because I am satisfied that my wife possesses no ownership in Vanguard, or more specifically in the Vanguard Management Company, which is what is germane to the recusal determination. She has never received a proxy statement, an opportunity to vote for directors, or any indicia of ownership other than her aliquot share in the fund to the extent of her investment. I believe that Judge Alito was not required to recuse himself in a suit against Vanguard (in which he had no imaginable interest).

That view is corroborated by the learned opinion of Dean Rotunda, which is, I understand, a part of the record..

Third: Intellect. Sam Alito's intellect is of a very high order. He is brilliant. He is highly analytical, and meticulous and careful in his comments and his written work. He is a wonderful partner in dialogue. He will think of things that his colleagues have missed. He is not doctrinaire, but rather is open to differing views and will often change his mind in light of the views of a colleague. Contrary to some reports, Sam does not dissent often. According to our Court statistics, in the last six years he has dissented only sixteen times, or in a little over two cases per year, fewer times than a number of his colleagues. I am a devotee of the Supreme

Court. I have known almost all of its present and recent members extremely well, and am therefore familiar with their enormous intellects. I believe that Sam Alito measures up to them and that, if confirmed, he will be a strong and independent Justice – his "own man" as it were. Finally, Sam's intellect is not abstract but practical. He does not mistake the obscure for the profound.

Fourth: Approach to the Law. As I address this topic I am acutely aware of the deep concern of members of the Committee about this subject. I am also aware that my role here is to testify more to fact than opinion, and hence I will not express either normative or predictive judgments. The Sam Alito that I have sat with for fifteen years is not an ideologue. He is not a movement person. He is a real judge, deciding each case on the facts and the law, not on his personal views whatever they may be. He scrupulously adheres to precedent. I have never seem Sam exhibit bias against any class of litigation or litigants. He was a career prosecutor, but in numerous criminal cases on which we have sat together, if the evidence was insufficient or the search was flawed, he would vote to overturn the conviction. And if the record did not support summary judgment against the plaintiff in an employment discrimination or civil rights case, he would vote to reverse. In their words, Sam's credo is fairness – what is fair.

Sam is said to have certain ideological views, expressed in some twenty-year-old memos. Whatever these views may have been, his judging does not reflect them. The public does not understand what happens when you become a judge. When you take the judicial oath, you become a different person. You decide cases not to reach the result you would like, but based on what the facts and law command. Moreover, what you decide as a judge are not general principles, but the case in front of you. You do it as narrowly as possible – that's what Sam Alito

does, always with great respect for precedent. Sam is faithful to his judicial oath.

Why then, you ask, don't we all decide cases the same way, since we are looking at the same record and the same precedent? There are several answers. First, we are all human beings. Even husbands and wives will look at the same data and see things differently. Second, if I may explode what has become the conventional wisdom, judges do make law – that's what we have been doing in our Anglo-American legal system for hundreds of years. The facts do not always fit existing precedent, and the judge has to apply the precedent to new facts and thereby make new law. Different human beings will do this differently.

So much for background; what of Sam Alito? The best calipers that I could find to measure Sam's approach to the law was to compare it with my own. I have been a federal judge for over thirty-five years. My opinions would fill many bookshelves, but I think that I am fairly viewed as a mainstream or centrist judge. A computer survey run by our Court librarian retrieved 1,050 opinions in cases on which Sam Alito and I have sat together. In these cases we disagreed 27 times, which is probably about the same number of times that I would have disagreed with most other colleagues. Some cases turned on our reading of the record, others on how rigorously or flexibly we interpreted the reach of a statutory or constitutional provision or a state court's jurisprudence or applied our usually deferential standard of review. But in every case on which we differed, Sam's position was closely reasoned and supportable, either by the record or his interpretation of the law, or both. Sam and I saw some cases differently, but we saw over 97% of them the same. To me, this rough survey debunks the notion that Sam Alito is a doctrinaire or ideological judge.

The short of it, members of the Committee, is that Sam Alito is a superb judge in terms of

temperament, integrity and intellect. And he has exhibited a careful, temperate, case-by-case approach to the law.

I thank you for this opportunity to address you.

B'NAI B'RITH INTERNATIONAL

January 6, 2006

The Honorable Patrick Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

On behalf of B'nai B'rith International and our more than 110,000 members and supporters, we write to ask that the confirmation hearings of Judge Samuel Alito deeply probe the nominee's judicial philosophy with regard to issues of great concern to our organization. Founded in 1843, B'nai B'rith is America's pioneer Jewish agency, with a wide range of domestic and international public policy priorities. Included in our agenda are several issues that we would like to ask the Judiciary Committee to raise with Judge Alito:

1) **Church-State Relations.** We hope the Committee will ask Judge Alito which judicial test should be applied to determine whether a particular government action violates the First Amendment's Establishment Clause. It might be helpful to ask if the nominee feels it is permissible for public school officials to lead students in prayer or scriptural readings, or whether he believes that public funds and public property may be used for religious displays. We also would be interested to learn whether Judge Alito believes that a statute or ordinance requiring schools to give "equal time" to instruction in creationism or intelligent design would violate constitutional principles.

2) **Asylum.** B'nai B'rith hopes the Committee will ask the nominee what standard should be applied to asylum claims by individuals facing persecution in their homelands. We would be interested to know what threshold of harm, or risk of harm, a person fleeing a repressive society must demonstrate before receiving asylum in the United States.

3) **Workplace Discrimination.** B'nai B'rith would like to hear Judge Alito's views on the standard that should be applied to cases of age, disability, or sexual discrimination in the workplace. It would be useful to know the nominee's position on the burden of proof an older worker must meet to demonstrate that he or she has been passed over for promotion, denied accommodation, or unfairly rejected as a job applicant because of his or her age or disability.

Thank you for your attention and consideration. B'nai B'rith looks forward to remaining in communication with you about this and other matters of mutual interest in the months to come.

Respectfully,

Joel S. Kaplan
President

Daniel S. Mariaschin
Executive Vice President

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SCHUMER QUESTIONS NOMINEE'S THEORY ON EXECUTIVE ROLE The Boston Globe January 10, 2006 Tuesday

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HEADLINE: SCHUMER QUESTIONS NOMINEE'S THEORY ON EXECUTIVE ROLE

BYLINE: BY CHARLIE SAVAGE, GLOBE STAFF

BODY:

WASHINGTON Senator Charles E. Schumer yesterday signaled that he will grill the Supreme Court nominee, Samuel A. Alito Jr., over the next few days about the judge's endorsement of the "unitary executive theory," an expansive view of presidential power that calls for greater White House control of government operations and a reduced role for Congress.

"That's a marginal theory at best, and yet it's one that you've said you believe," said Schumer, a New York Democrat, during his opening statement at Alito's hearing before the Senate Judiciary Committee.

"This is not an abstract debate," Schumer said. "The Bush administration has repeatedly cited this theory to justify its most controversial policies in the war on terrorism."

Schumer added, "Under this theory, the Bush administration has claimed the right to seize American citizens in the United States and imprison them indefinitely without a charge.

"They've claimed this right to engage in torture, even though American law makes torture a crime.

"What was the rationale?" Schumer added. "The unitary executive theory, which you've spoken of."

Adherents of the theory say that the Constitution prevents Congress from passing a law restricting the president's power over executive branch operations. And, they say, any president who refuses to obey such a statute is not really breaking the law.

As a lawyer during the Reagan administration, Alito worked for a Justice Department office that helped developed the modern form of the theory. Alito and colleagues were seeking ways to increase the power of the president.

In a speech in November 2000 before the conservative Federalist Society, Alito said he believes that the Constitution gives the president "not just some executive power, but the executive power the whole thing."

"We were strong proponents of the theory of the unitary executive, that all federal executive power is vested by the Constitution in the president," Alito said, referring to his days in the Reagan administration. "And I thought then, and I still think, that this theory best captures the meaning of the Constitution's text and structure."

Alito did not specify how he would apply the theory. But other adherents have invoked it to argue for giving the president increased powers, including authority to withhold information from Congress; to take secret actions without telling Congress; and to take control of independent agencies.

When President Bush took office, many adherents of the "unitary executive theory" joined his administration.

During Bush's first term, according to a study by a Portland State University professor in Oregon, Phillip J. Cooper, Bush objected to 82 provisions of new laws on grounds that they violated his power, in Bush's words, to "supervise the unitary executive."

The mechanism that Bush used to make those 82 complaints was the presidential signing statement, an official document in which a president lays out an interpretation of a new law.

As a Reagan administration lawyer, Alito helped expand the use of signing statements to ensure, in his words, that "the president will get in the last word on questions of interpretation."

Bush's interpretations of torture and surveillance laws have come under dispute in several recent cases.

Two weeks ago, he issued a signing statement invoking his executive powers to reserve the right to waive a law governing torture.

Because the Supreme Court may be called upon to resolve disputes over the president's wartime powers, Schumer said yesterday, Alito must explain whether his embrace of the "unitary executive theory" means that he might feel inclined to resolve such disputes in the president's favor.

"We need to know, when a president goes too far, will you be a check on his power or will you issue him a blank check to exercise whatever power he alone thinks appropriate?" the New York senator added.

Ronald Cass, dean emeritus of the Boston University School of Law and an Alito supporter, said that Alito was merely endorsing the idea that the federal bureaucracy should be more accountable to the president, because the president is the official elected nationwide.

"There is absolutely nothing in Judge Alito's record that shows that he's an apologist for presidential authority," Cass said. "Politicians always use whatever means are available to score their political points and to fling arrows at their political opponents.

"That's what is going on here. I don't think it's a fair way to judge what Sam Alito would do as a justice on the Supreme Court."

But Cooper, the Portland State professor who studied Bush's assertion of executive authority, said Alito's support for a "unitary executive theory," coupled with his help in developing the signing statement as a device for expanding executive power, cannot be dismissed lightly.

"The question is the degree to which the court is going to defer to the interpretation of a law issued in a presidential signing statement," Cooper said.

"As someone who asserted [his belief in] a unitary executive, he is going to have to assure everyone that the view of the president will not control his decisions" as a Supreme Court justice.

Brady Center

To Prevent Gun Violence

January 11, 2006

Honorable Arlen Specter
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Samuel A. Alito, Jr. to the United States Supreme Court

Dear Chairman Specter and Senator Leahy:

The Brady Center to Prevent Gun Violence writes to express its strong opposition to the nomination of Samuel A. Alito, Jr. to the U.S. Supreme Court. The Center does not take this position lightly. This is the first time the Brady Center has ever opposed a Supreme Court nomination.

Judge Alito's nomination poses serious dangers to the safety of our communities, our families, and our children, as evidenced by his troubling dissent in *U.S. v. Rybar*, 103 F.3d 273 (3rd Cir. 1996), *cert. denied*, 522 U.S. 807 (1997). In that case, Judge Alito argued that the federal machine gun ban amounted to an unconstitutional exercise of Congressional power under the Commerce Clause. He attempted to erect arbitrary hurdles to Congressional efforts to reduce the availability of machine guns to criminals. In unusually harsh language, the *Rybar* majority criticized Judge Alito's dissent as having "no authority" in the law and "run[ning] counter to the deference that the judiciary owes to its two coordinate branches of government...." *Rybar* at 281.

If Judge Alito's dissent were to be adopted by the Supreme Court, it would place in jeopardy the ability of Congress to protect the public from gun violence. In a tellingly ominous note of the future impact of Judge Alito's limited view of Congressional power, he argued in his *Rybar* dissent that his view could mean that Congress may have no

and possession of machine guns not lawfully possessed before May 19, 1986. These "grandfathered" machine guns remain subject to strict registration, possession, transfer, and taxation requirements.

Criminals have used machine guns in deadly crimes around the country, and many of these machine guns have been converted from legal semiautomatic guns to illegal fully automatic guns by their owners. A key element of the federal machine gun ban is its prohibition on the possession of machine guns even if they have been converted to machine guns by their owners and the machine guns have not crossed state lines. If Judge Alito had prevailed in *Rybar*, the federal government would have been prevented from prosecuting criminals who possess machine guns. Such a restriction on federal law enforcement would have posed a grave danger to the public and officers who face criminals possessing these dangerous weapons.

For these reasons, the Brady Center to Prevent Gun Violence opposes the nomination of Samuel A. Alito, Jr. to the United States Supreme Court.

Sincerely,

Mike Barnes
President

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Brady Center

To Prevent Gun Violence

**STATEMENT OF DENNIS A. HENIGAN, DIRECTOR,
LEGAL ACTION PROJECT, BRADY CENTER TO PREVENT GUN VIOLENCE
SUBMITTED TO THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF SAMUEL A. ALITO, JR. TO BE AN
ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT**

January 19, 2006

My name is Dennis A. Henigan. I am the Director of the Legal Action Project of the Brady Center to Prevent Gun Violence. The Brady Center, and its sister organization the Brady Campaign to Prevent Gun Violence, are the nation's largest national, non-partisan, grassroots organizations leading the fight to prevent gun violence.

The Brady Center strongly opposes the nomination of Samuel A. Alito, Jr. to the U.S. Supreme Court. The Brady Center does not take this position lightly. This is the first time the Brady Center has ever opposed a Supreme Court nomination.

Judge Alito's nomination poses serious dangers to the safety of our communities, our families, and our children, as evidenced by his troubling dissent in *United States v. Rybar*, 103 F.3d 273 (3rd Cir. 1996), *cert. denied*, 522 U.S. 807 (1997). In that opinion, he concluded that the federal ban on possession of machine guns is unconstitutional. His dissent is an example of judicial activism at its worst – a federal judge showing scant deference to our elected representatives in Congress on an issue of public safety. If Judge Alito's view were to be adopted by the Supreme Court, it would place other federal restrictions on gun possession in jeopardy, such as the ban on the possession of firearms

that are undetectable by metal detectors and the ban on possession of handguns by juveniles. *See* 18 U.S.C. § 922(p) (prohibiting possession of undetectable firearms manufactured after the date of enactment in 1988); 18 U.S.C. § 922(x) (generally prohibiting possession of handguns by juveniles).

The Rybar Machine Gun Case

The *Rybar* case concerned the arrest of Raymond Rybar, Jr., a federally licensed gun dealer. Rybar attended a gun show in Monroeville, Pennsylvania on April 4, 1992. He possessed a fully automatic Chinese Type 54, 7.62-millimeter submachine gun, which he sold to Thomas Baublitz. The next day Rybar returned to the gun show and sold Baublitz another fully automatic firearm, a U.S. Military M-3, .45 caliber submachine gun. The guns were sold for a total of $600. Rybar pleaded guilty to two counts of unlawfully possessing a machine gun under 18 U.S.C. § 922(o), with the condition that he be allowed to appeal to allege that the federal machine gun possession restrictions are unconstitutional.

Machine guns are fully automatic weapons that have been heavily regulated by Congress since 1934. They fire continuously with one pull of the trigger and can discharge hundreds of rounds in seconds. In 1986, Congress enacted the Firearm Owners' Protection Act, which severely weakened federal gun laws, but contained one redeeming provision banning the future manufacture of machine guns for the civilian market. It also banned the transfer and possession of machine guns not lawfully possessed before May 19, 1986, the effective date of the Act. *See* 18 U.S.C. § 922(o). These "grandfathered" machine guns remain subject to the strict registration, possession

and transfer requirements and taxes of the National Firearms Act of 1934, 26 U.S.C. § 5801 *et seq.*

Rybar challenged the constitutionality of the machine gun ban based on the Supreme Court's ruling in *United States v. Lopez,* 514 U.S. 549 (1995). In *Lopez*, the Supreme Court struck down the federal Gun-Free School Zones Act, which prohibited the possession of a firearm within 1,000 feet of a school. The Court ruled 5-4 that the Act was not a permissible exercise of Congressional Commerce Clause power. The Court held that Congress may regulate under its commerce power: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) those activities "that substantially affect interstate commerce." *Lopez*, at 558-59. The Supreme Court held that the Gun-Free School Zones Act did not fit within any of these commerce powers.

The majority in *Rybar* upheld the constitutionality of the federal machine gun ban and distinguished the Supreme Court's ruling in *Lopez*. The *Rybar* majority noted that unlike in *Lopez*, where Congress was regulating gun possession in school zones for the first time, Congress has heavily regulated machine guns since 1934. *Rybar*, at 279. The court cited:

> Congressional findings generated throughout Congress' history of firearms regulation [that] link both the flow of firearms across state lines and their consequential indiscriminate availability with the resulting violent criminal acts that are beyond the effective control of the states.

Id. This "explicit connection of the interstate flow of firearms to the increasing serious violent crime in this country" demonstrated Congress' commerce power to enact the

machine gun ban, to address what "Congress saw as ... a problem of 'national concern.'" *Id.* The court concluded that the machine gun ban was constitutional because,

> [It] targets the possession of machine guns as a demand-side measure to lessen the stimulus that prospective acquisition would have on the commerce in machine guns. It follows, and we hold, that the authority of Congress to enact § 922(o) [the machine gun ban] under the Commerce Clause can be sustained under the third category identified by the Supreme Court: as a regulation of an activity that "substantially affects" commerce.

Id. at 283.

Judge Alito's Rybar Dissent

Judge Alito, however, dissented and wrote that the federal machine gun ban amounted to an unconstitutional exercise of Congressional power under the Commerce Clause. He attempted to erect arbitrary hurdles to Congressional efforts to reduce the availability of machine guns to criminals. Dismissing years of regulation by Congress and Congressional findings concerning the impact of illegal guns and criminal gun violence on interstate commerce, Judge Alito called the machine gun ban a "novel law" and demanded that Congress and the President "assemble[] empirical evidence" for him to review to determine whether the ban was constitutional. *Rybar*, at 287, 294. In Judge Alito's view, such "empirical evidence," if provided by Congress, "*might*" be sufficient to persuade him to uphold the law. *Id.* at 287 (emphasis added). Judge Alito also stated that Congress could fix the law by re-enacting it to only allow prosecutions against persons possessing a machine gun that has traveled in interstate commerce. *Id.* The courts have never held Congress to such a requirement, which would severely limit the ability of law enforcement to protect the public from the clear dangers of fully automatic weapons. His recommended fix was based on his personal view that such a requirement "has not posed any noticeable problems for federal law enforcement." *Id.*

Judge Alito's self-imposed requirement of evidentiary proof, beyond the substantial findings already made by Congress, was sharply criticized by the *Rybar* majority as having "no authority" in the law. *Id.* at 282. Indeed, the Supreme Court in *Lopez* itself held, "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *Lopez*, at 560. The majority stressed that Judge Alito's attempt to create new hurdles for Congress and the President tramples "a basic tenet of the constitutional separation of powers." The majority further noted that Judge Alito's requirement that "Congress or the Executive ... play Show and Tell with the federal courts at the peril of invalidation of a Congressional statute" "runs counter to the deference that the judiciary owes to its two coordinate branches of government...." *Rybar*, at 282. As to Judge Alito's suggested "fix" to the law by limiting its scope to machine guns that have traveled in interstate commerce, the majority noted that courts "have rejected the argument that *Lopez* requires federal criminal statutes to contain a jurisdictional element." *Id.* at 285.

Courts Uniformly Disagree With Judge Alito's Activist Dissent

Prior to Judge Alito's activist dissent, every appellate court to consider the constitutionality of the federal machine gun ban upheld the law. Likewise, every appellate court to rule after Judge Alito's dissent also upheld the law, except for one panel in a Ninth Circuit case that was later vacated by the U.S. Supreme Court. That Ninth Circuit case, *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), was vacated following the Supreme Court's recent ruling in *Gonzales v. Raich*, 125 S.Ct. 2195, 2208 (2005), which repudiated Judge Alito's reasoning in his *Rybar* dissent. As of today, the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits have all

found the machine gun ban to be constitutional. The following is a summary of the case law examining the constitutionality of the machine gun ban. In each case a criminal defendant appealed his guilty plea or conviction for violation of the machine gun ban based on a Commerce Clause challenge, and in each case the courts denied the appeals.

In rulings prior to Judge Alito's dissent, the Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits upheld the constitutionality of the machine gun ban. In *United States v. Kirk*, (5th Cir.), *aff'd en banc*, 105 F.3d 997 (5th Cir.), *cert. denied*, 522 U.S. 808 (1997), William J. Kirk had been charged with unlawful possession of an M-16 machine gun; an EA Company Rifle, .223 caliber, model J-15 machine gun that he had converted from a semiautomatic weapon; an Uzi machine gun; and an Action Arms Limited Uzi carbine, Model A, 9 millimeter, which had been converted to a machinegun by the addition of an Uzi machine bolt. He pled guilty with the condition that he be permitted to appeal. The Fifth Circuit denied his appeal, holding that the ban was a constitutional exercise of Congressional commerce power. The Fifth Circuit cited its own opinion in the *Lopez* case, which distinguished the machine gun ban from the Gun-Free School Zones Act, and was affirmed by the Supreme Court:

> [The machine gun ban is] restricted to a narrow class of highly destructive, sophisticated weapons that have been either manufactured or imported after enactment of the Firearms Owners Protection Act, which is more suggestive of a nexus to or affect on interstate or foreign commerce than possession of any firearms whatever, no matter when or where originated, within one thousand feet of the grounds of any school.

Id. at 796, *citing United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

Likewise, in *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996), the Sixth Circuit upheld the constitutionality of the law in a challenge brought by Gary

Beuckelaere. Beuckelaere collected assault weapons and had a total of 13 weapons at his residence, including two machine guns. He also purchased literature from a gun dealer containing instructions on how to convert a Cobray M/11 semi-automatic pistol into a machine gun. The court distinguished *Lopez*, holding that Congress properly acted to regulate the "extensive, intricate, and definitely national market for machineguns." *Id.* at 784. In *United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996), John Kenney was arrested for unlawful possession of an Intratec TEC-9 semiautomatic pistol that had been converted to fire as a machine gun. Kenney claimed he needed the machine gun because of his unspecified "past dealings in Central America." He pled guilty and appealed. The Seventh Circuit denied his appeal, distinguishing *Lopez* and concluding that

> the local conduct of machine gun possession, including possession resulting from home manufacture, [serves] to effectuate [the machine gun ban's] purpose of freezing the number of legally possessed machine guns at 1986 levels, an effect that is closely entwined with regulating interstate commerce.

Id. at 890. Also, in *United States v. Pearson*, 8 F.3d 631 (8th Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994), the Eighth Circuit ruled prior to *Lopez* that Congress could, under the Commerce Clause, properly criminalize Robin Pearson's illegal possession of an Uzi carbine, a Heckler & Koch 9mm machine gun, a PWA Commando .223 caliber machine gun, an Uzi machine pistol, and a weapon with an attached silencer.

Similarly, in *United States v. Rambo*, 74 F.3d 948 (9th Cir.), *cert. denied*, 519 U.S. 819 (1996), the court sustained the conviction of Charles Roy Rambo for unlawful possession of a machine gun. The court upheld the law, highlighting the importance to public safety of prohibiting the possession of fully automatic machine guns:

> By regulating the market in machineguns, including regulating intrastate machinegun possession, Congress has effectively regulated the interstate trafficking in machineguns.

Id. at 952. In *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995), the Tenth Circuit also upheld the law, sustaining the conviction of Larry Francis Wilks for illegal possession of a machine gun. The Court distinguished Lopez, explaining:

> Whereas [the Gun-Free School Zones Act] sought to regulate an activity which by its nature was purely intrastate and could not substantially affect commerce even when incidents of those activities were aggregated together, ... [the machine gun ban] regulates machineguns, which by their nature are "a commodity ... transferred across state lines for profit by business entities."

Id. at 1521, *quoting United States v. Hunter*, 843 F.Supp. 235, 249 (E.D. Mich. 1994).

The courts continued to uniformly reject Judge Alito's reasoning after his dissent was published. Indeed the most recent Supreme Court ruling on Congressional Commerce Clause power squarely rejected Judge Alito's extreme view. In *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), six Justices, including Justice Antonin Scalia, upheld Congressional power under the Commerce Clause to regulate the intrastate production and possession of marijuana for medical purposes. The Court noted that Congress began regulating marijuana in 1937, first taxing it and later banning its possession. *Id.* at 2202. This was remarkably similar to Congress' initial 1930's regulation of machine guns by taxation, and later through a possession ban. The Court in *Raich* upheld the federal ban on marijuana possession, noting that its "case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 2205. It stressed that it was irrelevant that Congress did not include specific findings on the need to ban intrastate marijuana possession, because the Court has "never required Congress to make particularized findings in order to legislate," *id.* at 2208, refuting Judge Alito's remarks in his *Rybar* dissent that Congress should "assemble[] empirical evidence" for him to review to

determine whether Congress included sufficient findings to sustain the law. *Rybar*, at 287.

Following the Supreme Court's ruling in *Raich*, the Supreme Court vacated the Ninth Circuit's ruling in *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), the only appellate court case to find the machine gun ban to be unconstitutional. In that case, a Ninth Circuit panel split 2-1 in ruling that the machine gun ban was unconstitutional as applied to intrastate possession of a machine gun. The Supreme Court vacated this ruling in 2005, following its ruling in *Raich*. Every other federal appeals court to consider the constitutionality of the machine gun ban since Judge Alito's *Rybar* dissent upheld the law. *See United States v. Franklyn*, 157 F.3d 90 (2nd Cir. 1998), *cert. denied*, 525 U.S. 1112 (1999); *United States v. Knutson*, 113 F.3d 27 (5th Cir. 1997); *United States v. Gonzales*, 121 F.3d 928 (5th Cir. 1997), *cert. denied*, 522 U.S. 1063 (1998) and *cert. denied*, 522 U.S. 1131 (1998); *United States v. Haney*, 264 F.3d 1161 (10th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

In His Testimony Before The Senate Judiciary Committee, Judge Alito Failed To Acknowledge The Flawed Legal Reasoning In His Rybar Dissent

In his testimony before the Senate Judiciary Committee, Judge Alito refused to acknowledge the flawed legal reasoning of his dissent in *Rybar*. In an exchange with Senator Charles Schumer, Judge Alito refused to change his view despite being confronted with the Supreme Court's recent ruling in *Raich* repudiating Judge Alito's view.

In addition, in his testimony, Judge Alito defended his *Rybar* dissent by stating that, in his view, it would be "easy" for Congress to fix the law to comport with the Constitution. He suggested that Congress could re-enact the ban and limit federal

prosecutions only to criminals who possess machine guns that have crossed state lines. Yet limiting Congressional power to prohibit machine guns only if they have crossed state lines has no basis in the law. Further, it would tie the hands of prosecutors who protect the public by cracking down on criminals who convert semiautomatic firearms to fully automatic machine guns without the machine guns crossing state lines.

In a troubling revelation that his decision was based on his personal views, Judge Alito admitted, in response to questions by Senator Jon Kyl, that his view was based on his personal experience as a prosecutor. Judge Alito stated:

> [A]ll that's necessary is that is to show that the firearm at some point in its history passed in interstate or foreign commerce.... From my experience, this was never a practical problem and this was how all the federal firearms statutes had been framed.

Senate Judiciary Committee Hearing Transcript, Jan. 10, 2006. It is not up to unelected federal judges to second-guess the wisdom of Congress based on their personal experience, particularly on issues of public safety. Judge Alito's continuing refusal to acknowledge his flawed legal reasoning in declaring the federal machine gun ban unconstitutional places law enforcement and the public in great jeopardy.

Moreover, Judge Alito's personal experience is based on flawed information. Contrary to his assertion, prosecutors frequently prosecute criminals who possess illegal fully automatic machine guns that have not crossed state lines, particularly those that have been converted from legal semiautomatic weapons. Moreover, Judge Alito's claim that "all the federal firearms statutes" require proof of interstate commerce is incorrect. Several federal laws protect the public without requiring illegal guns to cross state lines, including laws barring firearms not detectable by metal detectors and handgun possession by juveniles. *See* 18 U.S.C. § 922(p) (prohibiting possession of undetectable firearms

manufactured after the date of enactment in 1988); 18 U.S.C. § 922(x) (generally prohibiting possession of handguns by juveniles). These laws would be placed in jeopardy if Judge Alito's views were to be adopted by the Supreme Court.

The Dangers of Judge Alito's Dissent

If Judge Alito's view had prevailed, the federal ban on machine gun possession would have been struck down. Apart from the fact that Judge Alito's position in *Rybar* was legally indefensible, it also is fair to ask: If Alito's view had prevailed in the federal courts, what would have been the real world consequences for the American people? As shown by the cases described below, if federal authorities were unable to bring charges of machine gun possession against violent criminals, it would increase the risk of injury and death, particularly to law enforcement personnel who must face gun-wielding criminals on a daily basis.

Below are examples of actual criminal use of machine guns to kill, injure and threaten law enforcement officers. As these cases demonstrate, it is difficult to imagine a more horrifying scenario for our police than a criminal armed with a fully automatic weapon that can fire hundreds of rounds in seconds. Also listed are examples of successful federal prosecutions of violent criminals, including drug lords, white supremacists and terrorists, for violation of the machine gun possession statute. In each case, the statute was used to put these criminals behind bars before they could commit violent attacks on police and other citizens.

Under federal sentencing guidelines, a violation of the federal machine gun possession ban alone means up to 5 years behind bars, but in combination with other offenses can dramatically increase prison time. For example, possession of a machine

gun in furtherance of a crime of violence or drug trafficking crime carries an automatic 30-year prison term.[1]

Machine Gun Shootings

North Hollywood, California – Bank of America Robbery

On February 28, 1997, bank robbers Larry Eugene Phillips, Jr. and Emil Dechebal Matasareanu turned North Hollywood, California into a war zone. During a botched robbery of a Bank of America, in which they wore body armor and carried fully automatic machine guns (with a trunk full of spare ammunition clips and additional machine guns in their getaway car), they ended up engaging in a massive firefight with police.

Once they were surrounded at the bank, they fired armor-piercing bullets at anything that moved – about 1,100 rounds in the course of an hour – wounding 11 Los Angeles police officers and 7 bystanders in the process. The two assailants completely outgunned the first group of responding officers, wounding 9 officers and 3 civilians in the first 5 minutes of the firefight. Their machine-gun firepower was so immense that it ultimately took 350 police officers, including SWAT teams and armored personnel carriers, and more than an hour to kill them in the siege. This was one of the most violent shootouts in U.S. history.

Waco, Texas – Branch Davidian Shootout

Perhaps even more notorious than the West Hollywood shootout, the 51-day government siege of David Koresh's Branch Davidian complex near Waco, Texas on February 28, 1993, was initiated because the Bureau of Alcohol, Tobacco and Firearms

[1] *See* USSG § 2K2.4(b) and 18 U.S.C. § 924(c)(1)(C)(ii).

(ATF) learned that Koresh and his followers had been converting semi-automatic weapons into illegal fully automatic machine guns.

A large group of federal agents, attempting to execute a search warrant of the Branch Davidian compound were met by a hail of machine gun fire from Koresh's followers. Four officers were killed and twenty were wounded in the ensuing firefight. (Many other Branch Davidians were killed by their own gunfire.) Koresh's followers had access to a much larger arsenal than the two North Hollywood bank robbers, and it required the government to bring in an army of federal agents and very heavy firepower to subdue the Davidian compound.

Newington, Connecticut – Officer Slain By M16 Machine Gun[2]

Officer Peter Lavery of the Newington Police Department was slain on December 30, 2004 during a response to a domestic violence dispute. As Lavery and his backup descended into the cellar of the residence where the dispute occurred, he was fired on and killed with a fully automatic M16 machine gun, the weapon used by US armed forces.

West Virginia – Marijuana Growers Fire Machine Gun at West Virginia State Police[3]

On September 1, 1999, the West Virginia State Police Special Response Team and other law enforcement officers entered a heavily wooded area to apprehend two marijuana growers – Bobby Wayne Hager and Everett Hager. Police were able to arrest and handcuff Bobby Wayne Hager without being shot at, but as he was being handcuffed, Bobby Wayne shouted, "Everett, they're coming to get you. Everett, they're coming to get you." Shortly thereafter, Everett opened fire on law enforcement officers with a fully automatic SKS machine gun. Luckily, Everett did not hit any of the officers, and he was

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[2] *See* Eric Reed, *Case Closed on Slain Cop*, New Britain Herald, May 27, 2005.

[3] *United States v. Hager*, 22 Fed. Appx. 230 (4th Cir. 2001).

arrested. Both Bobby Wayne and Everett were charged and convicted under federal law with unlawful possession of a machine gun and other crimes.

San Juan, Puerto Rico – Drug Lords Shoot Two Federal Officers[4]

Drug lords with ties to the both the Cali and Medellin cartels in Colombia were involved in trafficking cocaine from Colombia to Puerto Rico and New York. In the course of carrying out numerous federal crimes, defendant and his conspirators fired on and seriously wounded two federal agents with automatic weapons. On defendant's orders, members of the conspiracy murdered another individual.

Machine Gun Prosecutions

Tyler, Texas – Antigovernment Terrorist Planning Assault on IRS Building Sought to Procure an Arsenal of Automatic Weapons[5]

Charles Ray Polk was a car salesman in Tyler, Texas and boasted of a desire to blow up federal buildings and kill federal employees. Polk identified himself as "third in command" of an organization he identified as "Constitutional America." In 1995, Polk sought to procure an arsenal of automatic weapons and explosives from undercover agents, to be used in coordinated assaults on IRS buildings in Austin, Texas.

Polk stated that he and his group planned to blow up the federal buildings and then enlist mercenaries who knew how to use M-60 and Uzi machine guns and who "don't mind shooting people if they get in the way." The defendant compiled a small arsenal of nearly 50 weapons and then paid an undercover federal agent to secure plastic explosives, machine guns and rocket propelled grenades as well as hand grenades. He had detailed information about the Austin building and a clear plan for where explosives

[4] *United States v. Escobar-deJesus*, 187 F.3d 148 (1st Cir. 1999).

[5] *United States v. Polk*, 118 F.3d 286 (5th Cir. 1997).

should be placed to ensure the building was destroyed. When an undercover agent asked him about the innocent people who would die during his plan the defendant replied: "Doesn't hurt my feelings," and "all I can say, gentlemen, is shit happens." The defendant also possessed a map detailing other I.R.S. buildings in other cities the defendant planned to target after the Austin bombing.

Polk was convicted of violating the federal ban on machine gun possession. Polk argued that the ban was an unconstitutional violation of the U.S. Constitution's Commerce Clause. The 5th Circuit rejected this view and upheld his conviction.

Southern Illinois – White Supremacists Intending to Rob Banks and Armored Cars and Carry Out Assassinations Convicted of Machine Gun Possession[6]

Defendants were founding members of the "New Order," a white supremacist group that sought to "unit[e] white supremacist groups in a violent struggle against those would resist the creation of a 'pure white Christian country.'" McGiffen, the lead coordinator who was also a Grand Dragon in the Illinois Ku Klux Clan "regularly used...force to maintain members' allegiance." McGiffen threatened to kill one member if he ever talked to anyone about their group again after the member told his mother about their plans. The group decided to carry out a string of robberies of banks and armored cars to finance their scheme. The group stockpiled weapons and was particularly fond of automatic weapons "for their destructive capability." The group accumulated a significant stockpile of weapons – including several automatic weapons. a rocket, dynamite and homemade hand grenades to carry out the assassination of Morris Dees and the destruction of the Southern Poverty Law Center and other crimes.

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[6] *United States v. McGiffen*, 267 F.3d 581 (7th Cir. 2001).

Thankfully, federal authorities arrested the defendants before they could carry out their plans.

Mississippi – Leader of Vice Lords Gang Arrested With Machine Gun[7]

Michael Starnes, leader of a gun trafficking gang known as the "Unknown Vice Lords," was arrested after firing gunshots into a trailer home in retaliation for a shooting involving of one of his gang members. Police seized more than a dozen guns from the motel room where he was apprehended, his car, and his apartment, including a fully automatic AR-15 machine gun. Starnes had committed so many offenses that he was sentenced to 145 years in prison.

Georgia – Arsenal of Automatic Weapons and Pipe Bombs Accumulated By Member of Private Militia Terrified of "New World Order"[8]

Donald Wayne Wright claimed he was "spooked" by the threat of the "New World Order," so he began stockpiling automatic weapons and ammunition and pipe bombs and meeting with members of a "militia." He intended to keep his arsenal until the "threat" of the new world order and the devil arose and it was time to fight.

Federal authorities, who received a tip that Mr. Wright wanted to know how to reassemble a .50 caliber machine gun, obtained a warrant to search his premises. They uncovered a huge arsenal, including several machine guns, pipe bombs, 2300 rounds of ammunition, M16 rifle parts, a booby trap device, a handgun, several semi-automatic rifles, The Anarchists' Cookbook, several pieces of literature on weapons and military skills, as well as several pieces of right-wing propaganda materials.

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[7] *United States v. Starnes*, 2005 WL 3309685 (5th Cir. 2005).

[8] *United States v. Wright*, 117 F.3d 1267 (11th Cir. 1997).

Montana – Convicted Felon Threatened Federal Agents With Machine Gun[9]

David Burgart, a convicted felon on bail on a charge of felony assault of a police officer was apprehended after he failed to show up at a pre-trial conference. He was found at a Montana camping area where he and others who were a part of a militia group were "stockpiling weapons, ammunition and survival gear." The defendant attempted to flee from authorities again and after a seven-hour standoff during which he threatened federal agents with the machine gun he possessed, Burgart was arrested.

California – North Valley Jewish Community Center Assailant Buford Furrow Also Charged With Machine Gun Possession[10]

Buford Furrow, the white supremacist who embarked on a hate-crime spree in California in 1999, murdering US postal worker Joseph Ileto and shooting five individuals at the North Valley Jewish Community Center, was also charged with illegal possession of a machine gun.

Mississippi – Convicted Felon Apprehended With Arsenal of Sixty Guns, Including Machine Guns[11]

J.R. Morgan was a convicted felon who came to the attention of federal authorities when a gun used in a crime was traced back to him. The defendant had nearly sixty firearms at his home, including a machine gun and a silencer. He liked to frequent gun shows where he would buy and resell guns without a license.

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[9] *United States v. Burgart*, 116 Fed. Appx. 124 (9th Cir. 2004).

[10] *United States v. Furrow, Jr.*, 125 F.Supp.2d 1178 (C.D. Cal. 2000).

[11] *United States v. Morgan*, 216 F.3d 557 (6th Cir. 2000).

Michigan – Drug Dealer Had Nearly 90 Firearms at His Home[12]

Defendant Ronald Napolean Wolfe had a marijuana growing operation at his home. Upon executing a search officers found and seized 86 firearms, including multiple machine guns.

Indiana – Bank Robbers Used Machine Guns[13]

Criss Duncan and Ralph Berkey robbed the National City Bank in Leesburg, Indiana in 2003. Each was armed with assault rifles modified to be fully automatic.

Texas – Cocaine Traffickers Pulled Machine Gun on Federal Officers[14]

Enrique Gonzales Jr. and his co-defendants were engaged in a cocaine trafficking ring in Houston, Texas. When federal agents initiated an undercover drug buy to arrest them, one of the co-defendants pulled a machine gun and threatened to fire, but was persuaded to put the gun down by an officer who had his police pistol trained directly on him.

Illinois – Convicted Felon Set Up Phony Corporation in Attempt to Evade Firearms Laws[15]

Joseph Fleischli, who had previously been convicted of four felonies, tried to set up a sham firearms manufacturing company in the names of his father- and mother-in-law. Fleischli had previously been denied a federal firearms license by the Bureau of Alcohol, Tobacco, Firearms & Explosives. Once law enforcement became aware of Fleischli's scheme, they searched his premises and found numerous illegal machine guns and explosive devices.

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[12] *United States v. Wolfe*, 32 F. Supp. 2d 945 (E.D. Mich. 1999).

[13] *United States v. Duncan*, 413 F.3d 680 (7th Cir. 2005).

[14] *United States v. Gonzales*, 121 F.3d 928 (5th Cir. 1997).

[15] *United States v. Fleischli*, 305 F.3d 643 (7th Cir. 2002).

North Dakota – Methamphetamine Dealer Prosecuted For Possessing More Than 50 Firearms, Including a Machine Gun and Street Sweeper Shotgun[16]

Mark Backer owned a shop where he sold methamphetamines and other drugs on the side. Upon executing a search warrant, officers discovered a large cache of firearms, including a machine gun, Street Sweeper shotgun, and a gun with an obliterated serial number.

Montana – Drug Traffickers Possessed Machine Guns and Tools For Converting Weapons Into Fully Automatic Firearms[17]

Two drug traffickers, Patrick Neiss and James Daychild, were charged with numerous drug and gun violations, including for machine gun possession. At the house that served as their site of operation agents found several semi-automatic firearms, a semi-automatic rifle that had been converted into a machine gun, and all of the tools and materials necessary to convert other semi-automatic weapons into fully automatic firearms. The court found "ominous" evidence that defendants posed a "definite danger" to the community.

Tennessee – Gun Collector Assembled Machine Guns from Parts "Kits" Obtained Through the Mail[18]

A federal drug task force executing a search warrant found four machine guns in the possession of Bobby Fisher, who admitted to assembling them from parts "kits" he ordered through an advertisement in *Shotgun News*.

As these cases demonstrate, criminals have used machine guns in deadly crimes around the country, and many of these machine guns have been converted from legal

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[16] *United States v. Backer*, 419 F.3d 882 (8th Cir. 2005).

[17] *United States v.Daychild*, 357 F.3d 1082 (9th Cir. 2004).

[18] *United States v. Fisher*, 149 Fed. Appx. 379 (6th Cir. 2005).

semiautomatic guns to illegal fully automatic guns by their owners. A key element of the federal machine gun ban is its prohibition on the possession of machine guns even if they have been converted to machine guns by their owners and the machine guns have not crossed state lines. If Judge Alito had prevailed in *Rybar*, the federal government would have been prevented from prosecuting criminals who possess machine guns. Such a restriction on federal law enforcement would have posed a grave danger to the public and law enforcement officers who face criminals possessing these dangerous weapons.

For these reasons, the Brady Center to Prevent Gun Violence opposes the nomination of Samuel A. Alito, Jr. to the United States Supreme Court.

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December 28, 2005

The Honorable Dianne Feinstein
Judiciary Committee
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510-0504

BY FAX: (202) 228-3954

Dear Senator Feinstein:

California Women Lawyers (CWL), a statewide association of attorneys and women's bar associations that promotes justice and equality with an emphasis on women and children, opposes the appointment of Samuel A. Alito, Jr. to the United States Supreme Court. CWL reached this decision after a careful review of Judge Alito's writings and decisions, both before his appointment to the Third Circuit Court of Appeals and as an appellate judge following his appointment. CWL takes this position with a recognition that the judiciary must retain its independence; however, our review of Judge Alito's positions leads CWL to believe that Judge Alito has a demonstrated disregard for Constitutional and statutory protections on issues ranging from reproductive choice to the scope of executive powers.

CWL is well aware of Judge Alito's impressive scholastic and professional achievements. There is no question that he is "qualified," in terms of training and background, to be a Supreme Court justice. Nonetheless, the issue is whether Judge Alito has demonstrated the kind of fairness, independence, and considered judgment that the American people should be able to expect from a nominee to their highest court. A review of Judge Alito's stated positions indicates that he has not.

Some examples of Judge Alito's especially troubling statements and rulings include:

- **WOMEN'S REPRODUCTIVE FREEDOM.** Judge Alito's dissent in Planned Parenthood v. Casey found that the spousal notification requirement in Pennsylvania's Abortion Control Act of 1982 did not impose undue burdens on women seeking abortions and compared it to a parental notification requirement for minors that had previously been found not to impose an undue burden on such minors seeking abortions. (A-1) [See citations to cases and documents, including notes, in Attachment "A" enclosed.] Upon review, the United States Supreme Court found that the restriction placed an undue burden on a woman's reproductive freedom. Justice Sandra Day

Affiliates: Asian Pacific American Women Lawyers Alliance; Black Women Lawyers Association of Los Angeles; Contra Costa County Bar Association –Women's Section; Fresno County Women Lawyers; Kern County Women Lawyers; Lawyers Club of San Diego; Monterey County Women Lawyers; Napa County Women Lawyers; Orange County Women Lawyers; Queen's Bench; San Mateo County Bar Association-Women's Section; Santa Barbara Women Lawyers; Santa Clara County Bar Association–Women Lawyers Committee; Sonoma County Women in Law; Women Lawyers Association of Los Angeles; Women Lawyers Association of San Luis Obispo County; Western Lawyers of Alameda County; Women Lawyers of Long Beach; Women Lawyers of Sacramento; Women Lawyers of Santa Cruz County

O'Connor, writing for the majority, concluded, "[A] State may not give to a man the kind of dominion over his wife that parents exercise over their children." (A-1, at 898) This dissent is even more troubling when viewed in the context of Alito's pre-judicial statements of his strong beliefs that Roe v. Wade should be overruled because the Constitution does not protect a right to an abortion. (A-2) CWL believes that these pre-judicial statements, when viewed against Alito's record on choice issues as a judge, reflect that if given the ability to set precedent, he will move the Supreme Court towards overturning Roe v. Wade or towards further restricting the right to reproductive choice.

- **SEXUAL HARASSMENT.** Judge Alito's opinion in Robinson v. City of Pittsburgh, demonstrated an inability to recognize the nature of sexual harassment and insensitivity to those who have encountered such harassment. The Third Circuit upheld as irrelevant a City report finding that the supervisor had created an "uncomfortable" work environment for another woman which was offered to prove notice of a hostile work environment because the conduct discussed did not put the City on notice of Robinson's alleged harassment by the same man. (A-3, at p. 993)

- **EMPLOYMENT DISCRIMINATION.** Judge Alito's dissents in several cases would have made it more difficult to prove claims of job discrimination. In Bray v. Marriott Hotels and Sheridan v. E.I. DuPont de Nemours and Co., he would have imposed exceedingly high evidentiary burdens for plaintiffs to bring their cases before a jury. (A-4) In Bray, the majority noted that his position "would immunize an employer from the reach of Title VII if the employer's belief that it had selected the 'best' candidate, was the result of conscious racial bias." (A-4, at 993.)

- **RACIAL DISCRIMINATION IN JURY SELECTION.** In Riley v. Taylor, the Third Circuit reversed the findings against an African-American sentenced to death for felony murder by an all white jury because Riley's rights were violated by the prosecution's peremptory strikes of black jurors. (A-5) The court found the attempt in Alito's dissent to compare the statistical evidence of the prosecution's repeated use of peremptory challenges to strike black jurors to the percent of left-handed Presidents was insensitive and that such a comparison minimized the history of discrimination against prospective black jurors and black defendants. (A-5, at 292)

- **SEPARATION OF CHURCH AND STATE.** Judge Alito's opinion in Child Evangelism Fellowship of New Jersey v. Stafford Township School District, appears to create an impermissible entanglement of church and state. (A- 6) The Fellowship's stated "purpose is to evangelize boys and girls with the Gospel of the Lord Jesus Christ and to establish (discipline) them in the Word of God and in a local church for Christian living." (A-6, at p. 521.) Writing for the majority, Judge Alito rejected the argument that students could view requiring the school district to distribute the

Fellowship's materials to students, post materials in school and distribute materials at back-to-school nights as endorsing a particular religious perspective because the school district could send home materials "explaining the school district's policies and disclaiming any endorsement of religion" or have "teachers ... explain the point to students." (A-6, at p. 534.)

- **MACHINE GUN BAN.** Dissenting from the majority in United States v. Rybar, Alito wrote that Congress did not have power under the Commerce Clause to enact a ban on machine gun possession because there had been no showing that intrastate possession of machine guns had a substantial effect on interstate commerce. (A-7) The Supreme Court rejected this restrictive interpretation of Congress' authority under the commerce clause in Gonzales v. Raich. (A-7) Judge Alito's position in Rybar is of special concern because the Commerce Clause serves as the basis for Congress's power to regulate in many areas, including civil rights, environmental protection, consumer protection, and worker protection.

- **FAMILY AND MEDICAL LEAVE ACT.** Judge Alito is the author of the opinion in Chittister v. Department of Community & Economic Development, which held that a state employee fired while on an approved sick leave did not have the ability to sue under the Family and Medical Leave Act of 1993 because Congress did not have the power to require state employers to comply with the FMLA. (A-8) The Supreme Court disagreed in Nevada Dept. of Human Resources v. Hibbs, holding that Congress validly acted under the Fourteenth Amendment when it enacted the FMLA. (A-8)

- **BLANKET IMMUNITY FOR WARRANTLESS WIRETAPS.** A recently released 1984 memo bears on Alito's ability impartially to review an issue that almost certainly will reach the Supreme Court again on different facts. While he was an assistant solicitor general, Alito wrote that he believed the attorney general should be absolutely immune from claims arising out of illegal, warrantless wiretaps based on national security. (A-9) He suggested an incremental legal strategy advocating for tactical reasons that the administration should attempt a more moderate defense instead of seeking complete immunity and should appeal on narrow procedural grounds because there were "strong reasons to believe that our chances of success will be greater in future cases." (A-9) The administration at the time did not follow Alito's advice, and the Supreme Court ruled that the attorney general only had qualified immunity from suit.

This list is not meant to be an exclusive recitation of all of the problematic points raised by Judge Alito's past statements and opinions, and it is not meant to reflect a belief that there cannot be disagreement about individual issues or cases. Nor is this list meant to imply that CWL contends that all of Judge Alito's decisions are out of step with principles of justice. Rather, this list is meant to show that Judge Alito's record does not

consistently demonstrate an open mind to decision-making, a commitment to protecting the rights of ordinary Americans, a commitment to the progress made on civil rights, women's rights, and individual liberties, or a respect for the constitutional role Congress plays in promoting those rights and health and safety protections.

CWL does not expect you to take a position with respect to Judge Alito without asking him questions. Consistent with CWL's approach with past nominees, and based on comments we have received and discussions we have held, CWL is recommending some questions for you to ask Judge Alito during his confirmation hearing next month to help determine his impartiality and independence and commitment to principles of importance to CWL. The recommended questions are set forth in Attachment "B".

We hope these questions, and CWL's statement of position, are useful in evaluating Judge Alito's suitability for the United States Supreme Court. CWL appreciates your consideration of its concerns about Judge Alito and in asking Judge Alito the questions set forth in the attachment. We welcome any questions you might have about CWL's stance on Judge Alito's nomination.

Sincerely,

CALIFORNIA WOMEN LAWYERS

Pearl Gondrella Mann

Pearl Gondrella Mann
President

cc: Senator Barbara Boxer
Senator Patrick Leahy
Senator Arlen Specter



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January 11, 2006

Senator Arlen Specter – Chairman
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Senator Orrin Hatch
Senator Charles Grassley
Senator Edward Kennedy
Senator Jon Kyl
Senator Joseph Biden Jr.
Senator Mike DeWine
Senator Herbert Kohl
Senator Jeff Sessions
Senator Dianne Feinstein
Senator Lindsey Graham
Senator Russell Feingold
Senator John Cornyn
Senator Charles Schumer
Senator Sam Brownback
Senator Richard Durbin
Senator Tom Coburn

Dear Chairman Specter, Ranking Member Leahy and Members of the Judiciary Committee:

I write to you today as president of Catholics for a Free Choice, an organization that shapes and advances sexual and reproductive ethics that are based on justice and reflect a commitment to women's well being, to express our opposition to the nomination of Judge Samuel A. Alito Jr. to the Supreme Court of the United States.

Our decision to ask the US Senate Committee on the Judiciary to reject this nomination and not to send this nominee for an up-or-down vote by the entire Senate is not one that we take lightly. Indeed, Catholics for a Free Choice, after examining his record and carefully following Chief Justice John Roberts' confirmation hearing, did not oppose his nomination.

Based on public documents released by relevant government agencies and from published interviews and statements with and from the nominee himself during the first days of the confirmation hearing, it is evident that Judge Alito is a vastly different nominee from Chief Justice John Roberts. These differences, however, are not only manifested in judicial philosophy, but sadly in critical aspects of his character and integrity.

Our reasons for opposing this nomination go far beyond Judge Alito's personal and legal opposition to reproductive health services including abortion—but center on the underlying principles of the qualifications necessary to serve on the Supreme Court.

In our view, serving on the highest court in the land takes a fundamental commitment to the individual rights enshrined in the Constitution. These include the rights of women to make

decisions about their bodies; the rights of employees to seek judicial relief when they feel they have been discriminated against based on race or gender; a belief in the "one person, one vote" doctrine that has been a pillar of American democracy; and an understanding that all citizens of the United States have equal standing under the law regardless of which religious tradition they identify with, if any. Throughout his time on the federal bench, Judge Alito has not shown an allegiance to these principles and has in fact, in many cases, shown hostility to them.

Equally important is the integrity and character of the man or woman being nominated. This integrity includes a consistent view of the law and a guarantee that the principles espoused by the nominee are based on sound legal reasoning and conscience—and not based upon which political appointment or job they are applying for at the time. Judge Alito has an unfortunate and well-documented history of changing his positions on key personal rights based upon which position in government he is being considered for. To us, this suggests a nominee whose values in public service are not grounded in principles, integrity and respect for individual rights, but in the politics and personal ideology of the moment.

Judge Alito has also demonstrated through his words and his actions that what he pledges during confirmation hearings does not necessarily reflect his actions once confirmed and behind the bench. During his 1990 confirmation hearings for the US Court of Appeals for the Third Circuit, Alito promised to recuse himself from any cases involving Vanguard Group Inc. and Smith Barney Inc., companies which have handled some of his personal investments. Despite this promise, Alito ruled on a case involving Smith Barney in 1996 and Vanguard Group in 2002. When pressed about this major lapse, Alito responded that the 1990 promise applied only to his first few years on the bench.[1] This is a clearly troubling example of either a major ethical lapse on the part of Judge Alito or yet another example of the nominee saying one thing to get the job, and then playing by different rules when he wins confirmation.

Of critical importance to Catholics for a Free Choice is the outright hostility to and the politicization of reproductive rights by this nominee. Unlike Chief Justice Roberts who was well known to be personally opposed to abortion before he was confirmed to the Court, but pledged to separate those views and respect the law of the land, nominee Alito has made both his personal and legal views on this subject a hallmark of his career advancement.

Throughout his career, Judge Alito has shown that he believes—both personally and legally—that the right to choose, to make decisions about the most private and profound aspect of a woman's life, i.e. when and whether to have children, is not protected under the Constitution. There are several examples of this, including his 1985 application letter to then-Attorney General Edwin Meese III in which Alito wrote that he was, "particularly proud" of his personal contributions to legal views endorsed by the administration including "that the Constitution does not protect a right to an abortion[2]," and his integral role as an attorney in the Reagan Justice Department where he sought "opportunity to advance the goals of overruling *Roe v. Wade* and, in the meantime, of mitigating its effects."[3]

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[1] Charles Babington and Amy Goldstein, "Alito on Day 1: 'A Judge Can't Have Any Agenda'," *Washington Post*, January 10, 2006.
[2] Amy Goldstein and Jo Becker, "Alito Helped Craft Reagan-Era Move To Restrict 'Roe'," *Washington Post*, December 1, 2005.
[3] David Kirkpatrick, "Alito File Shows Strategy to Curb Abortion Ruling," *New York Times*, December 1, 2005.

We were not convinced by his claim during his confirmation hearings that he has an open mind on the right to choose as embodied in Roe. Given his belief that the Constitution does not protect a right to an abortion and his personal view that abortion is morally untenable, it would be foolhardy to accept his claim of open mindedness.

During opening statements of the Alito hearings, Senator Edward Kennedy asked the defining questions for the entire hearings. He began, "So the question before us in these hearings is this: Does Judge Alito's record hold true to the letter and the spirit of equal justice? Is he committed to the core values of our Constitution that are at the heart of our nation's progress? And can he truly be evenhanded and fair in his decisions?"

Through his words, his legal actions and his incontrovertible actions to date, the simple answer is no. Judge Alito cannot be counted on to issue rulings and to write opinions based upon sound legal philosophy and the proper consideration of past landmark rulings by the Court. Judge Alito cannot be counted on to protect the individual rights and freedoms of Americans who count on the federal judiciary to protect them from undue burdens imposed by ideologically driven governments and administration officials. And lastly, Judge Alito cannot be counted on to deliver justice in a manner that does not commingle previously stated strongly held personal and legal viewpoints that will be of serious detriment to members of our society.

I urge you to vote no on this nomination and by doing so to save the rights to privacy and the individual freedoms and choice to which all Americans—regardless or race, gender, religion or sexual orientation—are entitled.

Sincerely,

Frances Kissling
President

TESTIMONY OF THE CENTER FOR REPRODUCTIVE RIGHTS ON THE NOMINATION OF SAMUEL A. ALITO TO THE UNITED STATES SUPREME COURT

The Center for Reproductive Rights ("Center") respectfully submits this testimony to provide an analysis of Judge Samuel A. Alito's record and testimony on issues relating to reproductive rights, *Roe v. Wade*, and stare decisis.

The Center was established in 1992 as an organization that uses the law to advance reproductive freedom as a fundamental right. The Center is the only public interest law firm dedicated exclusively to the protection of reproductive rights in the United States and abroad. Center attorneys have represented women and health care providers in numerous challenges to restrictive laws at every level of the state and federal court systems and were lead counsel in several Supreme Court cases concerning the right to choose and related issues, including *Ferguson v. City of Charleston*, 121 S. Ct. 1281 (2001), *Stenberg v. Carhart*, 530 U.S. 914 (2000), *Mazurek v. Armstrong*, 520 U.S. 968 (1997), *Lambert v. Wicklund*, 520 U.S. 292 (1997), and *Leavitt v. Jane L.*, 518 U.S. 137 (1996). It is this real-world view of the effects of Supreme Court jurisprudence on reproductive rights that we bring to our analysis of Judge Alito's record and testimony.

While the Center does not normally take positions on judicial nominations, our review of Judge Alito's record and testimony has spurred us to submit this written testimony to express our grave concern over the impact Judge Alito would have on reproductive rights jurisprudence as an Associate Justice of the United States Supreme Court. Of particular concern are 1) Judge Alito's repeated refusal to discuss whether he still holds the view, as he expressed in his 1985 job application, that "the Constitution does not protect a right to an abortion"; 2) his refusal to agree that *Roe v. Wade* is "settled law"; and 3) his failure to explain satisfactorily his dissent in the Third Circuit's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In that case, he voted to uphold a requirement that a woman notify her husband before obtaining an abortion and compared the woman's relationship with her husband to a child's relationship to a parent. Moreover, his testimony that *Roe v. Wade* is a precedent that is entitled to respect under the doctrine of *stare decisis* coupled with his refusal to state that *Roe* is "settled law," does not allay our concerns. After all, the dissenters in *Planned Parenthood v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, J., dissenting) argued that *Roe* "can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases."

We are hopeful that, if confirmed, Judge Alito will recognize that the United States Constitution, which he testified provides substantive protection for the liberty of U.S. citizens, protects a woman's ability to decide whether to carry a pregnancy to term. We are hopeful that he will recognize, as the Court did in *Casey*, that:

> That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for

> the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Casey, 505 U.S. at 852. However, taken together, Judge Alito's record and his testimony leave us with significant concerns about what he meant when he testified that he does not have an "agenda" when it comes to abortion and that, as a Supreme Court Justice, he would approach the issue with an "open" mind. Rather than eliminating our concerns, Judge Alito's testimony at the hearings – both the questions he answered as well as the ones he artfully left unanswered – has only deepened our concerns for the reasons we outline below.

I. Judge Alito's Testimony Does Not Adequately Explain his Dissent from the Third Circuit's Decision in *Planned Parenthood v. Casey* in which He Voted to Uphold Pennsylvania's Spousal Notification Requirement.

Judge Alito's dissent in *Planned Parenthood v. Casey* provides an especially important look into his approach to abortion jurisprudence. It is the only abortion case in which the outcome was not controlled directly by precedent and instead allowed him some leeway to interpret Supreme Court standards. When given this leeway, he interpreted these standards to provide the least protection to the right possible and, specifically, to uphold a spousal notification provision that he admitted placed some battered women and their children at risk.

At issue in *Casey* were a number of amendments to Pennsylvania's abortion law, including a parental consent requirement (with judicial bypass), a 24-hour waiting period, an "informed consent" requirement, and a spousal notice requirement. The Third Circuit struck down the spousal notice requirement but upheld the rest of the regulations under an "undue burden" standard. *Casey*, 947 F.2d 682 (3d Cir. 1991), *aff'd*, 112 S. Ct 2791 (1992). The Supreme Court later affirmed the Third Circuit's decision in a decision that replaced *Roe's* strict scrutiny analysis with an "undue burden" analysis. *See Casey*, 112 S. Ct. at 2821-22 ("We agree generally" with the conclusion of the Third Circuit, but "refine the undue burden analysis."). Judge Alito dissented from the Third Circuit's opinion, voting to uphold the spousal notice requirement and applying an interpretation of the "undue burden" standard that would allow almost any regulation of abortion to stand, short of an absolute ban.

A. Judge Alito Voted to Uphold a Spousal Notification Provision that Would Have Put Battered Women and Their Children at Risk.

In his dissent in *Casey,* Judge Alito indicated that he would have upheld Pennsylvania's spousal notification provision, even though, as he acknowledged, it contained only limited exceptions and, in particular, lacked an exception to notification for a woman who feared her husband would retaliate by beating their children. He acknowledged that the plight of women who "may suffer physical abuse or other harm as a result of th[e]

provision [was] a matter of grave concern." But he also said that whether Pennsylvania's approach of granting limited exceptions was sound was "not a question for [the courts] to decide."

B. Judge Alito Voted to Uphold the Provision Even Where He Determined It Would have a Heavy Impact on Some Women

Judge Alito also determined that there was no "undue burden" because the plaintiffs had not been able to prove "how many" women would be harmed. *Casey*, 947 F.2d at 722 (Alito, J., dissenting). Judge Alito contended that the burden imposed by the regulation should be analyzed according to the number of woman overall who were seeking abortions – not according to the impact it would have on the women it actually affected. *See id.* at 722 (arguing that an "undue burden may not be established by showing that a law will have a heavy impact on a few women but that instead a broader inhibiting effect must be shown."). In so doing, Judge Alito adopted the state's argument that there was no constitutional violation because the number of women who would be affected by the restriction was less than 1% of the *total number of women seeking abortions*.[1] In contrast, the Third Circuit majority rejected this approach because "the right not to carry to term is a constitutional right of *each individual woman*." *Id.* 691 n.4 (emphasis added).

Similarly, the Supreme Court flatly disagreed with Alito's approach, writing, "[t]he analysis does not end with the one percent of women upon whom the statute operates [to force spousal notification]; it begins there." *Casey*, 112 S. Ct. at 2830. The Court held that the "proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 2829. The opinion carefully notes that this group is not all women, nor all women seeking abortions, nor even all married women seeking abortions. The proper focus of inquiry is "married women seeking abortions *who do not wish to notify their husbands of their intentions* and do not qualify for one of the statutory exemptions to the notice requirement." *Id.* at 2829-30. The Court struck down the spousal notice provision on its face because in a "large fraction" of this narrowed group, this group to which the restriction "is relevant," the restriction would operate as substantial obstacle to the woman's choice, i.e., an "undue burden." Id.

At the hearings, Judge Alito was asked by Senator Biden to explain the difference between his approach and the Supreme Court's approach in *Casey*, but in response he failed to explain why he adopted a contrary view. He also appeared to misunderstand the Supreme Court's ruling, and seemed to suggest that the proper focus of inquiry is *married women seeking abortions*, the point specifically rejected by the Court in *Casey*. 112 S. Ct. at 2829-30. Judge Alito's misunderstanding or misrepresentation of the proper standard is disturbing.

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[1] Only one percent of all women seeking abortions were married and didn't want to notify their husbands. The state argued that fewer than this one percent would be harmed by being *forced* to tell their husbands. *See Casey*, 112 S. Ct. at 2829 (discussing State's contention).

C. Judge Alito's Definition of the "Undue Burden" Standard Was Extremely Limited.

At the time of the Third Circuit's opinion in *Casey*, the Supreme Court had yet to explicitly adopt the "undue burden" standard later adopted in *Casey*. Nevertheless, the Third Circuit, joined by Judge Alito, held that a series of concurrences and dissents written primarily by Justice O'Connor indicated that the standard that applied to review of abortion regulations had already changed from the "strict scrutiny" standard adopted by *Roe* to an "undue burden" standard. Judge Alito disagreed with the Third Circuit majority, though, when it came to defining the scope of the undue burden standard. First, he stated that an undue burden did not exist unless a law prohibits abortion, gives another person veto power over the abortion, or imposes "severe limitations" on the rights. *Casey*, 947 F.2d at 721 (Alito, J., dissenting). He then appears to go further, discarding the "severe limitation" prong to hold that the spousal notice provision did not impose an undue burden, because it "d[id] not create an '*absolute* obstacle' [to having an abortion] or give a husband 'veto power'" over the abortion decision, and because the plaintiffs had not proven that the regulation would have a "broad practical impact." *Id.* at 722-23.

Subsequently, the Supreme Court flatly rejected Judge Alito's proposed construction of the "undue burden standard," resuscitating the "severe limitation" prong and emphasizing that an abortion regulation imposes an "undue burden" when it "places a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 112 S. Ct. at 2820-21. It is difficult to think of any restriction, short of an absolute ban or veto, that would have been an undue burden under Judge Alito's proposed construction.

In his testimony, Judge Alito stated that the standard of review, the "undue burden test," was the "big issue" when *Casey* came before the Third Circuit. In response to questioning by Senator Biden on January 11th, Judge Alito testified, "[t]hat was the most hotly contested argument before us – had there been any change in the Supreme Court's case law? – and the plaintiffs argued strenuously that there had not." Judge Alito further stated that the panel struggled to determine the standard but concluded that it was the "undue burden standard. And there just wasn't a lot to go on. ... I looked for whatever guidance I could find." *Id.* Judge Alito did not explain how he came to such a different conclusion from the majority or the Supreme Court itself. Nor did he explain how he came to consider the burden imposed by the spousal notice provision on battered women who feared their children would be physically abused or that they themselves would be subject to mental torture if their husbands were notified of the abortion not to be "undue."

D. Judge Alito Compared a Woman's Relationship to Her Husband to A Child's Relationship to a Parent

In his *Casey* dissent, Judge Alito broke from the majority to argue that Pennsylvania's statute requiring a married woman to notify her husband before having an abortion was constitutional. His analysis appears not to recognize that a married woman's relationship to her husband should not be treated the same as a minor's relationship to her parents. As with Judge Alito's testimony on his view of the "undue burden standard," his explanation

of this apparent failure did little to allay our concerns about how he will address issues of reproductive freedom as a Supreme Court justice.

In arguing that the evidence presented in *Casey* failed to show that the spousal notice requirement imposed an undue burden, Judge Alito relied on several Supreme Court opinions upholding parental notice requirements. He wrote that "Justice O'Connor's opinions [on parental notice] disclose that the practical effect of a law will not amount to an undue burden unless the effect is greater than the burden imposed on minors seeking abortions in *Hodgson* or *Matheson*." *Casey*, 947 F.2d at 721.[2] In other words, Judge Alito made no distinction between the justifications for requiring parental notice and those for requiring spousal notice that would alter the constitutional analysis of the two types of restrictions.

Responding to questions from Sen. Feinstein on this issue, Judge Alito testified that "I've never equated the situation of an adult woman who fell within the notification provision of the Pennsylvania statute with the situation of a minor . . . . I actually said that I don't equate these two situations. I was mindful of the fact that they are very different situations." (1/10 p.m. Sen. Feinstein)

While he may have been "mindful" that the situations are different, it is simply not true that he stated that he didn't equate them. In fact, after comparing the two situations he never recognized or explored any differences between them. To the contrary, Judge Alito wrote that even as to the women who were inhibited from obtaining an abortion because of the notice requirement, "the plaintiffs did not show that the impact [of the law] would be any greater or any different from the impact of the notice requirement upheld in *Matheson*," one of the parental notice cases, 947 F.2d at 723, i.e., the constitutional inquiry was the same.[3]

Before the Judiciary Committee, Judge Alito defended his use of *Hodgson* and *Matheson* by explaining that he was reasoning by analogy and that this is what lawyers do. The problem with this explanation, of course, is that in this case Judge Alito, "reasoned by analogy" that the situations *were the same* with respect to the constitutional inquiry, not that they were the same in some ways but different in others relevant to the constitutional inquiry. For example, Judge Alito never pointed out or took account of the significant difference between the woman's relationship to her husband (as co-equals) and the child's relationship to her parent. That this distinction is crucial to analyzing whether spousal or parental notice restrictions on the liberty of the individual are justified is clear

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[2] In *Hodgson v. Minnesota*, 497 U.S. 417 (1990), and *H.L. v. Matheson*, 450 U.S. 398 (1981), the Court reviewed laws requiring parental involvement before a minor could obtain an abortion.

[3] Judge Alito went so far as to state that the Pennsylvania legislature "could have reasonably believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems – such as economic constraints, future plans, or the husbands' previously expressed opposition – that may be obviated by discussion prior to abortion." 947 F.2d 726. In other words, Judge Alito seemed to believe that a woman might misunderstand her marriage or her family situation but that her husband could straighten her out – telling her that they have enough money for another child, that he would help with child care this time, that he actually wants to stay in the marriage.

from both the Third Circuit and the Supreme Court opinions. As the Court recognized in *Casey*, the analogy between parental notice requirements and spousal notice requirements can only go so far: "[Parental notification statutes], and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women." 112 S. Ct at 2830.

II. Judge Alito Refused to Disavow His View, Expressed in 1985, that "the Constitution Does Not Protect a Right to An Abortion"

Judge Alito clearly admitted that the statement he made in his 1985 application for a promotion in the Reagan/Meese Justice Department that "the Constitution does not protect a right to an abortion" reflected his belief at the time. (*See, e.g.* 1/10 a.m. Sen. Specter, 1/10 p.m. Sen. Schumer) However, Judge Alito consistently refused to explain whether he continues to believe that "the Constitution does not protect a right to an abortion."

Instead of addressing his current views, Judge Alito claimed several times that the statement reflected his view from the "vantage point as an attorney in the Solicitor General's office." (1/10 a.m. Sen. Specter). Then, he consistently and tenaciously moved on to describe how he would address the question as a judge – by applying principles of state decisis and "if the Court were to get beyond the issue of stare decisis, then I would to go through the whole judicial decision-making process before reaching a conclusion." (1/10 p.m. Sen. Schumer).

In describing how he would address the substantive issue as a justice, Judge Alito testified that he had an open mind and appeared to be distancing himself from the 1985 statement with comments like these:

- When someone becomes a judge, you really have to put aside the things that you did as a lawyer . . . and think about legal issues the way a judge thinks about legal issues. (1/10 a.m. Sen. Specter).
- I would need to know the case before me. And I would have to consider the arguments – and they might be different arguments from the arguments that were available in 1985. (1/10 p.m. Sen. Schumer)
- The things that I said in the 1985 memo were a true expression of my views at the time . . . But that was 20 years ago, and a great deal has happened in the case law since then. *Thornburgh* was decided and then *Webster* and then *Casey* and a number of other decisions." (1/11 a.m. Sen. Durbin) *See also* Responses to Sen. Kohl (1/11 p.m.).

In response to sharp questioning from Sen. Schumer, Judge Alito explained that the due process clause of the Fifth and Fourteenth Amendments provides "protection for liberty, it provides substantive protection, and the Supreme Court has told us what the standard is for determining whether something falls within the scope of those protections."

However, unlike the question of whether the Constitution protects free speech, Judge Alito refused to opine on whether be believed the Constitution protected abortion, explaining that "[a]sking about the issue of abortion has to do with the interpretation of certain provisions of the Constitution." (1/10 p.m. Sen. Schumer). This, coupled with his refusal to agree that *Roe* is "settled law," *see infra*, causes us grave concern.

III. Judge Alito's Unwillingness to Say that *Roe v. Wade* is "Settled Law" Raises Serious Questions about How He Will Apply *Roe* and *Casey* to Abortion Issues Before the Court.

Judge Alito spent a good deal of his testimony discussing principles of stare decisis and his view of precedent. Indeed, his testimony opened with a long colloquy between him and Sen. Specter about *Casey,* its discussion of stare decisis and how that applies to the right to choose. Judge Alito, as he did throughout his testimony, carefully addressed the importance of precedent, but he consistently refused to discuss how the principles actually applied to a consideration of *Roe v. Wade, Casey*, or abortion more generally. In addition, although Judge Alito agreed that certain issues were "settled," or "well-settled," he refused to say whether he believed *Roe* and *Casey* were "settled."

Throughout his testimony, Judge Alito reiterated his respect for precedent and the important role that stare decisis should play in constitutional decision making. In response to questions about the strength of *Casey*, Judge Alito testified that when a decision is reaffirmed that "strengthens its value as stare decisis" and that when the Supreme Court declines to reach the merits of an issue but says it will rule on stare decisis principles, "that is a precedent on precedent." But he also reiterated that stare decisis is "not an inexorable command." *See, e.g.*, 1/11 p.m. Sen. Feinstein.

In contrast to his willingness to identify as well-settled *Brown v. Board of Education*, *Griswold v. Connecticut*, and the principle of one-person, one-vote established by the Warren Court, Judge Alito consistently refused to say that *Roe* and *Casey* were settled law. For instance, when asked by Sen. Durbin if he agreed that *Roe* is settled law, Judge Alito described the opinion as an "important precedent" that had been reaffirmed, "strengthen[ing] its value as stare decisis." When pressed again about whether it is the "settled law of the land," Judge Alito replied:

> It is a – if "settled" means that it is – it can't be reexamined, then that's one thing. If "settled" means that it is a precedent that is entitled to respect as stare decisis – and all of the factors that I've mentioned come into play, including the reaffirmation and all of that – then it is a precedent that is protected, entitled to respect under the doctrine of stare decisis. (1/11 a.m. Sen. Durbin)

He declined to be more specific because "it is an issue that is involved in litigation now, at all levels." *Id.* Similarly, in response to a question from Sen. Kohl, Judge Alito refused to say whether "in [his] mind . . . the principle embodied in *Roe* ... or ... in *Casey* is clearly established law that is not subject to review." Because of the "current state of

litigation relating to the issue of abortion," Judge Alito testified that it would not be appropriate for him to "go further than that." (1/11 p.m. Sen. Kohl)

These careful responses do not clarify how Judge Alito will address challenges to *Roe* and *Casey* if they come before him as a Supreme Court justice.

IV. Judge Alito Agreed that the "Case Law" is Clear that Any Restriction on Abortion Must Include an Exception Protecting the Health of the Mother

In response to a question from Sen. Feinstein, Judge Alito agreed that "I think the case law is very clear that protecting the life and the health of a mother is a compelling interest throughout pregnancy. I think that's very clear in the case law." (1/10 p.m. Sen. Feinstein). We remain hopeful, therefore, that Judge Alito would apply this case law as an Associate Justice of the Supreme Court to require any restriction on abortion to protect the life and health of the woman.

V. Judge Alito's Other Third Circuit Decisions Relating to Abortion and His Testimony about Those Decisions Do Not Provide Any Significant Evidence of His Position on Reproductive Rights

As a judge on the Third Circuit, Judge Alito participated in several cases touching on abortion rights in addition to *Planned Parenthood v. Casey*. His participation in all three demonstrates a judge who is willing to follow precedent when it leaves him no wiggle room and to apply careful statutory, regulatory analysis but they do not provide any insight into how he would approach the issue as an Associate Justice of the Supreme Court.

In two of those cases, he was bound by the Supreme Court's clear precedent on the issue, and he followed it. In *Planned Parenthood v. Farmer,*[4] the Third Circuit was called on to review New Jersey's partial birth abortion statute that was nearly identical to the one struck down by the Supreme Court in *Stenberg v. Carhart.*[5] Judge Alito voted with the majority to apply *Stenberg*. Notably, however, he went out of his way to write a concurrence objecting to the majority's issuance of an opinion it had written before *Stenberg* was handed down. It isn't clear from his opinion whether he initially voted with or against the majority – and he was not called on to testify about his concurring opinion during his confirmation hearings. Also, in *Alexander v. Whitman,*[6] Judge Alito voted with the majority in a decision holding that stillborn fetuses did not have equal protection rights and thus state law was not required to include a cause of action for stillborn fetus. Again, Judge Alito's position here was mandated by Supreme Court and Third Circuit precedent.[7]

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[4] 220 F.3d 127 (3d Cir. 2000).

[5] 539 U.S. 914 (2000).

[6] 114 F.3d 1392 (3d Cir. 1997).

[7] Judge Alito also wrote an inscrutable concurring opinion here, seeming to distance himself from the reasoning of the precedent that bound him.

Finally, Judge Alito voted with the majority in *Elizabeth Blackwell Health Center for Woman v. Knoll*,[8] a case challenging a Pennsylvania law imposing special requirements on Medicaid funding of abortions. The court found that Pennsylvania's reporting requirement in cases of rape or incest conflicted with federal law and were thus, invalid. It also found that the requirement that a second physician certify that a woman's life was in danger was invalid. This was a simple application of federal preemption doctrine and did not address the constitutionality of abortion.

For all these reasons, the Center for Reproductive Rights remains extremely concerned about the impact Judge Alito would have on constitutional abortion jurisprudence and thus on the lives and health of women in this country if confirmed as an Associate Justice of the United States Supreme Court.

[8] 61 F.3d 170 (3d Cir. 1995).

TESTIMONY

CONCERNING THE NOMINATION OF JUDGE SAMUEL A. ALITO, JR.
FOR THE UNITED STATES SUPREME COURT

UNITED STATES SENATE, COMMITTEE ON THE JUDICIARY

January 12, 2006

Erwin Chemerinsky
Alston & Bird Professor of Law and Political Science, Duke University

I am honored to have been asked to testify concerning the nomination of Samuel Alito to be an Associate Justice of the United States Supreme Court. It is impossible to overstate the importance of this nomination for the immediate future of constitutional law in the United States. Often in considering judicial nominees, the Senate can take refuge in doubt over the impact of a particular nominee. In considering the nomination of Judge Alito, there is no doubt as to the importance of this seat on the Supreme Court or as to Judge Alito's likely impact on the law.

For almost two decades, the Supreme Court has been frequently referred to as the "O'Connor Court" because of the pivotal role of Justice Sandra Day O'Connor in virtually every aspect of constitutional law. In almost every major area of constitutional law – campaign finance regulation, death penalty litigation, racial justice, reproductive freedom, separation of church and state – Justice O'Connor was in the majority in 5-4 decisions. Replacing her thus has the

possibility of dramatically changing the law in some of the most important and controversial areas of contemporary constitutional law.

This Committee thus must assess Justice O'Connor's prospective replacement in terms of his likely impact on constitutional law. Unlike many nominees in American history, Judge Alito has a long written record which provides clear indication of his views and what he is likely to do if confirmed to the United States Supreme Court. The contrast between Samuel Alito and Sandra Day O'Connor is stark.

I want to focus on one area: separation of powers and specifically checks and balances on executive power. No area of constitutional law is likely to be more important in the years ahead than constitutional challenges to claims of broad executive authority. In recent years, the Bush administration has claimed unprecedented executive power, including the authority to detain American citizens apprehended in the United States as enemy combatants; the power to engage in warrantless eavesdropping of conversations and electronic communications by American citizens with those in foreign countries; the ability to detain enemy combatants indefinitely in Guantanamo, Cuba, without due process; and the power to authorize torture of individuals.

My goal today is not to discuss the legality or desirability of any of these

executive actions. Rather, my point is that these and other issues of executive power are enormously important and are sure to come before the Supreme Court in the near future. As President Bush has explained, the war on terrorism is likely to last beyond all of our lives and thus surely will pose many other issues concerning executive power in the years and decades ahead.

Thus, a crucial issue before this Committee must be whether Samuel Alito is likely to examine the claims of executive power critically or whether he is likely to be a virtual rubber-stamp approving executive actions. What is striking about Judge Alito's record is that every available indication of his views – from his memos as a Justice Department lawyer, his speeches, and his judicial opinions – points in one direction: Judge Alito is likely to be extremely deferential to claims of executive power and very unlikely to enforce needed checks and balances. I have carefully reviewed Judge Alito's record and I could find no indication where he wrote a memo, gave a speech, or authored a judicial opinion favoring limits on executive power. My conclusion is that at this point in time, it is far too dangerous to approve someone for the Supreme Court with such a consistent record of strong deference to executive claims of authority.

The Importance of Limiting Executive Power

At the risk of saying the obvious, checking executive power was a central

goal of the American Constitution. For the framers of the Constitution, executive power was the power most to be feared. Indeed, in their view, reposing virtually all power in a single individual, such as King George III, threatened all liberty. Having endured the tyranny of the King of England, the framers viewed the principle of separation of powers as the central guarantee of a just government.[1]

Madison wrote the strict separation of powers was essential to preserve democracy in a republic because: "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that . . . [t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."[2] Madison further warned, "[t]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger

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[1] *Freytag v. Commissioner*, 501 U.S. 868, 870 (1991).

[2] THE FEDERALIST NO. 47, at 301 (Madison)(C. Rossiter ed., 1961).

of attack."[3]

In the past, the Supreme Court has served an essential role in the system of separation of powers by checking executive power and rejecting presidential actions that usurp the powers of other branches of government or prevent them from carrying out their constitutional duties. In cases like *Youngstown Sheet & Tube Co. v. Sawyer,*[4] which rejected President Truman's effort to seize the steel mills during the Korean War, and *United States v. Nixon,*[5] which rejected President Nixon's effort to invoke executive privilege to keep the Watergate tapes from being used as evidence in court, the Court imposed essential checks on executive power. A crucial question must be whether Judge Alito will continue this tradition of judicially imposed limits on presidential authority or whether he will be a virtually sure vote for the executive on the important issues likely to come before the Court concerning separation of powers.

Samuel Alito's Record on Executive Power

Judge Alito's writings, speeches, and opinions indicate that his confirmation to the Supreme Court would shift the Court's balance towards potentially

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[3]THE FEDERALIST No. 51, at 321-22 (Madison)(C. Rossiter ed., 1961).

[4]343 U.S. 579 (1952).

[5]418 U.S. 683 (1974).

dangerous deference to executive power. In this, like every area, the contrast to Justice O'Connor is crucial in assessing the impact of confirming Judge Alito. Justice O'Connor, for example, in rejecting the Bush administration's position that it could detain enemy combatants without due process declared that even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[6] Similarly, Justice O'Connor voted with the majority in holding that federal courts had jurisdiction to hear the habeas corpus petitions brought by detainees held in Guantanamo, Cuba.[7]

But there is nothing in Judge Alito's record to suggest recognition of the need for limits on executive power. Prior to becoming a judge, Alito worked exclusively in the executive branch of government, in the United States Department of Justice: as an Assistant United States Attorney, as Assistant Solicitor General, as Deputy Assistant Attorney General in the Office of Legal Counsel, and as a United States Attorney. In these capacities, he repeatedly expressed the need for expansive, unchecked executive power.

For example, as an Assistant Solicitor General, Alito addressed the question whether high-ranking executive officials should have absolute immunity from

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[6]Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

[7]Rasul v. Bush, 542 U.S. 466 (2004).

lawsuits claiming that they authorized the illegal, warrantless wiretapping of American citizens thought to present domestic threats to national security. In 1972, the United States Supreme Court unanimously ruled that the President could not authorize such warrantless electronic surveillance.[8] After this decision, individuals who were subjected to illegal wiretapping sued the Attorney General and other executive branch officials. Alito, who was working in the Justice Department at the time, wrote a memo saying that he believed that those responsible were protected by absolute immunity. He declared: "I do not question that the Attorney General should have this [absolute] immunity."[9] The United States Supreme Court rejected this position and declared in words that seem quite important today: "The danger that high federal officials will disregard constitutional rights in their zeal to protect national security is sufficiently real to counsel against affording such individuals an absolute immunity."[10]

Judge Alito's views about executive power are reflected in other writings when he was at the Justice Department. For instance, he wrote a memorandum urging that the President issue statements when signing bills so that presidential

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[8]United States v. United States District Court, 407 U.S. 297 (1972).

[9]Memorandum from Samuel A. Alito to the Solicitor General, Re: Forsyth v. Kleindienst, No. 82-1812 (June 12, 1984).

[10]Mitchell v. Forsyth, 472 U.S. 511, 523 (1985).

views, and not legislative history, be used in interpreting statutes.[11] Alito's clearly stated objective was to shift power from the legislature, whose legislative history often guides statutory interpretation, to the executive branch. He said that his goal was to give the Executive "the last word" on issues of statutory interpretation and to "increase the power of the Executive to shape the law."[12]

Since becoming a judge, Alito has given a number of speeches in which he has advocated expansive executive powers. For example, in a 1989 speech, Judge Alito sharply criticized the Supreme Court's decision in *Morrison v. Olson,* upholding the constitutionality of the federal law providing for an independent counsel.[13] The Supreme Court, in a 7-1 decision, recognized the need for Congress to create an independent counsel to investigate wrong-doing by the President and high level executive officials. Judge Alito, in his speech, strongly disagreed and characterized Justice Scalia's lone dissent as "brilliant."[14] In other words, Judge Alito rejected the need for checks and balances and sided with

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[11]Memorandum from Samuel A. Alito, Jr., to the Litigation Working Group, re: Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law (February 5, 1986).

[12]Id.

[13]487 U.S. 654 (1988).

[14]Introduction by Samuel Alito, *Debate: After the Independent Counsel Decision: Is Separation of Powers Dead?*, 26 Am. Crim. L. Rev. 1667 (1989).

Justice Scalia's dissent which favored broad executive power.

In a speech to the Federalist Society, in 2001, Judge Alito expressed his view that "the theory of the unitary executive . . . best captures the meaning of the Constitution's text and structure."[15] He explained that under this theory, "all federal executive power is vested in the President" and "a vigorous executive is needed."[16] This theory would significantly increase presidential power and greatly limit the ability of Congress to impose checks on it. As its advocates explain, "[t]he practical consequence of this theory is dramatic: it renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power."[17] This theory requires all executive tasks to be under presidential control and rejects most limits on presidential power. The fact that Judge Alito champions the unitary executive theory is strong indication that as a Justice he would be a consistent vote for executive power.

On the Third Circuit, Judge Alito has not had the occasion to deal directly with issues of presidential power. But repeatedly Judge Alito has had to deal with

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[15]Remarks of Judge Samuel Alito in "Administrative Law and Regulation: Presidential Oversight and the Administrative State," Engage (November 2001) at 12.

[16]Id. at 12.

[17]Steven A. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153, 1165-66 (1992).

cases involving the conflict between executive, law enforcement power and individual rights. Judge Alito consistently has ruled against individuals and in favor of government powers. For example, in *Doe v. Groody*,[18] Judge Alito dissented from a decision that allowed a woman and her 10 year old daughter to receive money damages after they were strip searched by police who were executing a search warrant unrelated to these two individuals. Judge Alito sided with the police and would have precluded any recovery for the injured individuals.

On some occasions, Judge Alito has dissented from *en banc* decisions on his Court protecting individual freedoms from government power. For example, Judge Alito dissented from a 9-2 decision of his court holding that notice must be sent by mail to the place where a person is being held and from a 10-1 decision that notice must be reasonably calculated to actually reach the person whose property is being seized.[19]

Conclusion

Simply put, there is nothing in Judge Alito's memos, speeches, or opinions that offer hope that he will be a vote to uphold checks and balances. Instead, everything points to his being a strong voice and vote for expansive executive

[18]361 F.3d 232 (3rd Cir. 2004), *cert. denied,* 125 S.Ct. 111 (2004).

[19]United States v. McGlory, 202 F.3d 664, 673 (3d Cir. 2000) (en banc); United States v. One Toshiba Color Television, 213 F.3d 147 (3d Cir. 2000) (en banc).

power. At this point in American history, replacing Justice O'Connor with Judge Alito likely will mean a significant shift on the Supreme Court in favor of executive authority and against checks and balances. For this reason, and so many others where Judge Alito is likely to bring about a dramatic change in the law, he is the wrong nominee at the wrong time to go on the Supreme Court.

STATEMENT BY HOMELAND SECURITY SECRETARY MICHAEL CHERTOFF ON JUDGE SAMUEL ALITO

Press Office
U.S. Department of Homeland Security

Press Release

January 10, 2006
Contact: DHS Press Office, 202-282-8010

Statement by Homeland Security Secretary Michael Chertoff on Judge Samuel Alito

During Judge Samuel Alito's confirmation hearings today, some criticism has apparently been leveled at him based on his dissent from a Fourth Amendment decision, which I wrote when I served on the Third Circuit.

I enthusiastically support Judge Alito's nomination. He is an outstanding jurist. Of course, judges sometimes disagree about the application of a legal principle to a narrow set of facts in a specific case. What is not subject to dispute is Judge Alito's fairness, intellect, and commitment to the Constitution. Through the years I worked with him as a prosecutor and as a fellow judge, he displayed a strong belief in, and commitment to, the principles of the Fourth Amendment and equal justice.

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A man of integrity

CHICAGO TRIBUNE
By Steven Lubet, law professor at Northwestern University and David McGowan, law professor at the University of San Diego
Published November 18, 2005
http://www.chicagotribune.com/news/opinion/chi-0511180355nov18,0,3282342.story?coll=chi-newsopinioncommentary-hed

Supreme Court nominee Samuel Alito Jr. did not play fast and loose with judicial ethics rules in a 2002 appeal involving the Vanguard Group mutual fund company, as some reports suggest.

Eight Senate Democrats have initiated an inquiry into the case, requesting information about Alito's initial decision not to recuse himself even though he held a six-figure investment in Vanguard funds at the time. They are going to discover that Alito's conduct in the matter, though not perfect, actually provides a good example of how judges should ultimately handle financial conflicts of interest.

Here are the known facts: Since at least 1990, Alito has been heavily invested in mutual funds managed by Vanguard, holding $400,000 to $1 million in 11 Vanguard funds. Nonetheless, he participated in a 2002 case in which a Massachusetts woman was suing Vanguard, joining a unanimous court of appeals decision in the company's favor. About a year later, however, the plaintiff learned of Alito's investments and complained that he should have disqualified himself from the case.

Alito did not agree, but he still removed himself. "I do not believe that I am required to disqualify myself," he wrote to his court's chief judge, "however, it has always been my personal practice to recuse in any case in which any possible question might arise." The case was then reassigned and a new panel of judges reaffirmed the original decision.

What are we to make of this? Did Alito violate the rules of judicial ethics, as some have claimed? Was he right all along? Or did he simply make a mistake?

As it turns out, the judicial disqualification statute is surprisingly tricky when it comes to mutual funds. Without parsing the intricate details, it is sufficient to say that Alito should not have heard the appeal if his investment in the individual Vanguard funds amounted to an ownership share in the management company. It is not immediately clear whether that is the case, however, at least from our examination of Vanguard's Web site and promotional materials.

But let's take the worst-case scenario and assume that Alito got it wrong, sitting in the Vanguard case when he should have disqualified himself. He still did the right thing when presented with the plaintiff's complaint. He did not dig in his heels and insist that his judgment was unquestionable. He did not engage in self-righteous self-justification (as other judges have been known to do). Instead, he voluntarily stepped back and allowed the matter to be reconsidered by other judges against whom no claim of any kind could be made. That is good judicial temperament in action.

There is one complicating factor. In 1990, when he was nominated to his current seat on the 3rd U.S. Circuit Court of Appeals, Alito informed the Senate Judiciary Committee that he would disqualify himself "from any cases involving the Vanguard companies." By 2002, it appears that he either forgot about that statement or reconsidered it.

But so what? The plaintiff in the Vanguard case obviously did not rely on Alito's 1990 confirmation hearings and, in any event, it is not at all clear that such blanket disqualification was even required. To be sure, it would have been better for Alito to stick to his original commitment, taking greater care to avoid cases involving any relationship to his Vanguard investments.

So Alito is not perfect. Who is? Judges make mistakes all the time, on matters great and small. That is why we have appellate courts, and that is why there are nine justices on the U.S. Supreme Court. The truly important question is not whether the judge made an error, but how he responded when it was pointed out to him. You do not need to be a fan of Alito's jurisprudence (and one of us definitely is not) to recognize that he is a man of integrity.

In the final analysis, Alito showed admirable sensitivity to the question of recusal, agreeing to disqualify himself "in any case in which any possible question may arise." Other judges--and justices--would do well to follow that example.

CHBA
COLORADO HISPANIC BAR ASSOCIATION

January 10, 2006

U.S. Senator Ken Salazar
702 Hart Senate Office Building
Washington, D.C. 20510
Fax: (202) 228-5036

Dear Senator Salazar:

The Colorado Hispanic Bar Association (CHBA) expresses its opposition to the confirmation of Samuel Alito as Associate Justice of the United States Supreme Court. After review of his opinions written during his tenure on the United States Court of Appeals for the Third Circuit, the CHBA is concerned that Judge Alito has not displayed sufficient respect for two fundamental legal principles: (1) the role of the jury to resolve disputed questions of fact; and (2) the restraints that *stare decisis* imposes upon a judge's decision-making. Both of these principles recognize the important – but limited – role that an individual judge plays in our justice system. Judge Alito's resistance to these tenets is troubling and counsels against his confirmation to the highest court in the land. Although a detailed discussion of Judge Alito's writings is beyond the scope of this message, the CHBA offers a few examples to illustrate its concerns.

In a 1996 case brought under Title VII of the Civil Rights Act of 1964, an employee alleged that her employer had discriminated against her on the basis of sex. *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3rd Cir. 1996). At issue was the minimum evidentiary showing the plaintiff must make in order to permit the jury to decide her case. All of the reviewing judges agreed that the plaintiff had presented both a *prima facie* case of illegal discrimination and enough evidence to permit the jury to disbelieve the employer's proffered nondiscriminatory reason (for the adverse employment action) as merely a pretext. In an *en banc* proceeding, the Third Circuit held, by an 11-to-1 vote, that the plaintiff presented sufficient evidence to permit the jury's verdict in her favor to stand. The court emphasized that "determining whether the inference of discrimination is warranted must remain within the province of the jury . . . not the court." *Id.* at 1071-72. Alone among the 12 judges, Judge Alito dissented and expressed an extreme view of the plaintiff's evidentiary burden, requiring something akin to the largely discredited "pretext-plus" requirement. *Id.* at 1070, 1078-

88. Rather than defer to the jury's role as factfinder, Judge Alito would have thrown out the jury's verdict and granted judgment as a matter of law to the employer.

In another Title VII case, Judge Alito, again in dissent, showed similar disregard for the jury's role, voting to keep the case from the jury. *Bray v. Marriott Hotels*, 110 F.3d 986 (3rd Cir. 1997). Referring to Judge Alito's analysis of the evidence, the majority of the court explained that a "factfinder may well agree with that interpretation, but that is not for us to decide." *Id.* at 992. His fellow judges also found that "Title VII would be eviscerated" under Judge Alito's analysis of the law. *Id.* at 993.

Moreover, Judge Alito has displayed a tendency to disregard *stare decisis* (adherence to the rule announced in prior cases). For example, in a death penalty case, the *en banc* Third Circuit granted the defendant a writ of habeas corpus because the prosecution had violated the Equal Protection Clause by striking black jurors on account of their race. *Riley v. Taylor*, 277 F.3d 261 (3rd Cir. 2001). The court noted that its analysis was guided by several prior opinions. *See id.* at 290. Judge Alito dissented again. According to his colleagues, Judge Alito, rather than following precedent, "accord[ed] little weight to these authorities." *Id.* The court also took issue with Judge Alito's attempt to analogize the statistical evidence of the use of peremptory challenges to strike black jurors to the percent of left-handed presidents. *Id.* at 292. The Third Circuit found that Judge Alito had "overlooked the obvious fact that there is no provision in the Constitution that protects persons from discrimination based on whether they are right-handed or left-handed." *Id.* Further, his fellow judges found that Judge Alito had "minimize[d] the history of discrimination against prospective black jurors and black defendants, which was the *raison d'etre* of the [U.S. Supreme Court decision barring the use of peremptory challenges on the basis of race]." *Id.*

These are but a few examples of Judge Alito's seeming reluctance to recognize the limits of *stare decisis* and his willingness to invade the jury's province. Judge Alito's opinions reveal a consistent and discomforting inclination to arrogate undue authority to individual judges such as himself. Judge Alito's activist streak stands in sharp contrast to the cautious pragmatism of Justice Sandra Day O'Connor, whom he would replace on the Court.

The CHBA is particularly troubled by the addition of Judge Alito's unrestrained view of judicial authority to a Supreme Court on which Hispanics are not represented. Given that the Hispanic community has no direct voice on the Court, Hispanics should be very concerned if the Court were to embark on an era in which it feels free to upset settled law and to assume new powers within our justice system. Hispanics expect this institution to operate within the well-recognized limits on its authority. Accordingly, unless and until Judge Alito sufficiently addresses the concerns outlined herein, the CHBA opposes his elevation to the United States Supreme Court.

Thank you for your kind consideration of our message as you perform the Senate's constitutional duty to evaluate carefully the nominees to the Court.

Sincerely,

Victoria Lovato
President
Colorado Hispanic Bar Association

Congress of the United States
House of Representatives
Washington, DC 20515

January 6, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
711 Hart Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy:

As you examine the nomination of Judge Samuel Alito to the United States Supreme Court, we ask that you consider the particular implications that Judge Alito's confirmation would have on the Latino community.

We are deeply disappointed that President Bush did not take this third opportunity to nominate a qualified Latino to the Supreme Court. Given the size of the Hispanic community in the United States, the under-representation of Hispanics in the judiciary and the abundance of Hispanics qualified for appointment, it is difficult to comprehend the President's decision other than in the harsh light of political factors trumping all other considerations.

We do not need to stress to you the importance of this nomination and the impact that the Court has on the lives of our citizens. We are equally confident that you understand the critical role that the Supreme Court has played in safeguarding the rights of minorities. Oftentimes it is the Court to which minorities must turn for protection from discriminatory laws and practices. It is therefore important that nominees are sensitive to the experiences and struggles that minorities have faced in securing their constitutional rights.

While Judge Alito's background and record on the bench have been largely discussed in the public forum, his opportunity to explain his opinions and philosophy will come during the confirmation hearings. Like all Americans, we deserve and expect clear

answers on his record both on and off the bench, as many of his opinions and writings give us reason to be concerned. In order to better gauge his current attitudes, we respectfully request that you consider asking Judge Alito the attached questions or questions similar to these during the confirmation hearings in the Senate Judiciary Committee.

While we should not expect any Supreme Court justice to consistently rule in a manner that we agree with, we hope that the successor to Justice Sandra Day O'Connor will share her tradition of being fair, open-minded and unbiased towards any specific group.

Thank you for taking these views into consideration as you proceed with fulfilling your constitutional duty to provide advice and consent on Judge Alito's nomination.

Sincerely,

Grace Flores Napolitano, M.C.
Chair
Congressional Hispanic Caucus

Charles A. Gonzalez, M.C.
Chair
CHC Civil Rights Task Force

Congressional Hispanic Caucus Questions to Supreme Court Justice Nominee Judge Samuel A. Alito, Jr.

A. Racial (Ethnic) Discrimination:
Pemberthy v. Beyer, 19 F.3d 857 (3d Cir. 1994)

Facts: Alito wrote majority opinion allowing "peremptory challenges" by the prosecution of bilingual prospective jurors because of concerns that ability to understand Spanish would jeopardize jurors' acceptance of official translations of tape recorded conversations.

Question: This holding would provide a vehicle for striking jurors based on ethnicity (i.e., Latinos more likely to speak Spanish) under the guise of "language concerns". Why isn't this unconstitutional as it relates to the prospective juror being struck (deprivation of right to serve on jury, participate in government)? Why isn't this unconstitutional as to the defendant per Batson precedent?

B. Voting Rights Act:
Jenkins v. Manning, 116 F.3d 685 (3d Cir. 1997)

Facts: The issue was the "at-large" election of school board members. After reversing and remanding the District Court's ruling that no violation of the VRA took place, the District Court considered additional evidence and again found no violation. Judge Alito appears to have joined the majority in affirming the District Court's ruling. Judge Rosen's dissent is insightful and a good example of a judge's exercise of discretion in viewing the same evidence and reaching a decision that gives meaning to the VRA.

Question: The "Senate Factors" (after finding Gingles factors present) were additional and necessary considerations and consisted of (1) the extent to which minority group members had been elected to public office in the jurisdiction and (2) the extent to which voting in the elections of the political subdivision is racially polarized. Judge Alito found the that Senate Factors were met when historically only 3 of 10 black candidates over a 10 year period were successful (one in a never-repeated plurality win and one by a black candidate defeating another black candidate). Would Judge Alito please elaborate on his "judicial philosophy" when it comes to VRA and "at-large" voting districts?

C. Immigrant Rights:
1986 Deputy Attorney General Alito Memo to FBI Director William Webster

Facts: The memo reflects Judge Alito's legal analysis that "...illegal aliens have no claim to nondiscrimination with respect to non-fundamental rights."

Question: In light of Plyler v. Doe, 457 U.S. 67 (1982), how does he reconcile his conclusions that appear to be based on the 1976 case of Matthews v. Diaz, 426 U.S. 67 (1976), obviously a case decided PRIOR to Plyler? Does he follow precedent only when convenient? If he is not willing to follow existing precedent (is there any other kind?), then it would appear that if he is able to establish "precedent" (that's what the Supreme Court does), he will do it readily and easily.

Congress of the United States
House of Representatives
Washington, DC 20515
January 20, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
711 Hart Senate Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
433 Russell Senate Building
Washington, DC 20510

Dear Sens. Specter and Leahy:

We write to inform you that the Congressional Hispanic Caucus has formally voted to oppose the nomination of Judge Samuel A. Alito, Jr. to the United States Supreme Court.

After five days of hearings and testimony from Judge Alito and his supporters, we have learned nothing more about his judicial philosophy that would serve to allay our concerns with respect to his record on minority and/or women's rights. In examining his background, writings and opinions he does not embody the principles we, the CHC, have articulated we support and would like to see reflected in a Supreme Court Justice. It is our opinion that Judge Alito failed to take the opportunity presented by the Senate confirmation hearings to give us, the American people, insight into the kind of Associate Justice he would be.

We were deeply disappointed that Judge Alito did not expound upon the legal opinions he rendered or joined with on cases of significance to the Latino community. The public had the right to know why he ruled in *Pemberthy v. Beyer* to allow that language be used to discriminate against Spanish-speaking individuals and prevent them from serving on juries. They also had the right to an explanation of how he did not see a violation of the Voting Rights Act in *Jenkins v. Manning*, where the minority's voting rights were diluted by the use of an "at-large" school district voting system. In a case much discussed during the hearings, Bray v. Marriott Hotels, the public deserved to know why Judge Alito believed a higher standard was required to bring an employment discrimination case to court. Similarly, with the matter of his 1986 memo to then FBI Director William Webster, the Caucus would have welcomed an explanation of his reasoning in recommending the denial of constitutional protections to immigrants when prior cases had already settled that question.

Though he provided few responses to the questions posed to him, we were most troubled with the one he gave in response to the question on birthright citizenship. The Constitution's 14th amendment clearly spells out the right to citizenship by virtue of birth in the United States and in 1898, in *United States v. Wong Kim Ark*, the Supreme Court settled the question and subsequent court rulings have upheld this standard. Judge Alito's response to Senator Schumer on whether the Congress can pass a statute denying citizenship was alarming. He

responded, *"I don't want to say anything that anybody will characterize as an argument that I am making on one side of this question or on the other side of the question."* That he could not - or would not - give an answer to a matter of settled law makes us wonder what other interpretations of the Constitution Judge Alito will call into question.

An additional concern of the Caucus with respect to Judge Alito is his support for expanded presidential powers. For us that calls into question whether he will employ the necessary objectivity to curb abuses that may arise on the part of the executive branch. At a minimum, it was imperative for Judge Alito to demonstrate a commitment to uphold not only the independence of the courts but to safeguard and exercise the judiciary's powers as an equal branch of government and an essential element of our system of checks and balances. Our opinion is that he will allow for the excesses such as we are witnessing under this Administration with respect to the illegal surveillance of American citizens.

Judge Alito's ascension to the nation's highest court should be of concern to all Americans. At stake is whether he will vigorously defend the rights of all Americans as enshrined in the Constitution. Minorities have historically relied more heavily on the judicial branch to protect and promote the constitutional guarantees of equal rights and justice to all Americans. We believe that should Judge Alito be elevated to the Supreme Court, we may no longer be able to rely upon an independent judiciary that decides cases on the merits and interprets the Constitution to the benefit of all.

Because fundamental questions remain unanswered as to Judge Alito's views on these and other issues, the CHC cannot embrace his nomination to the U.S. Supreme Court. This is not a time to approve a nominee based solely on academic credentials and his ability to deftly answer questions in a hearing. Too much is at stake for Latinos and all Americans to step back and simply hope for the best. We urge you to consider our position as you move forward to vote in full committee on this nomination.

Thank you.

Sincerely,

Grace Flores Napolitano
Chair
Congressional Hispanic Caucus

Charles A. Gonzalez
Chair
CHC Hispanic Judiciary Initiative

cc: Members of the U.S. Senate Committee on the Judiciary
The Honorable Harry Reid

Congress of the United States
Washington, DC 20515

January 9, 2006

The Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy:

As women Members of Congress who work hard to enact legislation and promote policies that protect women and ensure equality within our society, we fear our work, and the contributions of our colleagues who served before us, will be dismantled with the confirmation of Judge Samuel Alito to the U.S. Supreme Court.

We believe that Judge Alito poses a direct threat to the rights of women in America. As the attached memorandum details, Judge Alito has a long record of extreme views on women's reproductive health, sexual and workplace discrimination, the Family Medical Leave Act and civil rights. He has worked to thwart established precedent and has affiliated himself with radical organizations that have actively sought to keep women and minorities from advancing educationally and economically.

Under the scrutiny of the nomination process, it is not surprising that Judge Alito now disavows his positions on issues important to women and families in order to secure confirmation votes. But his record speaks to his true views and it speaks loudly. Rather than offering a balanced successor to the moderate views of Justice Sandra Day O'Connor and the majority of this nation, Judge Alito's nomination radically tips the scales of justice against women.

As guardians of the Constitution, Supreme Court Justices play a key role in protecting and ensuring our liberties. They are given life tenures and are expected to stay above the political fray so their decisions will be fair and unbiased. They must judge cases with impartiality and open mindedness, and they must respect settled law.

You have a responsibility to ensure that the highest court is not stacked against the hard fought rights that protect women across the country. When you consider the nomination of Judge Alito to the U.S. Supreme Court, we hope you will reflect on the milestones in women's rights and determine that America cannot afford to abandon these fundamental protections. We encourage you to review the attached memorandum which details many of the disturbing examples of Judge Alito's extreme views on women's rights in the law. We urge you to consider that this lifetime

appointment will have detrimental consequences for American women, and oppose the confirmation of Judge Alito as the next U.S. Supreme Court Justice

Sincerely,

Louise M. Slaughter
Louise M. Slaughter
Member of Congress

Hilda L. Solis
Hilda L. Solis
Member of Congress

Tammy Baldwin
Tammy Baldwin
Member of Congress

Corrine Brown
Corrine Brown
Member of Congress

Lois Capps
Lois Capps
Member of Congress

Rosa L. DeLauro
Rosa DeLauro
Member of Congress

Jane Harman
Jane Harman
Member of Congress

Eddie Bernice Johnson
Eddie Bernice Johnson
Member of Congress

Barbara Lee
Barbara Lee
Member of Congress

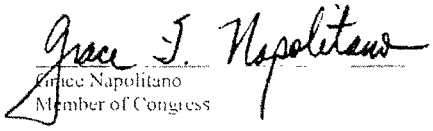
Carolyn B. Maloney
Carolyn Maloney
Member of Congress

Doris O. Matsui
Doris O. Matsui
Member of Congress

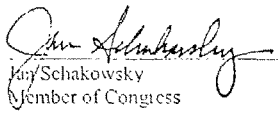
Betty McCollum
Betty McCollum
Member of Congress

Juanita Millender-McDonald
Member of Congress

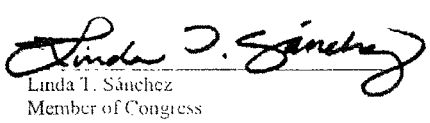
Gwen S. Moore
Member of Congress



Grace Napolitano
Member of Congress



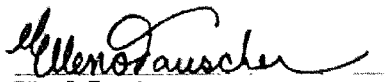
Jan Schakowsky
Member of Congress



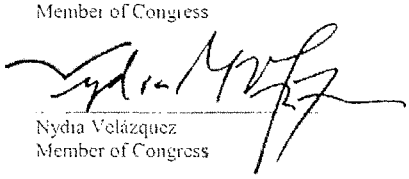
Linda T. Sánchez
Member of Congress



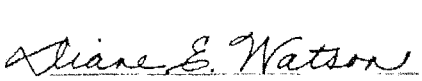
Debbie Wasserman Schultz
Member of Congress



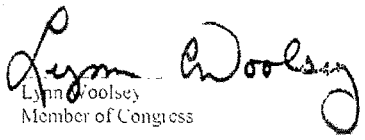
Ellen O. Tauscher
Member of Congress



Nydia Velázquez
Member of Congress



Diane E. Watson
Member of Congress



Lynn Woolsey
Member of Congress

DAILY PRINCETONIAN

SUPREME COURT

Alito '72 joined conservative alumni group

Concerned Alumni of Princeton known to be anti-coeducation

Chanakya Sethi
Princetonian Senior Writer

Clarification appended

Earlier this week, recently released documents drew attention for showing that, in a 1985 job application, Supreme Court nominee Samuel Alito '72 wrote that he is "particularly proud" of his work on cases arguing that "racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion."

Now, opponents to his nomination are using another piece of information from those documents to suggest he is far outside the mainstream in his political and social views: Near the end of his "Personal Qualifications Statement" for a high-level job in Ronald Reagan's Justice Department, Alito wrote that he was "a member of the Concerned Alumni of Princeton University, a conservative alumni group."

Interviews with several alumni who were students in the 1970s paint a picture of Concerned Alumni of Princeton (CAP) as a far-right organization funded by conservative alumni committed to turning back the clock on coeducation at the University.

The group, which published a magazine in which students wrote nostalgically about the days before coeducation, was frowned upon by Nassau Hall. Some alumni expressed surprise at Alito's association with CAP, but at least two suggested he might have put it on the 1985 job application to appeal to a personal connection in the Reagan administration.

See all of the 'Prince' coverage of the Alito nomination here.

The only CAP member who could be reached by The Daily Princetonian, Alito supporter and former New Jersey Superior Court judge Andrew Napolitano '72, defended the group, saying that there is "absolutely no way" it sought to protest coeducation.

The organization, Napolitano said, was committed instead to increasing alumni involvement in Princeton and tempering "the University's anti-traditionalist leftist urges" at a sensitive time in history when the majority of students and faculty were opposed to the Nixon administration's policies, particularly the Vietnam War.

Napolitano said he never associated himself with any individual's anti-coeducation stance, adding that "Sam Alito would never associate himself with that" either.

Also, Napolitano, who served on CAP's board from its founding in 1972 until it shut down in the early 1980s, said that he has "zero recollection of Sam Alito being involved directly or indirectly" with the group.

But Marsha Levy-Warren '73, who was a member of the University's first coeducational class and student government vice president, remembers things differently. In an interview Thursday evening, she recalled Alito, Napolitano and T. Harding Jones '72, another CAP member, as "part of a group of extremely conservative undergraduates."

Though Levy-Warren did not recall Alito being involved with CAP as an undergraduate, she said the group "stated explicitly that they were not in favor of coeducation and that they weren't in favor of affirmative action. Implicitly, they were opposed to any form of diversity on campus."

The group's magazine, "Prospect," seems to support this assessment. Writing in the February 1973 issue of the magazine about the increasing number of women on campus, Jones, who served as editor of the publication, wrote: "The makeup of the Princeton student body has changed drastically for the worse."

He could not be reached for comment.

"Prospect" was founded in October 1972 by the then-newly-formed CAP, which was co-chaired by Asa Bushnell '21 and Shelby Cullom Davis '30. The latter, who was the University's largest donor at the time, was a strong traditionalist, firmly opposed to the many of the new directions Princeton was taking, including coeducation.

He wrote in "Prospect": "May I recall, and with some nostalgia, my father's 50th reunion, a body of men, relatively homogenous in interests and backgrounds, who had known and liked each other over the years during which they had contributed much in spirit and substance to the greatness of Princeton," according to an account in "The Chosen," a book by Jerome Karabel on the history of admissions at Harvard, Yale and Princeton.

"I cannot envisage a similar happening in the future," Davis added, "with an undergraduate student population of approximately 40% women and minorities, such as the Administration has proposed."

The first issues of "Prospect" ostensibly did not receive a warm reception, particularly from Nassau Hall, which viewed the magazine and its group sponsor as a barrier to the progressive agenda of President William Bowen GS '58 and the University trustees. Princeton officials were quoted criticizing the publication in the 'Prince,' Princeton Alumni Weekly and The New York Times.

Former U.S. Senator Bill Bradley '65, who served on the alumni advisory board of "Prospect," also created a stir when he quit the publication abruptly after its second issue, saying in the 'Prince' that the magazine was "filled with innuendo and unsupported allegations" about the University.

Surprise association for some

Several alumni expressed surprise when they learned that Alito associated with Davis and CAP.

"We all thought of [CAP] as the crinkly old alums," said Mark Dwyer '72, a friend of Alito's and his roommate when both of them were studying at Yale Law. "But they seemed a little far enough from the mainstream that I didn't know anybody who had much to do with them."

Diane Weeks '75, a vocal critic of CAP financier Davis and a colleague of Alito's when he was U.S. Attorney for New Jersey, did not expect Alito to publicly associate himself with the group. "I'm very surprised that he would support such an organization," Weeks said, but added, "I once joked to him that he must be very disappointed that women were admitted to Princeton and he just didn't have a response."

Some alumni have suggested, however, that Alito's association with CAP may not be exclusively about politics, but also about networking for the job market.

"Probably the most cynical view was that undergraduates [who were members of CAP] wanted to ingratiate themselves so that they had good summer jobs," Lee Kaplan '73 said. "Other people thought that they were truly committed individuals who were swimming against the prevailing political tide."

A possible networking connection involves Terry Eastland, who served in the Justice Department during the Reagan administration and was involved with CAP, according to two people familiar with the group who asked not to be named because of the sensitivity of the issue.

"That would have been a good connection for Sam," one of the individuals said.

Indeed, the mention of CAP seems out of place on a resume that discussed Alito's involvement with more prominent organizations such as the Federalist Society, a group of conservative lawyers, and the National Review and American Spectator, two national conservative publications.

Asked about his former roommate's possible intentions, Dwyer said, "I'm sure Sam had something in mind. He wouldn't have put that in his job application if he didn't have a connection."

Regardless, some alumni say Alito's association with CAP should factor into the nominee's pending hearings before the Senate.

"I don't know about his involvement in CAP," said Sally Franks '80, who sued several Prospect Avenue eating clubs for denying women membership. "But I know about CAP and what kind of an organization CAP was in the late 70s and the early 80s and how reprehensible and scary it is that someone trying to be on the Supreme Court would have touted his membership in a job application."

Weeks, Alito's former colleague said: "I think now he has completely opened up the issue about what is your current opinion about abortion, about the rights of women and minorities ... as opposed to [recent nominee and Supreme Court Chief Justice John] Roberts, Sam's going to have to answer those questions."

Indeed for some interviewed, the revelation about Alito's association with CAP has already negatively affected their perceptions of him.

"It did rearrange my view of him a little bit because these people seemed so rabid and out of control," Abigail Bok '76 said. "This wasn't a serious debate about what Princeton should be like, as far as we could tell. It was just people snarling extremist views and yapping around the edges."

— Includes reporting by Princetonian Staff Writer Aditi Eleswarapu.

Clarification and editor's note

The original version of this article did not clearly identify Marsha Levy-Warren's quote regarding Concerned Alumni of Princeton's stance on coeducation and affirmative action as relating to the organization specifically. Also, this article reflects updates not in the paper's print edition.

The Honorable Patrick Leahy
c/o Mr. Bruce Cohen
Ranking Member, Committee on the Judiciary
United States Senate
Dirksen Senate Office Building, SD 152
Washington, DC 20510

Dear Chairman Specter and Senator Leahy:

As deans or former deans of law schools, we have special interest in the legal system and experience in both the academic and the practical worlds. Deans of law schools oversee the curriculum, help shape the instructional program, and are instrumental in the appointment of faculty who will educate young lawyers. We are deeply invested in the law, in assuring that lawyers enter the profession with full respect for the integrity of the law and for the rule of law.

Our experience gives us a distinctive vantage on the process of selecting and confirming judges. It is from that vantage that we write in support of Judge Samuel Alito.

Over many years of public service as a prosecutor, public official, and judge, Sam Alito has promoted the rule of law and has performed each of these roles skillfully, honorably, and in keeping with the best traditions of the law. He has demonstrated the sort of thoughtfulness, care, and reasoned judgment that we hope for in our faculty and our graduates.

Although we are hopeful about this process, we are distressed by recent attacks on Judge Alito that distort his record and its meaning. Such attacks depart from the sort of civil, deliberative process that Judge Alito and the American people deserve.

Judge Alito's decisions as a Circuit Judge have been consistently reasonable and in accord with law. Critics have misstated his opinions in cases such as *Planned Parenthood v. Casey*, *Doe v. Groody*, and *United States v. Rybar*, to name just a few. In *Casey*, Judge Alito voted to uphold regulations of abortion adopted by the Commonwealth of Pennsylvania, including a requirement that a woman notify her husband. The notice requirement had broad exceptions, including if a woman asserted that she was afraid of her husband's reaction. This decision was a reasonable construction of the law as it stood at the time. In *Groody*, Judge Alito concluded that police should not be subject to suit for money damages for acting under the terms of a search warrant and accompanying affidavit. While the warrant was more restrictive, the affidavit specifically said it was necessary to search "all persons" on the premises of a suspected drug dealer. The issue before the court was not whether the search was proper or good policy but whether police should be faced with possible money penalties for acting reasonably on the basis of the warrant and affidavit. Far from upholding the "strip search" of a 10-year-old girl, this opinion reasonably questions the use of damage litigation against police. And in *Rybar*, Judge Alito followed the path marked by the

Supreme Court's *Lopez* decision in declaring that while states can and do regulate sales of guns that are not in interstate commerce, Congress can only do so if it makes findings that support the connection of the guns to its authority over interstate commerce. All of these decisions by Judge Alito, whether one agrees or disagrees with the outcome, demonstrate thoughtful and reasoned decision-making and a commitment to legal authority.

Opponents of Judge Alito also have made much of statements Judge Alito made 20 years ago. First, he criticized the use of quotas to enforce equal protection obligations – taking a position that has been accepted by the Supreme Court and the American people. Second, he also criticized the basic holding of *Roe v. Wade*. Criticism of particular legal decisions is perfectly consistent with respect for the law. And no one, including Judge Alito, can know how he would respond if asked to reconsider a precedent he has criticized. Such questions come before judges in a particular case arising in a particular context and on a particular legal claim. Chief Justice Rehnquist criticized the decision in *Miranda v. Arizona*, but voted to reaffirm it when the issue came before the Court, concluding that it had become so ingrained in the fabric of the law as to merit continued adherence even if he would have decided the matter differently in the first instance. Judge Alito's record shows that he decides such matters carefully and thoughtfully within the framework of the law.

We urge the Senate to hold hearings that are respectful and dignified. Based on all we know now, we believe that the Senate should vote to confirm Judge Alito to the Supreme Court.

Respectfully,

Honorable Ronald A. Cass
Dean Emeritus & Former Melville Madison Bigelow Professor of Law,
Boston University School of Law
Past President, American Law Deans Association
Former Commissioner & Vice-Chairman, United States International Trade Commission

Bernard Dobranski
Dean, Professor & President, Ave Maria School of Law
Former Dean, Catholic University School of Law

James L. Huffman
Dean & Erskine Wood, Sr., Professor of Law,
Lewis & Clark Law School

Honorable Douglas Kmiec

Former Dean & St. Thomas Moore Professor, Catholic University School of Law
Former Assistant Attorney General of the United States (OLC)
Caruso Family Chair & Professor of Constitutional Law, Pepperdine University School of Law

Thomas D. Morgan
Former Dean, Emory University School of Law
Past President, Association of American Law Schools
Oppenheim Professor of Law, George Washington University Law School

John F. O'Brien
Dean & Professor of Law, New England School of Law

Daniel D. Polsby
Dean & Foundation Professor of Law,
George Mason School of Law

Daniel B. Rodriguez
Former Dean, University of San Diego
Warren Distinguished Professor of Law, University of San Diego

Honorable Kenneth W. Starr
Dean, Pepperdine University School of Law
Former Solicitor General of the United States
Former United States Circuit Judge

Statement of Nora V. Demleitner
Vice Dean for Academic Affairs and Professor of Law,
Hofstra University School of Law
before the Senate Committee on the Judiciary

Hearing on the Nomination of Samuel A. Alito, Jr. to serve as an Associate Justice on the Supreme Court of the United States
January 2006

Mr. Chairman, Senator Leahy and Members of the Committee. Thank you for the opportunity to testify today. My name is Nora Demleitner. I am the Vice Dean for Academic Affairs and Professor of Law at Hofstra University School of Law in New York. I clerked for Judge Alito from 1992 to 1993 and am here today to testify in enthusiastic support of the Judge's nomination to the United States Supreme Court.

Judge Alito has been my role model since the day I began working for him. I consider him one of the most brilliant legal minds of his generation, and a man of great integrity, decency, and character. And I say this as a left-leaning Democrat, a member of the ACLU, a woman, and an immigrant. I am not alone in this view of Judge Alito. I know many others who have clerked for and worked with Judge Alito, and everyone has only positive words about him. Each and every one of us has unfailing respect and regard for him, his character, his wit and his humanity.

All of his clerks, many of whom are politically liberal, have signed on to a letter strongly urging the Senate to confirm Judge Alito as Associate Justice. Why do all of us come out strongly in support of Judge Alito? In the years I have known the Judge he has never decided a case based on a larger legal theory about the Constitution or a conservative worldview but instead has looked at the merits of each individual case.

Let me detail why I believe that Samuel Alito deserves to sit on the highest Court and why his confirmation will not pose a threat to the foundation of this country or to the rights of women, minorities, immigrants, and other vulnerable groups. Judge Alito does not have a political agenda. Two overarching concerns have dominated his rulings: careful consideration and parsing of the lower court record and of prior judicial decisions binding on him. He has not attempted to reverse Third Circuit precedent; and he has tried to follow faithfully the mandates of the U.S. Supreme Court.

Two cases might suffice to explain to you Judge Alito's philosophy. While I clerked for Judge Alito, he had to decide the case of Parastoo Fatin. Ms. Fatin had left Iran for the United States in part to escape the strictures of the regime of Ayatollah Khomeini. She asked for political asylum in the United States but was denied by the immigration court and the Board of Immigration Appeals. Without revealing any confidences, I can tell you that Judge Alito was moved by the personal tragedy of the situation and the moral dilemma Ms. Fatin would face if returned to Iran. She would either be unable to express her personal beliefs as that of a Western feminist opposed to the governing regime, or she would be penalized by the Iranian regime. The problem with Ms.

Fatin's case was not only the absence of favorable case law but a thin record, indicating only limited opposition on her part to the Iranian regime.

Even though Judge Alito did not see himself in a position to help Ms. Fatin — who was, however, able to stay in the United States — he wrote one of the most progressive opinions on gender-based asylum. His decision was the first to recognize that gender alone could constitute a basis for asylum. This revolution in asylum law has not been widely recognized, neither has Judge Alito's ability to garner the votes of both of his fellow panelists — one a Nixon appointee -- for the decision. To me this case and Judge Alito's struggle with his concern for Ms. Fatin's safety and this faithfulness to the law exemplify his humanity, his concern for immigrants, and his outstanding legal mind.

My being able to testify for Judge Alito here today as one of his former clerks indicates that he has supported women, immigrants, and Democrats throughout their legal careers -- and I am just one example.

While Fatin v. INS, 12 F.3d 1233 (1993), gets less attention than it deserves, another case, United States v. Rybar, 103 F.3d 273 (1996), in which Judge Alito dissented, has gotten substantial press coverage as an example of his conservative judicial philosophy. However, I suggest it could -- and should -- be read differently in light of Judge Alito's overall judicial record. In 1995 the Supreme Court sent shockwaves through the criminal justice system when it held in United States v. Lopez, 514 U.S. 549 (1995), that a statute prohibiting the possession of machine guns on school grounds was unconstitutional as written. Justice O'Connor joined the majority in its conclusion. Even though some commentators expected this decision to affect federal criminal law enforcement dramatically, appellate courts read the decision narrowly, and arguably incorrectly, to avoid having to strike down a host of federal criminal statutes. Not so Judge Alito.

Even though the Judge has been labeled as anti-defense, in his dissent in *Rybar* he made it clear that he was willing to follow Supreme Court precedent even though it might lead to the dismissal of a host of criminal indictments. He took pains to note, however, that Congress could remedy the problem with the statute if it entered empirical findings into the record indicating the connection between the possession of machine guns and interstate commerce. While Commerce Clause limitations are frequently considered to be part of the conservative mantra for state's rights, a bipartisan blue-ribbon ABA Task Force has critiqued the increasing federalization of criminal law. It has highlighted the damage the federalization of crime has had on state and federal law-enforcement forces, on criminal defendants, and on society as a whole.

Judge Alito's record indicates that he will read congressional legislation and Supreme Court precedent carefully. Of course, this will not and cannot mean that he will put aside all of his prior experiences. Rather than bemoan his background as a federal prosecutor, this Committee should cherish it, as I came to do when clerking for him.

I came to work for Judge Alito from the liberal environment of the Yale Law School where I had worked in the criminal justice clinic. The clinic, not surprisingly is entirely defense oriented, and I fully identified with that focus. I was apprehensive about working for a former prosecutor.

Nevertheless, in my youthful fervor I tried to persuade Judge Alito to vote to reverse the conviction of many a criminal defendant. This already indicates that he welcomes different points of view; he encourages and does not stifle debate. Even I though was amazed that Judge Alito not only listened but took my arguments seriously. I remember one case in particular in which Judge Alito took much of the trial transcript home to re-read in light of my arguments. The next day he sat down with me to go over the transcript and point out to me why I had read the record incorrectly. He was right but what amazed me the most was that he had taken me — barely out of law school — seriously enough to devote part of his evening to my argument. Needless to say, Judge Alito taught me much about law, about legal analysis, and about how to treat others.

Much of my professional interest remains in the criminal area, and in particular in sentencing. In light of recent landmark decisions sentencing issues will be among the major topics facing the Supreme Court in the years to come. While Judge Alito's record on the Third Circuit does not give us much indication about how he will rule in this area, his overall record and his background give us some idea. Judge Alito is a pragmatist and a former federal prosecutor who has seen the pre-guidelines and guidelines regimes as a prosecutor and the guidelines and post-guidelines systems as an appellate judge. He will be able to infuse the Supreme Court's argument with his practical knowledge, a background that should be helpful to the Court. I have no doubt that Judge Alito will be able to entertain fairly and without bias arguments on both sides of criminal justice issues and strike a practical balance, informed but not predetermined by his background.

In light of my personal experience with Judge Alito, I can assure you that you are not voting on an ideologue. Judge Alito has always tried to follow the law and decided cases on their individual merits. He deserves to be confirmed as the Court's next Associate Justice.

Testimony of Stephen R. Dujack
5820 Doris Dr.
Alexandria, Virginia 22311

Before the United States Senate
Committee on the Judiciary

On the

Nomination of Judge Samuel A. Alito Jr. to be
Associate Justice on the Supreme Court of the United States

January 11, 2006

Mr. Chairman and Members of the Committee, I am Stephen R. Dujack. I am not affiliated with any of the groups that have been besieging your offices in this great exercise of democracy, for which perhaps you can be grateful. I testify as a citizen, but one who in his profession as a journalist has acquired some special knowledge that may prove helpful to you in your important decision.

You have been hearing a lot about the Concerned Alumni of Princeton. I graduated from Princeton in 1976, and became an editor on the university's alumni magazine, which allowed me to follow events concerning this organization at first hand. In 1986, a few years after I left Princeton, I wrote a long expose of CAP published in the *Princeton Alumni Weekly*.[1] The following fall, the *Daily Princetonian* invited me to write CAP's "obituary."[2] I was happy to oblige.

One year earlier, in October 1985, a 35-year-old attorney in the Reagan Justice Department named Samuel A. Alito Jr. applied for a promotion. In what might be called the essay portion of the application, he established his political qualifications for the high-level position. He chose to highlight two organizations that he belonged to. One was the Federalist Society, whose luncheon meetings he sometimes attended. The second was "the Concerned Alumni of Princeton University, a conservative alumni group."[3] This was an essay; he wasn't required to put these memberships down, but he chose to make them a major part of his credentials.

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[1] "The Contradictions of CAP," Stephen R. Dujack, *Princeton Alumni Weekly,* April 9, 1986.
[2] "Princeton's Cancer: Concerned Alumni's many sins, Stephen R. Dujack, *Daily Princetonian,* September 18, 1986.
[3] Samuel A. Alito Jr., 1985 job application.

This is the same brief essay, by the way, in which this ambitious attorney disagreed with the Court's one-person, one-vote decision and said, "I am particularly proud of my contribution in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to abortion."

Today, some of CAP's former principals are speaking about the need at the time for a conservative voice at Princeton, one that would speak up for more conservatives on the faculty, for the defense of traditional mores, and, yes, for ROTC on the Princeton campus. I fully accept that Judge Alito may have joined CAP in protest over Princeton's decision in 1969 or 1970 to banish ROTC from the campus (although Army ROTC was back by 1972).[4]

But what *was* this Concerned Alumni of Princeton group? And why should we be concerned that Judge Alito was a member, one who, apparently, did not attend meetings, did not write for the organization's publication, and never was involved in the organization's policies?

We should be concerned because CAP was not "a conservative alumni group." It was a pressure group that tried to deny women and minorities a Princeton education, and it published a membership magazine called *Prospect* that peppered its conservative content with articles containing racist and misogynist material.

Sometimes this material was expressed in the special code of discrimination and exclusion. "We had trusted the admission office to select young men who could and would become part of the great Princeton tradition," wrote one alumnus in 1974.[5] But more often than not it was in full view as taunts and epithets that no person with a respect for the dignity and concerns of women and minorities could have overlooked -- nor tolerated. To CAP, the university's feminists were "frumps and freaks,"[6] a Latino dean was "señor,"[7] student gays were "campus lispers."[8]

As you have heard in testimony this week, your future colleagues Bill Bradley and Bill Fritz, both alumni of Princeton, repudiated the organization within a short time after its founding. Its reputation only got worse over the years.

CAP was an organization that was so toxic to decent people that, after its founding editor left in 1976, it could not find a Princeton graduate to edit its membership magazine for the rest of its existence – a period of 10 whole years. And at the end – the two years or so before Alito bragged of being a member -- it hired two editors in succession who were

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[4] Princeton University Archives.
[5] *Propect,* March 11, 1974.
[6] *Prospect,* October 1985
[7] *New York Times,* March 25, 1984
[8] *Prospect,* January 1984

known to have printed racist material in the previous publication they had managed.[9] Unfortunately, they lived up to their reputation, and even exceeded it, in putting out the magazine that went to all members.

Let's look at that period. Two years before Alito's job application, CAP printed an article in the membership magazine entitled, "In Defense of Elitism."[10] According to the article, "Everywhere one turns blacks and Hispanics are demanding jobs simply because they're black and Hispanic, the physically handicapped are trying to gain equal representation in professional sports, and homosexuals are demanding that government vouchsafe them the right to bear children."

As the *New York Times* reported a year and a half before Alito's job application, "the magazine ... referred to the director of the Women's Center at Princeton as 'the Wicked Witch of the Women's Center.'" The same *New York Times* article reported that the editor had printed details of the sex life of an underage female student. For most of its history, *Prospect* was distributed not only to members, but also to the entire alumni body. It went to every room on campus. This very young first-year student had to live her entire undergraduate experience under the shame of CAP's scarlet letter.[11]

As the great political analyst William Greider would put it in the *Washington Post,* describing *Prospect* at the this time – the time of the Justice Department job application -- it was "a nastly little magazine . . . which spewed venom rather freely on women, racial minorities, and gays."[12]

I do not believe that Samuel Alito is a racist. Nor do I believe he is a sexist. But the fact that he could belong to an organization such as CAP – no matter the reason he joined – raises important questions about his sensitivity to the special issues and concerns of women and minorities in the United States. The fact that he can't remember that he was a member, or be sure of the reason why he may have joined, merely accentuates this indifference. The Senate, in my view, must concern itself about whether Samuel A. Alito Jr. has sufficient perspective to sit as a Justice on the Supreme Court, a Court that weighs the issues of the People of the United States -- not just the white male people.

One month after that 1985 Justice Department application was submitted by Alito, CAP hired an airplane to fly a banner around Princeton's football stadium during a critical home game. The banner made remarks intended to humiliate Princeton's president. I was at that game. I was sickened by the stunt. And it wasn't the first time. At this point, CAP had compiled an unmatched record of such outrages spanning 13 years.

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[9] "The Contradictions of CAP."
[10] Prospect, November 1983
[11] "Magazine Angers," *New York Times*, March 25, 1984. Article on young woman appeared in March 1984 issue of *Prospect.*
[12] *Washington Post*, April 20, 1991.

When CAP first started, it sent a letter to the parents of all freshmen, implying that the coed dorms their children were living in were really a form of "cohabitation." Two years later, one of its leaders sent a letter to alumni in the business community discouraging them from giving to Princeton.[13] In 1985, just a few months before Alito's Justice Department application, they repeated that injurious interference in the university's fund raising in an open letter to *all* alumni.[14]

So CAP, an organization created "To Fill An Obvious Void By Functioning As A Mature, Independent Agency Qualified To Evaluate The Directions Being Taken By Princeton University, To Provide Constructive Criticism Where Indicated, To Funnel To Appropriate Administrators Opinions And Suggestions Received From Individuals Or Groups, And To Keep The Alumni Informed And Up-To-Date Regarding Important Happenings On The Princeton Campus, Making Certain That Both Sides Of Controversial Matters Are Covered,"[15] as it declared on its founding, started off its discourse by sending sexual scare mail to frighten parents. And at the time Alito would submit his job application boasting of his membership 13 years later, it was "funneling to appropriate administrators opinions and suggestions" by the use of mocking airplane banners.

Samuel Alito graduated from Princeton in its last all-male class. 1972 was a year of turmoil on the nation's campuses, and the same year CAP was founded by one of his classmates, T. Harding Jones, and two old wealthy blue-bloods, Asa Bushnell, Class of 1921, and Shelby Cullom Davis, Class of 1930.[16] While Princeton like many universities in 1972 could have used a responsible conservative voice for alumni dissent, with CAP, instead it got Gangster Conservativism.

CAP used the guise of conservative principles as cover for the irresponsible expression of unrequited anger as it fought an all-out, take-no-prisoners rear-guard battle against the modern age that was sweeping all American universities. It professed to have a set of grievances with the Princeton administration, but it refused to meet with the university's president – who wrote to CAP's officers 13 times suggesting a meeting -- except in Bern, Switzerland, where Davis served as U.S. ambassador.[17]

Bushnell died in 1975, Davis retired from an active role in the group, and Jones left in 1976. Despite the best efforts of Princeton's president, William G. Bowen (now president of the Andrew W. Mellon Foundation) to reach out to the group in those four years, CAP's original leaders never did take their grievances to the Princeton administration.[18] But two years later, CAP then turned around and charged that Princeton has "not taken

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[13] "A Tiger by the Tail," E. J. Kahn Jr., *The New Yorker,* May 23, 1977.
[14] *Prospect,* February 1985.
[15] Asa Bushnell and Shelby Cullom Davis, letter to the Princeton alumni, October 9, 1972.
[16] "A Tiger by the Tail."
[17] "A Tiger by the Tail."
[18] "A Tiger by the Tail."

even the smallest step toward initiating some rapprochement with a group of alumni who have long since demonstrated their concern for Princeton and their willingness to work constructively to improve the university."[19]

To my knowledge, no CAP leadership ever met with Princeton's top official. CAP clearly wasn't interested in having its grievances resolved. It sought abuse, not compromise, mayhem, not resolution.

What CAP really wanted was impossible. Federal law prohibited it. CAP's program was first expressed by co-founder Davis in an issue of *Prospect* shortly after its founding: "Why shouldn't a goal of 10 percent women and minorities be appropriate for Princeton's long-term strength and future?"[20] CAP was especially opposed to the presence of women. Davis wrote wistfully of the old Princeton -- "a body of men, relatively homogenous in backgrounds."[21] *Prospect* editor Jones lamented that the increasing numbers of women on campus meant that "the make-up of the Princeton student body has changed dramatically for the worse"[22] and told the *New York Times* that "coeducation has ruined the mystique and the camaraderies that used to exist" among the students and "would prove to be a very unfortunate thing."[23] CAP later put forth a formal statement, never rescinded, that would limit the number of women to 1,000 in a student body of 4,200 to 4,400.[24]

As a result, CAP received major attention in last year's best-seller *The Chosen: The Hidden History of Admission and Exclusion At Harvard, Yale, and Princeton.*[25] The book tells the story in shocking detail about how these three elite institutions used their admissions policies to perpetuate a white male WASP aristocracy in the United States for most of the 20th century. Those policies were all but gone by 1972, the year of CAP's founding and Alito's graduation. The Civil Rights Act of 1964 had opened up the campus to African Americans and other minority groups in the previous decade. Women had begun to arrive in 1969. Congress passed Title IX of the Education Amendments in 1972, which ensured equality in higher education for women.

But CAP, which since its inception had the law against it, fought fiercely with the university over a policy of sex-blind admissions for its first several months, and lost when the trustees adopted "equal access" as university policy – a bow not only to changing times, but to Title IX. Equal access simply means that women would not be

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[19] *Prospect,* Fall 1982.
[20] *Prospect,* May 7, 1973.
[21] *Daily Princetonian*, November 18, 2005.
[22] *Prospect,* February 26, 1973.
[23] *New York Times,* March 3, 1974.
[24] "A Statement of the Concerned Alumni of Princeton Executive Committee," *Prospect,* March 15, 1975.
[25] *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton,* by Jerome Karabel, Houghton Mifflin, 2005.

discriminated against in admissions; it is not affirmative action. *The Chosen* calls CAP's loss on the equal-access issue its "Gettysburg."[26] But, apparently, it wasn't its Waterloo.

As E. J. Kahn Jr. wrote in the *New Yorker* in 1977, Harvard and Yale had their versions of CAP at the time. "They felt things were going to the dogs in Cambridge and New Haven, but after growling for a bit they subsided." Then speaking of Princeton, he writes, "The most loyal and supportive alumni body on earth, in startling contrast, has for nearly five years been racked by the stubbornly continuing existence of [CAP] – a highly conservative outfit that has done practically everything to torment its alma mater but sue her for nonsupport."[27] Kahn would no doubt have been surprised to find out that CAP would continue to torment its alma mater for another eight years, until the point when Alito filed his job application, and for most of another year beyond that.

Those who are hearing about CAP for the first time in these last few weeks may have wondered why it fills so many Princeton alumni with revulsion to hear that a proud member of that organization is up for membership in the nation's highest court. Not only alma mater was tormented.

Perhaps the words of Diane Weeks, a Princeton alumna from the class of 1975 who worked with Alito when he was Assistant U.S. Attorney in New Jersey, can give an idea of the sense we feel. She has praised the judge's integrity and legal mind. But "when I saw CAP in that 1985 job application, I was flabbergasted," she said in a recent press interview. "I was totally stunned. I couldn't believe it." She said that CAP "made it clear to women like me that we were not wanted on campus. And he is touting his membership in this group 13 years after he graduated. He's not a young man by this point, and I don't buy for a second that he was doing it just to get a job. Membership in CAP gives a good sense of what someone's personal beliefs are. I'm very troubled by this, and if I were on the Senate I would want some answers."[28]

As mentioned earlier, your colleague Bill Bradley, a 1965 graduate of Princeton who was then among its most famous alumni as a star on the Knicks, had been enticed onto *Prospect*'s advisory board. He declared in a letter to the editor after the first issue, "I cannot concur with the views presented. When I accepted the position on the Advisory Committee, I felt there would be a more representative cross-section of opinion. I do not believe from what I have read that an open forum is what the magazine desires to give to alumni."[29] A few issues later, he became convinced that he was right, and he quit in disgust.[30]

Two years later, your colleague Bill Frist, now the Senate Majority Leader, a member of Princeton's Class of '74, was asked to co-author a study on CAP, which was passed

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[26] *The Chosen.*
[27] "Tiger By the Tail."
[28] Eyal Press, *The Nation*, December 12, 2005.
[29] *Prospect,* December 4, 1972.
[30] *Prospect,* September 10, 1973.

unanimously by the Board of Trustees. The report condemned the organization. The report concluded that "CAP, through *Prospect* and its mailings, has presented a grossly inaccurate view of what is going on at Princeton. . . . And the language has become more strident."[31]

The Trustees Report emphasize that no Princeton graduate could reasonably associate him or herself with the organization, regardless of the reasonableness of that person's cause – such as ROTC:

"Many CAP supporters profess to disassociate themselves from the organization's more extreme language and more questionable activities. They appear to believe, however, that CAP's announced goal of changing the university in more conservative directions justifies their support regardless of the means to achieve that end. Other alumni, too, appear to tolerate CAP as if it were a 'loyal opposition' whose existence might be bothersome to the university but is, on balance, healthy. We emphatically disagree."[32]

That report was mailed to all living Princeton alumni. It was bound into the November 17, 1975, issue of the *Princeton Alumni Weekly*. A full-page "Letter to the Alumni" by the Chairman and Vice Chairman of the Trustee Committee on Alumni Affairs drew attention to the report.[33]

That is not the position taken by the aspiring lawyer in the Justice Department in 1985, however; nor, apparently, in 2005, when responding to questions from Members of your Committee. Judge Alito chose another course when publicly confronted with the fact of his membership. He has said he had "no recollection" of being a member and claimed not to have heard of any of these disputes, which were widely covered in the media.

Women were not the only evil at Princeton. The "body of men, relatively homogenous in backgrounds" that CAP wanted to reserve Princeton's leafy greens and spire-topped dormitories for was homogenously white. When CAP sought "a more traditional undergraduate population," as it warned in code in one of its first fund-raising letters, it made clear it wanted to avoid a quota it thought the university was striving for: "A student population of approximately 40 percent women and minorities will largely vitiate the alumni body of the future."[34] The disturbing thought of 40 percent non-male, non-white Princetonians caused Jones to write, "The make-up of the Princeton student body has changed dramatically for the worse."[35]

Apparently, quotas are only bad when they are for minorities. CAP was strongly in favor of affirmative action, as long as it was for alumni. A few months before Alito's job application, *Prospect* printed an open letter decrying the fact that "currently alumni

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[31] Report of the Trustee Committee on Alumni Affairs, October 1975.
[32] Trustees Report.
[33] *Princeton Alumni Weekly*, November 17, 1975.
[34] *Daily Princetonian*, November 18, 2005.
[35] *Prospect*, February 26, 1973.

children comprise 14 percent of each entering class, compared with an 11 percent quota for blacks and Hispanics."[36]

CAP had no meetings or events. CAP was simply *Prospect.* CAP was the forerunner in many ways to the Washington phenomenon that we see multiplying rapidly now, a pressure group that consists of a small communications staff in rented space and wealthy funders with an ax to grind – a one-room office and a post office box.

But by 1976, CAP had become so toxic, the organization was no longer able to find concerned Princeton alumni to edit its publication. So a succession of seven outsiders came in as mercenaries, to shoot up the university for a while, then leave town, while CAP's rich backers sat back in safety. By the time of Alito's job application, that had been going on for nine years.[37]

Under their direction, *Prospect* continued along the path of printing conservative philosophy alongside racist and misogynist rhetoric meant to hector the students CAP had failed to keep out of Princeton. "In my day [the dean of students] would have been called to task for his open love affair with minorities," wrote an alumnus in 1980.[38] In 1984, the editor dismissed the concerns of female Harvard professors who were claiming sexual harassment by noting, "We've noticed that women who claim sexual harassment often tend to be low on the pulchritude index. We bring this up not to sneer or make a political point, only to define a curiosity which sociologists may want to take up for further study."[39] A few months later, the magazine noted that a female coal miner who had won her job through a discrimination suit had died in a mining accident. The item concluded, "Sally Frank, take note."[40] Frank was a former student who famously took legal action to successfully open the doors of all-male eating clubs at the university to women. But to *Prospect,* she was a "putative female."[41]

The Sally Frank coal mine item, incidentally, was virtually plagiarized from a 1980 book called *The Journal of the Absurd.*[42] *Prospect* was frequently getting into trouble like that. It once had to backtrack on an article it had published by A. Bartlett Giamatti, then Yale's president, admitting that not only was the article not written for *Prospect*, it was copied without Giamatti's permission from his Yale inaugural speech.[43]

Prospect reached its apogee of visciousness near the time of Alito's job application. "People nowadays just don't seem to know their place," according to an essay titled "In

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[36] *Prospect*, February 1985.
[37] "The Contradictions of CAP."
[38] *Prospect,* Winter 1980.
[39] *Prospect,* January 1984.
[40] *Prospect,* June 1984.
[41] *Prospect,* November 1983.
[42] "The Contradictions of CAP." Also, *Journal of the Absurd* is by Jules Siegel and Bernard Garfinkel, Workman Publishing, 1980.
[43] *Prospect,* Spring-Summer 1980.

Defense of Elitism" published in 1983. "Everywhere one turns blacks and Hispanics are demanding jobs simply because they're black and Hispanic, the physically handicapped are trying to gain equal representation in professional sports, and homosexuals are demanding that government vouchsafe them the right to bear children." It was a year later that CAP exposed to the ridicule of the entire university community an underage female student because she had sex.

One might think that CAP's wealthy backers might have hired the editor who published these last two items by accident, but the facts are exactly the opposite. Dinesh D'Souza was an undergraduate at Dartmouth, where he was chairman of the *Dartmouth Review*, a conservative student publication that had garnered a well-deserved reputation for racist rhetoric and unethical journalistic practices. He received national condemnation for printing an article written in jive that was clearly intended to outrage the college's African American students – and succeeded. Your former colleague Jack Kemp, a member of the *Review*'s board, quit in protest over the racist article.[44] It doesn't speak well for CAP that they recruited this man to edit *Prospect* – and kept him on when he continued to print racist and misogynist material.

Worse, D'Souza was replaced in 1985 by Laura Ingraham, also an alumna of Dartmouth and the *Dartmouth Review*, where she had printed the transcript of a meeting of gay students made from a surreptitious tape recording, and drawn similar national approbation.[45] The *Daily Princetonian* quoted an African American professor at Dartmouth who accused Ingraham of using "all kinds of racial slurs" in an article about him. In an interview with the *Princetonian* at the time the editorial torch was passed, D'Souza countered, "I don't think Laura's a racist." Apparently not knowing when to stop, he added, "I do think she's kind of a sexist. And I'm sure she's a homophobe."[46]

This was the organization that we know Alito belonged to as a high Justice Department official. An organization without meetings, because it was not a real organization but a scare group. An organization that produced a filthy publication decent people wouldn't allow in their homes. An organization that "made it clear to women like me that we weren't wanted on campus," one of Alito's own legal colleagues has said. Its defenders have recently claimed that it was a mainstream conservative group, and that its views on women and minorities only amounted to opposition to affirmative action. But affirmative action never applied to women. And opposition to affirmative action is not expressed using racial insults. Let's face it. CAP didn't want women and people of color in their all-male, all-white bastion.

Whom we choose to associate with indeed does give the measure of the man or woman. We have been told that Alito joined the group to protest university policy in regard to

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[44] "The Contradictions of CAP."
[45] "The Contradictions of CAP."
[46] *Daily Princetonian*, November 13, 1985.

ROTC. But as can be seen, he wasn't joining an organization that actually met with the university president or led any form of constructive protest.

People simply did not brag about belonging to CAP. It was an admission usually made in private, if at all. Not because its views were unpopular, which they were, but because they were repulsive.

The Justice Department is supposed to enforce the laws of the United States, so why was Alito a member of an organization that ran counter to federal laws ensuring equality in education for women and minorities? How can we be sure that he will view women and minorities as deserving full equality under the law?

Thank you.

EARTHJUSTICE
Because the earth needs a good lawyer

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

January 11, 2006

The Honorable Arlen Specter
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, DC

The Honorable Patrick Leahy
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, DC

RE: Earthjustice Opposition to Supreme Court Nomination of Judge Samuel A. Alito, Jr.

Dear Chairman Specter and Ranking Member Leahy:

Earthjustice is writing to express our strong opposition to the confirmation of Judge Samuel A. Alito, Jr. to a lifetime seat on the United States Supreme Court. We did not oppose President Bush's previous Supreme Court nominations of D.C. Circuit Judge John G. Roberts, Jr. and White House Counsel Harriet Miers. Indeed, we have not urged the Senate to oppose any of the eight Supreme Court nominations since Judge Robert Bork, whom we opposed in 1987.[1]

Earthjustice's opposition to Judge Alito's nomination is based upon the attached, detailed analysis of his record. This analysis reveals that Judge Alito has an extreme record that threatens Congress' constitutional authority under the Commerce Clause that provides the basis for most federal environmental laws. Judge Alito's record also threatens Congress' ability to ensure that citizens have the right to go to court to enforce these laws. Judge Alito also has a disturbing record on other issues that are fundamental to environmental protections.

Also of great concern is the fact that Judge Alito has been nominated to fill the Supreme Court seat being vacated by Justice Sandra Day O'Connor, who has frequently been a swing vote in important environmental cases. In recent years, the Supreme Court has often been a hostile forum for pro-environmental litigants, issuing rulings that have limited many of the nation's most important environmental safeguards. In other cases, environmental protections have withstood challenges by one or two votes, with one of those votes usually being cast by Justice O'Connor. The stakes for public health and the environment in this nomination could hardly be higher.

The threat posed by Judge Alito's nomination is not theoretical. For example, by July, the Supreme Court will decide two major environmental cases that will determine the constitutionality of Clean Water Act safeguards, and by extension, the fate of other national laws that protect our health and environment. Both of the Clean Water Act cases address whether the Act protects streams and tributaries that flow into larger water bodies, and whether it similarly

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protects the wetlands adjacent to these streams. The industry groups that brought these cases are also questioning whether Congress has the authority under the Commerce Clause to protect such waters. If confirmed, Judge Alito could be the swing vote in a decision that could threaten the safety of our drinking water supplies, and allow the pollution or destruction of most of the nation's creeks and streams, along with tens-of-millions of acres of ponds and wetlands.

Please consider carefully the attached more detailed analysis of Judge Alito's record on environmental and conservation issues, which we incorporate herein by reference. We would also ask that this letter and analysis be entered into the record of the proceedings before the U.S. Senate on Judge Alito's nomination to the Supreme Court.

Thank you for providing us the opportunity to comment on this critically important nomination.

Sincerely,

Vawter Parker
Executive Director

CC: Members, Senate Committee on the Judiciary

[i] While Earthjustice and other conservation groups raised concerns about the Supreme Court nomination of Judge Roberts based on his record on Commerce Clause and access-to court-issues, we withheld judgment on whether or not he should be confirmed.

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FACTUAL RESPONSES to FALSEHOODS in the KNIGHT-RIDDER ARTICLE ATTACKING JUDGE ALITO

FACT 1: Knight Ridder's Writers Stephen Henderson And Howard Mintz Have Repeatedly Been Accused Of Biased Reporting On Judge Alito's Record:

National Journal's Stuart Taylor: "I Focus Here Not On The Consistently Mindless Liberal Hysteria Of The New York Times' Editorial Page. Nor On Such Egregious Factual Errors As The Assertion On C-SPAN, By Stephen Henderson Of Knight Ridder Newspapers, That In A Study Of Alito's More Than 300 Judicial Opinions, 'We Didn't Find A Single Case In Which Judge Alito Sided With African-Americans ... [Who Were] Alleging Racial Bias.' This, Henderson Added, Is 'Rather Remarkable.'" (Stuart Taylor Jr. Op-Ed, "Alito: A Sampling Of Misleading Media Coverage," The National Journal, 12/12/05)

* National Journal's Stuart Taylor: "What Is Remarkable Is That Any Reporter Could Have Overlooked The At Least Seven Cases In Which Alito Has Sided With African-Americans Alleging Racial Bias." (Stuart Taylor Jr. Op-Ed, "Alito: A Sampling Of Misleading Media Coverage," The National Journal, 12/12/05)

National Journal's Stuart Taylor: "Also Remarkable Is The Illiterate Statistical Analysis And Loaded Language Used By Henderson And Howard Mintz In A 2,652-Word Article Published (In Whole Or In Part) By Some 18 Newspapers. It Makes The Highly Misleading Claim That In 15 Years As A Judge, Alito Has Sought 'To Weave A Conservative Legal Agenda Into The Fabric Of The Nation's Laws,' Including 'A Standard Higher Than The Supreme Court Requires' For Proving Job Discrimination." (Stuart Taylor Jr. Op-Ed, "Alito: A Sampling Of Misleading Media Coverage," The National Journal, 12/12/05)

The December Article Written By Knight Ridder's Henderson And Mintz Was Accused Of Mirroring Third Party Liberal Groups Partisan Attacks Against Judge Alito. "According to sources with ties to third-party groups opposing the Supreme Court nomination of Judge Samuel Alito, the Knight Ridder newspaper analysis of Judge Alito's judicial record -- which ran in many of the papers operated by KR -- mirrors analysis that was pulled together by staff of People for the American Way, Alliance for Justice, and the Leadership Conference on Civil Rights, all groups that are coordinating their anti-Alito efforts." (American Spectator Blog, 12/8/05)

FACT 2: Knight Ridder's Stephen Henderson Has Admitted His Reporting Was Wrong Before On Judge Alito:

Henderson: "For Example, We Didn't Find A Single Case In Which Judge Alito Sided With African-Americans, For Example, Alleging Racial Bias, Which I Think Is, Again, Rather Remarkable." (CSPAN's "Washington Journal," 12/7/05)

* Radio Host Hugh Hewitt: "Goosby V. Johnson And Johnson. A Black Female Sued For Discrimination, The District Court Granted Summary Judgment For Her Employer. Judge Alito Was Part Of The Panel That Reversed, In Part." (Hugh Hewitt Radio Show, http://www.radioblogger.com/#001211, Accessed 12/8/05)

* Hugh Hewitt: "You Said You Couldn't Find A Single Case Where He [Sided With A Woman In A Gender Bias Case] ... Okay, So Goosby V. Johnson Is A Black Female. ... I'm Counting It As A Refutation Of Both Of Your Statements." (Hugh Hewitt Radio Show, http://www.radioblogger.com/#001211, Accessed 12/8/05)

* Hugh Hewitt: "Okay, Now Steven, I Want To Cite You Three Cases: Robinson V. Pittsburgh From 1997... Female Police Officer Harassed By Her Supervisor, Alito Rules For Her. ... Goosby V. Johnson And Johnson. Female That Was Suing For Discrimination. Alito Rules For Her. ... 2003, Reynolds V. Usx. Alito Affirmed A Judgment For An African-American Female Who Had Won A Claim Against A Steel Company, And Affirmed Her Attorney's Fees. ... That's Three Black Females." (Hugh Hewitt Radio Show, http://www.radioblogger.com/#001211, Accessed 12/8/05)

Henderson Admits Alito Ruled For Black Defendants, Contradictory To His Statements. Hewitt: "I'm saying that you said there were no cases where he ruled for black defendants. Zero. I've given you three. ... Henderson: "Where he wrote a case? Wrote an opinion?" Hewitt: "No. Where he voted. You said...ruled doesn't mean written. Ruled means voted." Henderson: "Well, okay. You got me. I mis-spoke." (Hugh Hewitt Radio Show, http://www.radioblogger.com/#001211, Accessed 12/8/05)

FACT 3: Knight Ridder's Stephen Henderson Admitted He Was Previously An Editorial Writer, Not A Reporter:

"Stephen Henderson Comes To Knight-Ridder From The [Baltimore] Sun, Where He Was Associate Editor Of The Editorial Page." (Knight Ridder Website, www.realcities.com <http://www.realcities.com/mld/krwashington/news/columnists/steve_henderson/> , Accessed 12/8/05)

* Henderson: "I Was Actually The Deputy Editorial Page Editor Of The [Baltimore] Sun." (Hugh Hewitt Radio Show, http://www.radioblogger.com/#001211, Accessed 12/8/05)

* Henderson: "I Joined The Editorial Board [At The Sun] Here As Associate Editor In 1999." (Editorial, "Who We Are," The [Baltimore] Sun, 12/29/02)

Despite History Of Editorial Writing, Stephen Henderson Listed In Byline With Howard Mintz In Controversial Knight Ridder Article. (Stephen Henderson And Howard Mintz, "Review Of Cases Shows Alito To Be Staunch Conservative," Knight Ridder, 12/01/05)

FACT 4: Knight Ridder's Stephen Henderson Admitted Bias On Affirmative Action Cases, Wrote Editorials In Favor Of It:

Henderson: "Bias Is Part Of Human Nature, So Any Reporter Who Claims Not To Be Biased Is Either A Robot Or A Liar." (Chips Quinn Scholars Website, www.chipsquinn.org <http://www.chipsquinn.org/skills/learning/learning.aspx?id=349> , Accessed 12/8/05)

* Henderson: "I Definitely Had To [Deal With Bias] With The University Of Michigan Cases Last Year. I Went To Michigan. I'm Black. I Attended School Just A Little Before The Woman Who Sued The Undergaduate [Sic] College There. The Case Was About Me! (I'm Kidding)." (Chips Quinn Scholars Website, www.chipsquinn.org <http://www.chipsquinn.org/skills/learning/learning.aspx?id=349> , Accessed 12/8/05)

The [Baltimore] Sun Editorial: "That Thinking Could Provide Important Direction For The Current Justices. They'll Need To Remember, If They Consider The Michigan Case, That Race Matters In Nearly Every Sector Of American Life, So It Would Be Astonishingly Naive For Colleges And Universities To Pretend Otherwise." (Editorial, "Affirmed?" The [Baltimore] Sun, 5/26/02)

FACT 5: Stephen Henderson's Editorial Board Attacked Bush Administration, Conservative Appointees:

The [Baltimore] Sun: "But Beneath That Rich Chord Of Ethnicity And Gender Lies A Conservative Political Monotone. Few Of Mr. Bush's Nominees Come From The GOP's Center. Worse, He Saved His Most Reactionary Picks For Departments That Control The Administration's Stance On Issues Such As Civil Rights And Labor." (Editorial, "A Political Monolith In Bush's Cabinet," The [Baltimore] Sun, 1/4/01)

* The [Baltimore] Sun: "Former Missouri Sen. John Ashcroft Sits Far To The Right Of The Political Mainstream - Especially When It Comes To Such Issues As Civil Rights, Affirmative Action And Abortion. Yet He Has Been Tapped For Attorney General, The Nation's Most Prominent Defender Of These Critical Legal Safeguards." (Editorial, "A Political Monolith In Bush's Cabinet," The [Baltimore] Sun, 1/4/01)

* The [Baltimore] Sun: "Linda Chavez ... Is Also Problematic. She Made Scores Of Enemies By Staunchly Opposing Affirmative Action, Bilingual Education And Equal Pay For Women While At The U.S. Civil Rights Commission Under Ronald Reagan." (Editorial, "A Political Monolith In Bush's Cabinet," The [Baltimore] Sun, 1/4/01)

The [Baltimore] Sun: "[O]ne Of Mr. Bush's Nominations - That Of South Carolina District Judge Dennis Shedd To The 4th U.S. Circuit Court Of Appeals, Which Covers Maryland And Four Other States - Goes Beyond The Acceptable Boundaries For A President Putting His Political Stamp On The Judiciary." (Editorial, "A Court Uneven," The [Baltimore] Sun, 10/3/02)

* The [Baltimore] Sun: "Judge Shedd's Appointment To The 4th Circuit Would Push The Nation's Most Conservative Appeals Bench Even Further Outside The Legal Mainstream For Decades To Come. It Would Dig More Potholes Along An Already Rocky Legal Road For Minorities Seeking Redress For Discrimination, Women In Search Of The Protection Of Long-Established Reproductive Rights, Workers Whose Employers Trample Labor Laws And Even Criminal Suspects Who Just Want To Be Read Their Rights Before Being Carted Off To Jail." (Editorial, "A Court Uneven," The [Baltimore] Sun, 10/3/02)

Fellow Judges Criticize Alito's Application of Precedent

1. *Dia* v. *Ashcroft*, 353 F.3d 228, 251 n.22 (3d Cir. 2003) (en banc): "Judge Alito makes no reference to the need for 'substantial evidence,' but, instead, applies the 'no reasonable adjudicator' standard to restrict our review. . . . **We have not applied the statutory standard in this manner**... We suggest that to read the 'no reasonable adjudicator' standard in a way that does away with the need for 'substantial evidence' **not only guts the statutory standard, but ignores our precedent**."

2. *LePage's Incorporated* v. *3M, Inc.*, 277 F.3d 365 (3d Cir. 2002) (Sloviter, J., dissenting): "The majority has accomplished its enervation of § 2 **by relying on theories and cases inapplicable here** and by failing to consider the synergistic effect of 3M's conduct taken as a whole. In the process, **it ignores the jury verdict, the District Court's careful analysis, and this court's directly applicable precedent**. . . . But perhaps more important, the majority's imposition of a requirement that plaintiffs demonstrate that they could not compete . . . **is contrary to our precedent and that of the Supreme Court**."

3. *Riley v. Taylor*, 277 F.3d 261, 290 (3d Cir. 2001) (en banc): "**[I]n case after case**—and most particularly in capital cases—we have found that even applying the more stringent post-AEDPA standard of review (not applicable here), there are reasons not to accord the usual deference to the state courts' findings.... **The Dissent accords little weight to these authorities**."

4. *RNS Services, Inc.* v. *Secretary of Labor*, 115 F.3d 182, 186 n.2 (3d Cir. 1997): "**The dissent**, with its 'basement bin' example, **overlooks our holding (in the instant case and prior cases)** that the MSHA has jurisdiction only over locations in which, inter alia, coal undergoes processing that prepares the coal for its ultimate use."

5. *Rappa* v. *New Castle County*, 18 F.3d 1043, 1086 (3d Cir.1994) (Garth, J., dissenting): "**I know of no rule of law which countenances the majority's disposition of this case**. Certainly nothing in the jurisprudence of the Supreme Court, or in ours, suggests that a three-judge panel of a court of appeals is free to substitute its judgment for that of a four-Justice plurality opinion, let alone that of the entire Court. **The majority concedes, in a footnote, that its approach is unprecedented, but justifies its disregard of established principles of stare decisis** as an extrapolation of the general reasoning of Casey. Nothing in Casey, however, suggests that we have the power, indeed the option, to overrule a plurality opinion of the Supreme Court."

6. In *Phillips* v. *Borough of Keyport*, 107 F.3d 164, 187 (3d Cir. 1997) (en banc) (Alito, J., dissenting): "Under *Bello* and its progeny, however, mundane land-use disputes that belong in state court are transformed into substantive due process claims cognizable under § 1983. . . . **I would curtail this trend and would overrule *Bello* and the cases that followed it**."

7. *Beauty Time* v. *Vu Skin Systems*, 118 F.3d 140, 147 (3d Cir. 1997): "**The dissent in this case has misconstrued Pennsylvania's tolling principles** and would apply the fraudulent concealment doctrine in an action involving inherent fraud.... **That makes no sense**."

Fellow Judges Criticize Alito's Application of Precedent

8. *United Artists Theatre Circuit* v. *Warrington*, 316 F.3d 392, 404, 407 (3d Cir. 2003) (Cohen, J., dissenting): "Under both the law of the case doctrine and our own internal operating procedures, **the majority is wrong to revisit an issue that has already been decided**.... [T]he Majority opinion gives far too little weight to the fact that **this Circuit has a well-established jurisprudence** employing the improper motive test in the substantive Due Process land-use context.... I would hold fast to **the scheme that is already firmly entrenched in this Circuit**: In land use constitutional tort cases, the government's conduct may be judged under an "improper motive" framework. **The evisceration of this standard by the Majority today is a most unfortunate step backwards** in the evolution of § 1983 as the legislative guardian of bedrock constitutional rights."

9. *ACLU* v. *Schundler*, 168 F.3d 92, 113-114 (3d Cir. 1999) (Nygaard, J., dissenting): "The majority **would effectively overrule one of our own opinions**: a task reserved for the en banc Court. Although this event would be cause for alarm in any case, my dismay is heightened here where the second opinion emanates from the exact litigation as the first. In this instance, the concern for the consistency of the law and the legitimacy our jurisprudence is intensified.... **This constitutional about-face** in the same case troubles me greatly, **strikes to the core of the legitimacy of our jurisprudence, and exposes us to well-earned criticism for inconsistency and for giving insufficient respect to an earlier instruction by the Court**."

10. *Bray* v. *Marriot Hotels*, 110 F.3d 986, 991 (3d. Cir. 1997): "The dissent carefully explains each of the discrepancies in this record in isolation and concludes that none of them creates a material issue of fact. **We have previously noted that such an analysis is improper** in a discrimination case...."

11. *In re Texas Eastern PCB Contamination Ins. Coverage*, 15 F.3d 1249, 1256 n. 3 (3d Cir. 1994): "The position of the dissent, that the carriers must demonstrate that they would have entered into negotiations in order to demonstrate prejudice from late notice, does not comport with our reading of the Texas caselaw."

12. *Exxon* v. *Exxon Seaman's Union*, 11 F.3d 1189, 1196 (3d Cir. 1993) (Seitz, J., dissenting): "[T]he majority say that the quoted ruling is distinguishable, **permitting it to promulgate a different controlling legal rule**.... I submit that it is not distinguishable. If the explicit rule in that case is to be rejected, it is for an en banc court to do so. Otherwise, our Internal Operating Procedure, making reported opinions binding on subsequent panels, **will be deprived of its stabilizing value**."

13. *Rompilla* v. *Horn*, 355 F.3d 233, 281, 290 (3d Cir. 2004) (Sloviter, J., dissenting): "The Majority's attempt to reconcile its conclusion...with the conclusion in *Wiggins* that defendant's counsel were ineffective is nothing short of astonishing.... **The Supreme Court does not interpret the unreasonable application of Supreme Court precedent prong** of § 2254(d)(1) **as narrowly as does the Majority**."

FEMINIST MAJORITY
Working for Women's Equality

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January 11, 2006

Senator Arlen Specter
Chair, Committee on the Judiciary
United States Senate

Senator Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate

Chair Specter and Senator Leahy:

The Feminist Majority strenuously opposes the nomination of Samuel Alito to the United States Supreme Court. We have carefully reviewed Alito's extensive public record, and have concluded that Samuel Alito should not be confirmed to the Supreme Court.

The hearings thus far have only amplified our concerns. Perhaps most shocking, Judge Alito has repeatedly refused to distance himself from his 1985 statement that the Constitution does not protect the right to an abortion, even though he did distance himself from other earlier positions. Based on his record we can only conclude that Judge Alito would be a vote on the Supreme Court against the Family and Medical Leave Act, affirmative action, women's rights, and enforcement of anti-discrimination laws, and he would be a vote on the Supreme Court to overturn *Roe v. Wade.*

Judge Alito's record on a wide range of issues important to the American people has led major women's rights, civil rights, environmental, and labor organizations to oppose his confirmation. This is the largest group of organizations committed to protecting the rights of individuals to come out against a Supreme Court nominee since the failed nomination of Robert Bork.

To our great disappointment, 86 years after women finally won the fight for the right to vote, women are still not fairly represented on the nation's highest court. Justice O'Connor's seat on the Supreme Court is especially critical because she was not only the first woman to sit on the Court, but she also has been the key vote to preserve a range of legal protections essential to women, including anti-discrimination laws, the Family and Medical Leave Act, a woman's right to choose abortion, and affirmative action. Judge Alito's writings and records indicate he is no Sandra Day O'Connor and will move the Court rightward away from women's rights.

Alito's record makes clear that if confirmed he will vote to erode important federal laws that protect women at work and women and girls at school, and that he would make it nearly impossible to obtain jury trials in sex discrimination cases under Title VII. His approach to discrimination cases is so extreme that the other judges on his own circuit noted in one case, that under Alito's approach, "Title VII [of the Civil Rights Act of 1964] would be eviscerated." His record is especially troubling in the area of sexual harassment, where his decisions in several cases strongly suggest that he is insensitive to the pervasive problem of sexual harassment and the way in which it is used as a weapon to deny women access to education and equal opportunity at work.

Women across the country worked for years to enact a Family and Medical Leave law. Alito wrote the Third Circuit decision arguing that Congress did not have the power to require state and local governments to comply with the Family and Medical Leave Act. Three years later, the Supreme Court, with Justice O'Connor in the majority, took the opposite position, upholding the power of Congress to require state and local governments to follow FMLA, referring specifically to the importance of the law for women.

Alito is on the record stating that the Constitution does not protect the right to abortion, and he helped craft the legal strategy designed to first chip away and then overturn *Roe v. Wade*. In a 1985 Justice Department job application, Alito state, "It has been an honor and source of personal satisfaction to me... to serve in the Office of the Solicitor General during President Reagan's administration and to help advance legal positions in which I personally believe very strongly." He stated that he was "particularly proud" of "contributions in recent cases in which the government has argued...that the Constitution does not protect a right to an abortion." He was the only judge on the Third Circuit who would have permitted a law that required women to notify their husbands before obtaining an abortion, and he minimized the potential impact this requirement would have on victims of domestic violence. Alito's opposition to women's reproductive freedom may not be limited to the right to choose abortion. Shockingly, in a 1985 memo, Alito equated some forms of birth control with "abortifacients."

Affirmative action outreach programs have been essential to the progress of women and people of color in the workplace and in higher education. If he is confirmed to replace Justice O'Connor, Alito will also shift the current 5-4 balance on the court regarding affirmative action. In his 1985 application for a Justice Department job, Alito said he was "particularly proud of [his] contributions as a government lawyer to cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed." In the Solicitor General's office, he co-authored three briefs attacking affirmative action programs, sometimes in sweeping terms. As a Judge on the Third Circuit he joined a ruling striking down a school district's affirmative action plan.

These are just a few of the major areas in which Judge Alito's confirmation threatens to turn back the clock on women. This nomination is a critical juncture in our nation's history. Too much is at stake for women's rights for the Senate to confirm Samuel Alito. We respectfully implore members of the Senate Judiciary Committee to remember women when you cast your vote. We urge you to vote no on the confirmation of Samuel Alito to the U.S. Supreme Court.

For Equality,

Ellie Smeal

Eleanor Smeal
President

LeBoeuf, Lamb, Greene & MacRae LLP

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January 12, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
711 Hart Senate Office Building
Washington, DC 20510

Re: *Judge Samuel Alito: Vanguard Recusal*

Dear Mr. Chairman:

This letter is offered to provide the Committee with background information respecting the question that has been raised as to whether it was appropriate under the canons of judicial ethics for Judge Alito to have participated in a case styled *Monga v. Ottenberg*, which was decided in 2002, at a time when he was a shareholder of mutual funds in the Vanguard family of funds (the "Vanguard funds"). As I understand from press reports, the question in part involves the unique management structure of the Vanguard funds, under which they, unlike other mutual funds, jointly own the company that acts as their investment adviser, *i.e.*, The Vanguard Group, Inc. (the "Vanguard adviser").

I am not addressing the application of the ethics rules to the issue, as the Committee already has received submissions on that point from experts in legal ethics. Rather, this submission is intended to assist the Committee in understanding the nature of a Vanguard fund shareholder's legal relationship with the Vanguard funds and the Vanguard adviser.

I write as a former General Counsel of the Securities and Exchange Commission, having served from 1971 to 1981, first on the executive staff of three Commission Chairmen and then as its General Counsel. Since then, my legal practice has focused on advising institutional, corporate and individual clients on the application of the federal securities statutes to their affairs in the area of securities regulation.

Introduction

The Vanguard family of mutual funds has an internalized management structure, unique among mutual funds, under which Vanguard fund investors may be described as possessing certain ownership interests in the funds' investment adviser. The interest of a Vanguard fund shareholder in the investment adviser, however, does not have the usual attributes of corporate ownership. Rather, like policyholders of a mutual insurance company, a Vanguard fund shareholder is principally a customer of the financial institution – in this case, the investment adviser – in which he or she holds an ownership interest.

Management structure of Vanguard funds

The Vanguard Adviser is organized internally to provide low cost services to Vanguard mutual funds. The Vanguard Group, Inc. is organized as a corporation in the State of Pennsylvania. Its stock is owned jointly by the mutual funds it advises, which is the source of Vanguard's unique management structure. The same individuals belong to the boards of the Vanguard funds and the Vanguard adviser. The Vanguard adviser provides management services to the Vanguard funds at cost. The Vanguard adviser is responsible for managing the assets of the Vanguard funds for the benefit of Vanguard fund shareholders. Vanguard fund shareholders as such do not participate in the management of the funds.

A Services Agreement that governs the Vanguard adviser's obligation to provide management services to the Vanguard funds also establishes the Vanguard funds' obligation to contribute capital to the Vanguard adviser. A Vanguard fund that withdraws from the Services Agreement must surrender its shares in the Vanguard adviser.

Vanguard fund shareholders, therefore, possess an indirect interest in the Vanguard adviser through the Vanguard fund. Vanguard funds are organized as business trusts in the State of Delaware. Shareholders of the Vanguard funds own an indirect proportional interest in the trust property as a whole, which includes shares of the Vanguard adviser held by the Vanguard funds. Shareholders of the Vanguard funds have the right to vote for the governing board of the funds ("the Board of Trustees"), as required under the Investment Company Act of 1940 (the "1940 Act"). Vanguard shareholders also have the right to redeem their shares in the Vanguard funds for the net asset value of the trust property attributable to the shares. Generally, mutual funds redeem shares for cash. If a mutual fund exercises its option under the 1940 Act to redeem shares in kind, the Board of Trustees determines the selection and quantity of the securities or other trust property to be distributed; fund shareholders have no right to require that specific securities owned by the fund be distributed in an in-kind redemption.

Analysis

Because the Vanguard management structure is unique in the mutual fund industry, there is not any literature examining the ownership interests of fund shareholders in the fund adviser. An analogous relationship exists, however, in the context of mutual insurance companies where the individuals who purchase services from the financial institution are also its owners.

Ownership in a mutual life company arises from the policyholder's purchase of an insurance contract. The policyholder is considered an owner because like a shareholder in a corporation, the policyholder has the right to elect the management of the insurance company. Unlike a shareholder in an ordinary corporation, however, the policyholder does not look to the management to maximize profits. Rather, the policyholder is principally concerned with the insurance company's performance of its contractual commitments under the policy. As a result, commentators have noted that the policyholder is principally a customer of the insurance company.[1] The essential ownership attributes of a mutual insurance company policyholder have been characterized as 1) the right to vote; 2) the right to receive dividends; and 3) the right to share in the surplus upon dissolution or demutualization. Looking at these three factors, the indirect ownership interest of the Vanguard fund shareholder in the Vanguard adviser is similar to and in some respects more remote than the ownership interest of a policyholder in a mutual insurance company.

As to the first factor, Vanguard fund shareholders do not have any voting rights with respect to the Vanguard adviser. The members of the Vanguard adviser's board are selected by the Board of Trustees of the Vanguard funds. While the individuals who serve on the board of the Vanguard adviser are the same as those who serve on the Board of Trustees of the Vanguard fund, who are elected by Vanguard fund shareholders, this identity is not established in the organizational documents of the Vanguard funds, which define the rights of the Vanguard fund shareholders. Furthermore, Vanguard fund shareholders do not have any means to control the management of the Vanguard adviser by calling a vote of the shareholders of the Vanguard adviser. Mutual funds vote shares in the companies in which they invest according to the stated voting policies of the adviser without soliciting instructions from their shareholders. In contrast to Vanguard fund shareholders, policyholders in mutual insurance companies typically have a right under state law to vote for the board of directors of the insurance company, although voting procedures prescribed under state law for mutual insurance companies tend to facilitate management control.

As to the second factor, Vanguard fund shareholders do not have any direct claim on the profits (if any) of the Vanguard adviser. The stated policy of the Vanguard adviser is to provide services to the Vanguard funds at cost, which means that the Vanguard adviser ordinarily would not expect to have any profit to distribute to shareholders as dividends. Rather, any "profit" would be passed through in the form of reduced charges for the Vanguard adviser's services. The fact that the Vanguard adviser is not managed to make a profit is an integral component of its unique relationship with the Vanguard funds.

Vanguard fund shareholders also do not have a direct claim on the shares of the adviser. The Vanguard fund shareholder has the right only to receive cash equal to the value of his or her proportional interest in the trust property as a whole. If a fund makes a distribution in kind, the Board of Trustees determines what property of the trust to distribute. While any dividends paid

[1] *See, e.g.*, Hetherington, *Fact v. Fiction: Who Owns Mutual Insurance Companies*, 1969 Wisc. L. Rev. 1068 (1969).

by the Vanguard adviser to the fund would indirectly benefit Vanguard fund shareholders, this is not the principal purpose of the fund's investment in the adviser. Unlike other fund investments whose purpose is to generate dividend income or capital gains, the principal purpose of the Vanguard fund's interest in the adviser is to provide low cost services to the fund. In this respect, the Vanguard funds and their shareholders, like the policyholders of a mutual insurance company, are more like customers rather than investors in the financial institution in which they hold an ownership interest.

Finally, as to the third factor, in the event of the liquidation of a Vanguard fund, the fund shareholders would not receive any ownership interest in the Vanguard adviser. Under the Service Agreement, withdrawing from the management relationship with the Vanguard adviser terminates the fund's ownership interest in the Vanguard adviser. On terminating the managerial relationship with the adviser, the fund surrenders its shares in the adviser and receives an amount equal to its proportionate interest in the surplus of the adviser, which becomes part of the net asset value of the fund. That the fund's ownership interest in the adviser is contingent on the management relationship further differentiates the relationship between a Vanguard fund and its shareholders from the relationship between an ordinary corporation and its shareholders, and reinforces the conclusion that the fund shareholders' principal relationship with the Vanguard adviser, like the relationship of a policyholder with a mutual insurance company, is that of a customer rather than an investor.

Given the Vanguard fund shareholders exceptionally attenuated ownership interest in the fund adviser, their financial interest in the adviser is so insubstantial as to be immaterial.

****

I hope that this information is helpful to the Committee. If you have any questions, I would be pleased to respond.

Sincerely,

Ralph C. Ferrara

Ralph C. Ferrara

cc: Members of the Senate Committee on the Judiciary
Counsel of the Senate Committee on the Judiciary
Members of the Majority Staff
Counsel of the Majority Staff
Members of the Minority Staff
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November 23, 2005

United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Samuel A. Alito

Dear Members of the Senate Judiciary Committee:

I am writing to express my enthusiastic and unqualified recommendation that Samuel A. Alito be confirmed as an Associate Justice of the United States Supreme Court.

I worked with Judge Alito in 1987. He was appointed United States Attorney for the District of New Jersey. At that time I was the Deputy Chief and Acting Chief of the Special Prosecutions Unit. I continued in that capacity for approximately eight months after Sam arrived at the U.S. Attorney's Office. He was an exemplary U.S. Attorney. He was also an exemplary boss He was at all times knowledgeable, thoughtful and supportive of me and the other lawyers in the office. In his quiet and wryly humorous way, he demonstrated wonderful leadership. It was clear that he was very conscious of the responsibilities of that office and he fulfilled those responsibilities admirably. I was very proud to work for Sam Alito.

After leaving the U.S Attorney's Office, I became a private practitioner. I have had the pleasure of appearing as an advocate before Judge Alito in the United States Court of Appeals for the Third Circuit in a number of cases. It is a pleasure to appear before Judge Alito due to his genial demeanor and obvious professionalism. His opinions – even when against my cause – were thoughtful, considerate, justifiable and well written.

Judge Alito did not ask me to write this letter; I volunteered. I am a lifelong Democrat. I am the President-elect of a national women's bar association. I chair the Corporate Integrity and White Collar Crime group at a national law firm. I do not speak on behalf of either my law firm or the women's bar association. I speak for myself only. But by providing my credentials as an outspoken women's rights advocate and liberal-minded criminal defense attorney, I hope you will appreciate the significance of my unqualified and enthusiastic recommendation of Sam Alito for the Supreme Court.

Sam possesses the best qualities for judges. He is thoughtful, brilliant, measured, serious, and conscious of the awesome responsibilities imposed by his position. I cannot think of better qualities for a Supreme Court Justice. It is my fervent hope that politics will not prevent this extraordinarily capable candidate from serving as Associate Justice on the United States Supreme Court.

I will be happy to provide any further details or information in any private or public forum.

Respectfully submitted,

Cathy Fleming

Testimony of Prof. John G.S. Flym
Before the Senate Judiciary Committee
Confirmation Hearing of Judge Samuel Anthony Alito, Jr.
January, 2006

Thank you, Mr. Chairman. Mr. Chairman, Ranking Member Leahy, and distinguished members of the Committee, I am honored to be here today. Growing up in a NYC Harlem tenement, where my father worked as "super", I never imagined that someday I might appear before such an august body, to express my opinion about the qualifications of a presidential nominee to the highest court in the land. Nor did that change when, following military service as an enlistee, thanks to the GI bill, I went on to obtain degrees from Columbia University and the Harvard Law School. Nor, for that matter, when later I joined the faculty of Northeastern University School of Law. I am the prototype of an immigrant, a naturalized citizen, whose pride in this country's greatness is affirmed by the fact that humble origins do not bar access to the highest circles of government. Again, I thank you for your invitation and courtesy.

You do not know me, of course, and it is a matter of coincidence that I happen to have information which I hope you will consider relevant to your decision whether to approve Judge Alito's nomination to the Supreme Court of the United States. I am the attorney who assisted *pro bono,* the widow of D. Dev Monga, Shantee Maharaj, in preparing the November 24, 2003 Motion to Vacate Judge Alito's 2002 opinion upholding a lower court decision against my client, and in favor of The Vanguard Group, Inc., Vanguard Fiduciary Trust Company, and Vanguard/Morgan Growth Fund, Inc., (hereafter "Vanguard").

My allotted time is brief, so I begin with my conclusion: I believe that Judge Alito's participation in the appeal of D. Dev Monga[1] against Vanguard[2], violated the federal recusal statute, 28 U.S.C. § 455, because of his financial and ownership interests in Vanguard. I further believe that Judge Alito's responses seeking to justify his failure to recuse himself in that case raise profound questions about Judge Alito's integrity. These doubts about Judge Alito's qualifications compel me to speak against his confirmation, and I hope that you will deny his bid for a seat on the Supreme Court bench of the United States.

I address below the technical reasons why I entertain grave doubts about Judge Alito's integrity, but they boil down to an analysis of two propositions underlying his asserted defenses, each of which I believe to be untenable:

First, Judge Alito claims the law did not require that he recuse himself from the Monga/Vanguard appeal. I find it impossible to agree with Judge Alito, or even to grant him the benefit of doubt, because the statute's language and its history leave no room for any hypothetical doubt. Centuries of jurisprudence on the principle of judicial impartiality as fundamental to the rule of law provide context for 28 U.S.C. § 455, the recusal statute enacted by Congress in its current form in 1974. Judge Alito claims to have "reviewed" that statute only after the filing of my 2003 motion challenging his active role in the Monga/Vanguard appeal. See Judge Alito's letter to Senator Specter. However, Judge Alito turns a blind eye to the recusal

[1] M. Monga is an immigrant from India, who prior to this case, exemplified the American dream.
[2] Among other parties. See U.S. Court of Appeals for the Third Circuit, Docket # 01-1827.

statute's language explicitly relied upon in my 2003 motion, 28 U.S.C. § 455(b)(4), (which provides that a judge "shall" disqualify himself when "He knows that he ... has a financial interest in ... a party to the proceeding") & 28 U.S.C. § 455(d)(4), (which specifies that a "financial interest" means ownership of a legal or equitable interest, "however small"). Instead, Judge Alito chooses to focus on another, plainly irrelevant, clause in 28 U.S.C. § 455(b)(4), which provides a different basis for disqualification: in this alternative scenario which applies to other, non-financial, "interests", a judge must recuse only if such other "interest" might be "substantially affected by the outcome" of the appeal.

The relevant portion of the statute does not qualify its mandate obliging a judge to recuse in case of Vanguard investments. Since the definition of a "financial interest" is one "however small", a federal judge is required to disqualify himself independent of any calculation as to the potential effect of the appeal's, (or other proceeding's) outcome. In response to opinions taking the opposite view, I will develop this point below, as succinctly as I can, but with adequate technical detail to answer questions raised by others, under the heading "The Law".

For now, I measure my words in saying that I find deeply troubling Judge Alito's use of his academic and professional credentials, his considerable intelligence and legal skills, as well as his judicial stature and authority, to deny the statute its plain meaning by choosing to ignore the real issue and substituting a straw horse. I find it potentially dangerous to envision would-be Justice Alito applying this mode of self-serving analysis to the text of our Constitution, or laws enacted by Congress. Judge Alito's own words in this case betray a judicial temperament at odds with the standard of excellence essential in a Supreme Court Justice.

Second, Judge Alito seeks to explain away his failure to recuse at an earlier point in the Monga/Vanguard appeal by reference to a so-called computer glitch, or variations on the theme. This amounts to a claim that he was unaware of the recusal issue before it surfaced when the November 2003 motion to set aside his July 2002 decision put the question on his radar screen. At the outset, there is a self-evident contradiction in Judge Alito's alternative positions: it is axiomatic, and part of the canons of judicial ethics that, if not obliged to recuse, Judge Alito had a duty to sit. The fact that he recused himself from ruling on the 2003 recusal motion speaks for itself. However, a number of other circumstances converge to make Judge Alito's "inadvertence" defense so implausible as to undermine confidence in his integrity: Among them, (1) In 1990, as nominee for a seat on the Third Circuit, Judge Alito promised in writing that he would recuse in any future case with Vanguard as a party - reflecting the self-evident fact that Justice Alito understood all too well what the 1974 recusal statute would oblige him to do whenever an appeal's caption included the name Vanguard. (2) Despite his 1990 promise to this Committee that he would recuse from any case in which Vanguard was a party, Judge Alito appears to have listed "Vanguard" on the recusal list he was required to file with the Third Circuit Clerk's Office only after my 2003 motion challenging his failure to recuse from the Monga/Vanguard appeal, Ex.7.[3] (3) The three Vanguard entities – The Vanguard Group, Inc., Vanguard Fiduciary Trust Company, and Vanguard/Morgan Growth Fund, Inc., were clearly named as Defendants/Appellees in the caption of the documents filed in the Monga/Vanguard appeal; (4) it appears in the pre and post-judgment orders he signed; (5) it appears in his own 2002 opinion; (4) Judge Alito was required to file annual statements with the Judicial Conference listing his

[3] The abbreviation "Ex." herein refers to one of the numbered documents attached hereto.

Vanguard investments. (6) Simultaneous with his participation in the Monga/Vanguard appeal, Judge Alito bought shares in Vanguard, before his 2002 Opinion, on 5/23/02, and 6/3/02, as well as on 10/7/02, a few weeks after he signed the *en banc* Order denying a rehearing.

It is hard to fathom how anyone could avoid the conclusion that Judge Alito turned a blind eye to the recusal issue. I will say a bit more on this point under the heading "The Facts", but, much less than I could because this statement is longer than I had intended.

Judge Alito's own words

The Questionnaire submitted to this Committee by Judge Alito includes, in relevant part, the following answer to question 23, (for ease of reference, I have separated the paragraph into seven numbered clauses):

> 15. Monga v. Ottenberg, No. 01-1827. ...
>
> (1) I sat on the original panel that heard the appeal. Due to an oversight, it did not occur to me that Vanguard's status in the matter might call for my recusal.
>
> ...
>
> (2) My principal financial interest in Vanguard is in the mutual funds I own, which were not at issue in this lawsuit.
>
> (3) After the issue was raised, I reviewed the applicable ethical rules and guidelines. According to the Code of Conduct and parallel language in 28 U.S.C. section 455, I did not have a financial interest in the outcome of the case. This law states that a financial interest exists in this type of case only 'if the outcome of the proceeding could substantially affect the value of the interest.' (... 28 U.S.C. 455(d)(4)(iii)).
>
> ...
>
> (4) Moreover, notwithstanding the fact that my vote on the unanimous panel did not affect the outcome,
>
> (5) I took the extra and unnecessary step of requesting that a new panel of judges be appointed to rehear the case.
>
> (6) The new panel of judges reached the same unanimous conclusion as the prior panel.
>
> At page 54 (emphasis added)

Judge Alito's December 10, 2003, letter to Chief Judge Anthony J. Scirica states in part, (again, for ease of reference, separated into consecutively numbered clauses):

> (7) ... I do not own any shares in any party. ...
>
> (8) I do not believe that I am required to disqualify myself based on my ownership of the [Vanguard]mutual fund shares.

(9) ... Nor do I believe that I am a party.

(10) ... I am voluntarily recusing in this case. This will of course necessitate the reconstitution of a panel to consider the pending motion.
(emphasis added)

The Recusal Statute

28 U.S.C. § 455 provides in relevant part:

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:
...
(4) He knows that he ... has a financial interest ... in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding ...;
...
(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes ... appellate review ...;
...
(4) "financial interest" means ownership of a legal or equitable interest, however small ... except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities ...;
...
(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).
(emphasis added)

As subsection (e) makes plain, disqualification for any ground specified in subsection (b) may not be waived.

The Law

A. 28 U.S.C. § 455(d)(4)(iii), a "definitions" subsection, upon which Judge Alito purports to rely, does not apply to mutual funds.

Judge Alito seeks refuge in the language of the "definitions" subsection (b)(4)(iii), - see clause numbered (3) above - which defines what "financial interest" means for " ... a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest ...." In such cases, recusal is mandated, "... only if the outcome of the proceeding could substantially affect the value of the interest."

However, subsection (d)(4)(iii) refers only to "policyholders" in "mutual insurance companies" and "depositors" in "mutual savings associations", or "similar proprietary interest[s]". That these categories do not extend to investments in mutual funds like Vanguard, is evident from subsection (d)(4)(i)'s explicit identification of "mutual or common investment funds" evidencing Congress's intent to specifically address "mutual funds" in a separate subsection as it has done in subsection (d)(4)(i). This will become perfectly clear when mutual funds are discussed below.

Moreover, an equivalent conditional phrase,

"... that could be substantially affected by the outcome of the proceeding,"

first occurs in the subsection 455(b)(4). This substantive subsection identifies two kinds of "interests": "financial" and "other", but it modifies only "other" interests, not "financial" ones. That reading of the conditional phrase's application is the only plausible one, given subsection (d)(4)'s explicit definition of a financial interest as one which, "however small", is enough to trigger recusal. Should one seek to apply the "substantially affected by the outcome" condition to "financial", (as well as "other"), interests, the result would be the same: Judge Alito's "financial interest" in Vanguard, even if not "substantially affected" by the outcome of the Monga/Vanguard appeal, would remain a "financial interest", within the meaning of subsections (b)(4) & (d)(4) - which place no limit on how small an interest might be to nonetheless mandate recusal.

B. 28 U.S.C. § 455(b)(4) & (d)(4) imposed a duty on Judge Alito to recuse himself from participating in the Monga/Vanguard appeal.

1. A financial interest in a party, however small, triggers the obligation to recuse.

The statutory language is unequivocal. Its legislative history reveals that Congress explicitly considered, and rejected, alternative language which would have conditioned judicial

disqualification upon a showing that a judge's financial interest is more than *de minimis*. Instead, Congress enacted the "however small" definition:

> ... The next major changes to § 455 took place in 1974. ... The 1974 amendment rejected the "substantial interest" standard as too uncertain. Instead, Congress established a per se disqualification rule, enumerating several types of conflicts which automatically disqualify a judge. ... Under the new rule, even a de minimis financial interest required disqualification. ...

Ziona Hochbaum, "Taking Stock: The Need to Amend 28 U.S.C. § 455 to Achieve Clarity and Sensibility in Disqualification Rules for Judges' Financial Holdings," 71 Fordham L. Rev. 1669, 1678-80 (2003).

The Joint Committee on the Code of Judicial Conduct of the Judicial Conference of the United States reached the same conclusion in 1977:

> ... Following ABA approval of the Code of Judicial Conduct, the Congress in 1974 amended Section 455 of title 28 ... In so doing Congress departed from the provisions of the Canons in several respects. Most significantly the new statute requires disqualification in any case in which a judge has a financial interest "however small" and prohibits any remittal of disqualification based inter alia upon a financial interest. ...

"A Review of the Activities of Judicial Conference Committees Concerned with Ethical Standards in the Federal Judiciary, 1969-1976," 73 F.R.D. 247 (1977). Cf. Steven Lubet, "Disqualification of Supreme Court Justices: The Certiorari Conundrum", 80 Minn. L. Rev. 657 (1996), "... The Justice may not sit where she holds even a de minimis financial interest 'in a party to the proceeding.' ...," at n. 25. See also Steven Lubet, "Disqualification of Supreme Court Justices: The Certiorari Conundrum", 80 Minn. L. Rev. 657 (1996), disqualification is automatic whenever a judge holds so much as a share of stock in a party to a proceeding ..., at n. 9.

Congress' 1974 choice of language in amending 28 U.S.C. § 455 comports with centuries of recusal jurisprudence. Federal judges have been prohibited from sitting in cases in which they have a financial interest since 1792. *Liteky v. United States*, 510 U.S. 540, 544 (1994), citing Act of May 8, 1792, ch. 36, paragraph 11, 1 Stat. 278. As early as 1813, Chief Justice Marshall and Justice Livingston of The U.S. Supreme Court disqualified themselves because they had pecuniary interests in matters before the Court. *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813); *Livingston & Gilchrist v. Maryland Ins. Co.*, 11 U.S. (7 Cranch) 506 (1813).

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988), applied 455(b)(4) to a trial judge named Collins who had ruled in favor of defendant Liljeberg. Ten months later, the plaintiff learned that Judge Collins was a member of the Loyola University board of trustees, and that Loyola stood to benefit financially if Liljeberg prevailed in the litigation. The plaintiff thereupon filed a motion in the Fifth Circuit seeking to vacate the judgment. Judge Collins defended his failure to recuse claiming that he had forgotten about his position as a trustee. Rejecting Judge Collins' inadvertence claim, the Fifth Circuit vacated his judgment, and a petition for writ of certiorari to review that decision was granted.

The Supreme Court had no difficulty concluding that the judge's failure to recuse himself violated section 455(a), 455(b)(4) and perhaps 455(c). *Id.* at 867-68. The judge's position as university trustee, according to the Supreme Court, gave an appearance of partiality in violation of §455(a); it also constituted a financial interest in the proceeding because of the judge's fiduciary duties as trustee, a violation of § 455(b)(4); and the judge's failure to stay informed of his fiduciary interest "may well" have been a separate violation of §455(c). *Id.* The Court found it "remarkable, and quite inexcusable" that Judge Collins failed to disqualify himself when he read papers which should have reminded him of his fiduciary interest in a party. *Id.* at 865-87. In affirming vacatur, the Court, commended the Fifth Circuit's "willingness to enforce section 455." *Id.* at 868.

A parallel argument applies here: It is "remarkable, and quite inexcusable" that Judge Alito failed to disqualify himself when he read papers, and signed orders, which must surely have reminded him of his financial investments in Vanguard, a party to the appeal. Judge Alito's purported failure to stay informed of his financial interest in connection with the Monga/Vanguard appeal could also represent a separate violation of §455(c).

The Second Circuit applied *Liljeberg* in *The Chase Manhattan Bank v. Affiliated FM Insurance Co.*, 343 F.3d 120 (2d Cir. 2003), where the trial judge owned stock in Chase worth $250,000 to $300,000, received papers reminding him of his disqualifying financial interests, and ruled for Chase. The Second Circuit held that a §455 violation does not depend on proof that his financial interest affected the judge's actions:

> ... [W]e emphasize that there is no possibility here that the judge ruled for the banks in order to enrich himself. The asset size of Chase Manhattan Bank is such that its portion of the sizeable judgment originally entered by the judge would not cause any discernible increase in the value of the shares he owned. Moreover, the shares of Chase New Stock held by him were not even 1% of the particular judge's personal fortune. The disqualifying appearance here is of a different character. . . . Section 455(b)(4) requires disqualification when a judge knows of his or her financial interest in a party. However, actual knowledge of the interest need not be present if the circumstances are such that the objective test of §455(a) is triggered by a financial interest ...."

343 F.3d at 128 (citing *In re Certain Underwriter*, 294 F.3d 297 at 306 (2d Cir. 2002), (quoting from *Liljeberg*, 486 U.S. at 860)). See also *In Re Honolulu Consolidated Oil Co.*, 243 F. 348 (9th Cir. 1917).

The Chase Court determined that a violation of 455(b)(4) also establishes a 455(a) violation: "We hold that an appearance of partiality requiring disqualification under §455(a) results when the circumstances are such that: (i) a reasonable person, knowing all the facts, would conclude that the judge had a disqualifying interest in a party under §455(b)(4), and (ii) such a person would also conclude that the judge knew of that interest and yet heard the case. In short, we hold that §455(a) applies when a reasonable person would conclude that a judge was violating §455(b)(4)." *Id.*

See also, *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1308 (9th Cir. 1982)("[A] financial interest commands recusal if no specified exception applies and regardless of whether the outcome of the proceeding could have any effect on the interest."); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir. 1980); *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 706 F. Supp. 776, 780 (D. N.M. 1989), ("Even the slightest financial interest by the judge, the judge's spouse or the judge's minor child requires disqualification"); Judicial Conference, Advisory Opinion 20, www.uscourts.gov/guide/vol2/20.html: "Ownership of even one share of stock would require disqualification."

2. 28 U.S.C. §455 does not distinguish between investments in mutual funds and investments in stocks, treating both as "financial interests".

The statute's definitions subsection provides:

> (d) For the purposes of this section the following words or phrases shall have the meaning indicated:
> ...
> (4) "financial interest" means ownership of a legal or equitable interest, however small ... except that:
>
> (i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities ...
> (emphasis added)

Congress did not mean to exclude investments in mutual funds from its definition of "financial interest". Had it meant to do so, it would not have included the otherwise unnecessary phrase, "in such securities". Subsection (d)(4)(i) would simply provide: "Ownership in a mutual or common investment fund that holds securities is not a 'financial interest'".

As enacted by Congress, subsection (d)(4)(i) articulates two sensible propositions:

(1) An investment in a mutual fund that holds securities is a "financial interest", within the meaning of subsection (b)(4); and

(2) Such a financial interest means that a judge owing mutual fund shares does not thereby have a financial interest in the particular securities held in the mutual fund portfolio, which are subject to change at any time.

As a matter of common sense, there is no basis for mandating recusal by a judge with a minimal investment in IBM, in a case where IBM is a party, and not mandating recusal by a judge with a minimal investment in Vanguard, in a case where Vanguard is a party. Congress made no such distinction in its 1974 recusal legislation. As one treatise observes:

> Ownership of a mutual fund or common investment fund is not a disqualifying financial interest as to any of the stocks or securities held by the fund, unless the judge participates

> in the management of the fund. Of course, the judge would be required to recuse if the common fund itself was a party to the suit. (emphasis added)

50 Am. Jur. Proof of Facts 3d 449.

The Facts

C. Judge Alito's ownership - and financial - interest in Vanguard's expenses.

Judge Alito denies being an owner of Vanguard. Vanguard explains that it is owned by its Funds, and therefore by the Vanguard funds' shareholders:

> Unique organizational structure. Vanguard has a unique organizational structure. The Vanguard Group is owned by the funds and thus by the funds' shareholders, instead of being controlled by an outside management firm, as most investment firms are . . . This enables us to pass along the sizable economies of scale involved in asset management to our shareholders - our owners

Vanguard's website www.vanguard.com under the link "Why Invest Here" further states:

> ... the shareholders and the owners are essentially one and the same at Vanguard. Vanguard shareholders own the Vanguard funds, which are independent investment companies that jointly own The Vanguard Group.

Vanguard's website, www.vanguard.com during the relevant period, it's 2002 Annual Report, and its Corporate Disclosure Statement, (Third Circuit LAR 26.1 required Vanguard to file this document which is included as part of the Monga/Vanguard appeal record).

As one of Vanguard's owners, Judge Alito, despite his denial, was therefore an owner of a "party" to the Monga/Vanguard appeal.

Indeed, the federal Judicial Conference checklist as adopted, after the 1974 statute was enacted, contains this explicit warning:

> ... shares in some mutual funds may convey an ownership interest in the mutual fund management company in which case that company should be included on the conflicts lists ....

www.uscourts.gov/guide/vol2/checklist.pdf; www.uscourts.gov/ttb/jun98ttb/reminder.html; and www.uscourts.gov/ttb/sep99ttb/interview.html.

Thus, 28 U.S.C. 455(b)(5) provides another reason why Judge Alito had a duty to recuse.

The statutory test is objective. Whether or not Judge Alito chose to ignore the checklist warning, whether or not he read the Vanguard documents telling him that he owns Vanguard, he

is an owner of Vanguard, therefore a "party" to this proceeding, and thereby disqualified by the mandatory text of 28 U.S.C. § 455(b)(5).

As an illustration of that warning, Vanguard explains, with unmistakable clarity, that its "unique" structure enables it pass along to its "owners" the benefits of economies of scale involved in management expenses. Vanguard's Corporate Disclosure Statement explains:

> ... Management expenses, which are one part of operating expenses, include . . . other costs of managing a fund — such as legal . . . expenses ....

www.vanguard.com. Thus, among other financial interests in Vanguard was Judge Alito's share of management operating expenses, which include "legal ... expenses", and their contingency upon the outcome of Appellant's case against Vanguard. Assuming Judge Alito's investment to be 1/2 million dollars, Vanguard's own estimate is that over a period of 10 years he would pay around $33,600.00 in management fees.[4]

The mandatory language of 28 U.S.C. §455, "Any justice .. shall disqualify himself ...", places upon the judge the duty to recuse himself. *Sao Paulo State v. Am. Tobacco Co.*, 535 U.S. 229 (2002). See also. *Haines v. Liggett Group Inc.*, 975 F.2d 81 (3d Cir.1992) (quoting *In re Murchison*, 349 U.S. 133 (1955)). "No action by a party is required to invoke the . . . statute;" 13A Charles Alan Wright et al., Federal Practice and Procedure §3550 (1984).

---

[4] ANNUAL FUND OPERATING EXPENSES (expenses deducted from the Fund's assets)
Management Expenses: 0.50%
12b-1 Distribution Fee: None
Other Expenses: 0.04%
Total Annual Fund Operating Expenses: 0.54%

The following example is intended to help you compare the cost of investing in the Fund with the cost of investing in other mutual funds. It illustrates the hypothetical expenses that you would incur over various periods if you invest $10,000 in the Fund's shares. This example assumes that the Fund provides a return of 5% a year and that operating expenses match our estimates. The results apply whether or not you redeem your investment at the end of the given period.

This example should not be considered to represent actual expenses or performance from the past or for the future. Actual future expenses may be higher or lower than those shown.

1 Year	3 Years	5 Years	10 Years
$55	$173	$302	$677

PLAI N TALK A BO U T
Fund Expenses
All mutual funds have operating expenses. These expenses, which are deducted from a fund's gross income, are expressed as a percentage of the net assets of the fund. We expect Vanguard Growth Equity Fund's expense ratio for the current fiscal year to be 0.54%, or $5.40 per $1,000 of average net assets. The average large-cap growth mutual fund had expenses in 2002 of 1.57%, or $15.70 per $1,000 of average net assets (derived from data provided by Lipper Inc., which reports on the mutual fund industry). Management expenses, which are one part of operating expenses, include investment advisory fees as well as other costs of managing a fund—such as account maintenance, reporting, accounting, legal, and other administrative expenses.

10

Congress and the federal judiciary have adopted and implemented a comprehensive set of rules and procedures designed to identify a disqualifying financial interest at the earliest stage. The statutory test is objective.

D. Judge Alito's inaccurate statements.

1. Judge Alito listed Vanguard funds on the Third Circuit's recusal list only after the 2003 motion accusing him of having failed to recuse himself from the Monga/Vanguard appeal.

A document which I just obtained, Ex 1, pp. 23-38, appears to show that, despite his 1990 promise that he would recuse in any Vanguard case, Judge Alito did not name Vanguard on the recusal lists he filed with the Third Circuit Clerk's Office, either before 1999 when the "system" was "automated", or before. The first such filing appears to have occurred in December 2003, after the motion challenging his failure to recuse from the Monga/Vanguard appeal, Ex. 1. pp. 25-30.

If this is accurate, then evidently Judge Alito's "oversight", computer glitch & similar exuses are specious.

If it is inaccurate, i.e. if it turns out that Judge Alito did list Vanguard on his recusal list, the same excuses would fare no better, for such evidence would show that Judge Alito knew all too well that he had no choice but to recuse in any Vanguard case.

2. Judge Alito's claim that he asked for a new panel to rehear the case.

Judge Alito claims that he "... took the extra and unnecessary step of requesting that a new panel of judges be appointed to rehear the case ...," see Alito's own words (5) above. That statement was made in 2005, as part of the questionnaire he filed with this Committee. In fact, Judge Alito's December 2003 letter to CJ Scirica observes only that his recusal, "... will of course necessitate the reconstitution of a panel to consider the pending motion" to set aside his 2002 opinion and judgment.

The distinction between recusal from the 2003 motion to vacate his 2002 judgment, as opposed to recusal from the appeal in 2002, is consequential. It, along with other inaccuracies in Judge Alito's account of his role in the Vanguard appeal, casts serious doubts on his credibility: One can't know if a discovered reason for mistrust is just the tip of an iceberg.

3. Judge Alito claims that the second panel reheard the case.

The fact that Judge Alito only recused himself from deciding the 2003 motion - entitled "Motion by Appellant to Vacate the July 30, 2002 Judgment, Disqualify Judge Alito from this Appeal and to Order a New Appeal to be Heard" - also came to have more significance than one would suspect. It may be that Judge Alito expected the new panel to absolve him of having failed to recuse from the appeal itself.

Instead, by letter dated December 17, 2004, the Clerk's office notified all parties that the case had been listed on the merits, (nothing other than the motion to vacate was pending). The Clerk requested both an acknowledgment of receipt to be sent on "an enclosed copy of this letter" with the name of the attorney who would present oral argument, and whether such attorney was a member of the Third Circuit bar. Ex. 1[5]. Ms. Maharaj gave notice that I would argue on her behalf. Letter dated 12/20/03, Ex. 2; Docket entry dated 12/21/03, Ex. 3. It happens that I have been a member of Third Circuit bar since the 1980s. Thereafter, in lieu of hearing & deciding the 2003 motion, CJ Judge Scirica issued an Order on January 12, 2004, setting aside the 7/30/02 Judgment, thereby mooting the motion Judge Alito had described as "pending", and further providing that a new panel would be appointed which would decide how to proceed:

> ... Because Judge Alito recused himself from this matter (sic), the judgment will be recalled and the judgment vacated.
>
> The appeal will be resubmitted to another panel for whatever action the new panel deems appropriate. ...

Docket Sheet entry dated 1/12/04, Ex. 3. Judge Scirica evidently decided that Judge Alito's failure to recuse as of 2002 could not be justified and, acting *per curiam*, that the better part of wisdom was to treat Judge Alito's recusal from the pending motion, (recharacterized by Judge Scirica as a recusal "from this matter") as a recusal from the case. This revision of Judge Alito's "recusal" served as predicate for Judge Scirica ordering the 2002 "judgment ... recalled and ... vacated."

On January 21, 2004, I filed my appearance as counsel for the Appellants. Docket entry dated 1/21/04, Ex. 3. For the next 11 weeks, through March 31, 2004, I and my client regularly inquired of the Clerk's Office, and checked the docket sheet available through PACER, to see whether a new panel had been appointed. We found no entry concerning a new panel, and were orally advised that no new panel had been appointed. Ex. 4, Affidavit of Shantee Maharaj, dated April 13, 2004. I was therefore shocked when, on the afternoon of April 6, 2004, I received a letter dated March 30, 2004, addressed to Ms. Maharaj and all counsel of record - but conspicuously omitting my name, advising that the appeal "... was submitted on the briefs on Thursday, February 12, 2004, and, in a sentence at the bottom, below the signature, advising that "... your appeal will (sic) be submitted to the following panel ...," naming CJ Scirica as one of the three judges. A check of the docket via the internet on PACER revealed a new entry dated 2/12/04, stating that the case had been "SUBMITTED Thursday, February 12, 2004", and naming the members of the new panel, without mention of when the panel members had been designated, and without mention of what procedures had been adopted or by whom. Docket entry dated 2/12/04, Ex. 3.

In short, the appeal was being treated as if it was still a *pro se* appeal by Ms. Maharaj, relying on Ms. Maharaj's *pro se* briefs, and dispensing with oral argument. I instantly drafted "Appellant's Motion for Leave to File a Substitute Brief, or to File a Supplemental Brief, and for Oral Argument," This motion was served by hand on Vanguard's Boston counsel on April 7, 2004, served by hand on Philadelphia counsel for some Appellees early in the morning of April

[5] "Ex." refers to exhibits attached hereto.

8, 2004, Ex. 5. This motion was also filed by hand with the Clerk's Office in Philadelphia at about 9AM, date-stamped April 8, 2004. Ex. 6. To my dismay, I learned that the new panel had filed its "NOT FOR PUBLICATION NOT PRECEDENTIAL UNREPORTED PER CURIAM OPINION" the prior day, affirming the lower court's decision. Docket entries dated 4/7/04, Ex. 3. This April 7 opinion is a verbatim replica of Judge Alito's 2002 Opinion, except for the addition of one footnote.

The Docket contains no entry about the motion I filed April 8, 2004.

On April 21, 2004, I filed a petition for rehearing. Like my April 7 motion, my April 21 motion argued that the "new" panel's procedure violated both Ms. Maharaj's constitutional right to the assistance of counsel in her appeal, as well as federal appellate rules governing right to counsel and the right to oral argument.

In short, the second panel did not "rehear" the case. In fact, neither did Judge Alito's panel. There was no hearing whatsoever in this appeal.

4. Judge Alito's role in the appeal voided his 2002 Judgment

Judge Alito claims that, "... my vote on the unanimous panel did not affect the outcome," Alito's own words (4) above, and observes that, "The new panel of judges reached the same unanimous conclusion as the prior panel" - implying that his failure to recuse was a mere technicality with no impact on the disposition of the Monga/Vanguard appeal, either the first or second panel's. The fact is that his failure to recuse in the Monga/Vanguard appeal rendered his panel's own NOT FOR PUBLICATION NOT PRECEDENTIAL UNREPORTED PER CURIAM OPINION void, and that the second panel's decision to proceed as it did can only be premised on the assumption that it did not regard the first panels decision as void. Otherwise, the second panel would have had to accord Ms. Maharaj a fresh appeal, with all of the accustomed procedures, including the right of her *pro bono* counsel to file briefs and present oral argument.

28 U.S.C. §46(b) mandates that a panel should consist of not less than three judges. As construed in *Khanh Phuong Nguyen v. United States*, 39 U.S. 69, 123 S.Ct. 2130 (2003), the statute requires a properly constituted panel:

> ". . . the statutory authority for courts of appeals to sit in panels, 28 U.S.C. §46(b), requires the inclusion of at least three judges in the first instance. . . . although the two Article III Judges who took part in the decision of petitioners' appeals would have constituted a quorum if the original panel had been properly created, ... it is appropriate to return these cases to the Ninth Circuit for fresh consideration of petitioners' appeals by a properly constituted panel organized conformably to the requirements of the statute. . .

Khanh Phuong Nguyen , 123 S.Ct. at 2138-39 (emphasis added)

United States v. American-Foreign S.S. Corp., 363 U.S. 685, 690–691 (1960), vacated the judgment of a Court of Appeals sitting *en banc*, because a Senior Circuit Judge who had participated in the decision was not authorized by statute to do so. The Court declined to conduct

a prejudice inquiry as impracticable, it being impossible to determine *post hoc* the unlawful adjudicator's role in the appellate process, which is collective, deliberative, and occurs behind closed doors.

Indeed, the "mere participation [of a disqualified judge] in the shared enterprise of appellate decisionmaking . . . pose[s] an unacceptable danger of subtly distorting the decisionmaking process." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986). "[T]he collegial decisionmaking process that is the hallmark of multimember courts [may lead] the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity." *Id* at 833; *accord Crump v. Bd. of Educ.*, 392 S.E.2d 579, at 588 (N.C. 1990) ("One biased member can skew the entire process by what he or she does, or does not do, during the hearing and deliberations.") See also *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372 (1893) (holding that because the composition of the panel violated a federal statute, its ruling was invalid); *Moran v. Dillingham*, 174 U.S. 153, 158 (1899); and *William Cramp & Sons Ship & Engine Building Co. v. International Curtiss Marine Turbine Co.*, 228 U.S. 645, 652 (1913).

Unsurprisingly, six federal Courts of Appeals - including the Third Circuit - have recognized the impossibility of determining the prejudicial effect of one unlawful adjudicator upon the lawfully-appointed panel members. See, e.g., *Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941):

> ... Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured ....

See also *Stivers v. Pierce*, 71 F.3d 732, 746-48 (9th Cir. 1995); *Hicks v. City of Watonga, Okla.*, 942 F.2d 737, 748-49 (10th Cir. 1991); *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767-68 (6th Cir. 1966).

Accordingly, where, as here, a disqualified judge, (Judge Alito), sits on a federal Court of Appeals, this unlawful arrangement constitutes "... a structural defect that [goes] to the validity of the very proceeding under review." *Freytag v. Comm'r*, 501 U.S. 868 at 884, 898 (1991). Such an error "undermines the structural integrity of the . . . tribunal." *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986).

Errors in the composition of an appellate court are regarded as jurisdictional defects. Where an error "embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as 'jurisdictional.' " *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962).

In short, the judgment rendered by the improperly constituted panel in which Judge Alito took part was void, and the fact it was rendered unanimously has no judicial relevance. The second panel's truncated process deserves the same fate, since it republished Alito's decision without affording Maharaj's new counsel an opportunity to present her case.

5. Judge Alito's motives - and mine.

Since others, friends and reporters, have asked me why Alito failed to recuse, (e.g. did I think it was "hubris"), you likely may have the same question. Indeed the recusal statute itself seems to suggest such an inquiry by using the phrase "financial interest", the disqualifying circumstance upon which Ms. Maharaj relies. I refuse to speculate about Judge Alito's motive(s).

The objective of the recusal statute is judicial "impartiality" and the appearance thereof, without which public respect for law and our institutions of justice would collapse. The first section 28 U.S.C. § 455 provides:

> (a) Any ... judge ... of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Section (a) charges the judge with the general obligation of recusing himself whenever his impartiality might reasonably be questioned. Section (b) goes on to list circumstances automatically mandating that a judge recuse, among them when a judge has a financial interest in a party. In other words, a violation of section (b) means that Judge Alito's "...impartiality might reasonably be questioned ...," and therefore necessarily also violates section (a). See e.g. the Second Circuit's 2003 opinion in *The Chase Manhattan Bank, supra*:

> ... Section 455(b)(4) requires disqualification when a judge knows of his or her financial interest in a party. However, actual knowledge of the interest need not be present if the circumstances are such that the objective test of §455(a) is triggered by a financial interest ...."

343 F.3d at 128. The trial judge in *Chase* owned Chase stock worth between $250,000 and $300,000. During his participation in the Monga/Vanguard appeal, Judge Alito's investments in Vanguard far exceeded $300,000.

So, at bottom, Judge Alito's motives are irrelevant. What matters is what he did, not why.

On the other hand, I can speak of my motives in undertaking Ms. Maharaj's case. After my dad died 25 years ago, my mom discovered that the pension he had left her was worth $700. She was devastated, and as a neophyte attorney with a predominantly *pro bono* practice and personal debts, I was in no position to help her. This set of circumstances is likely one all-too-familiar to millions of Americans today, and for them it promises to get worse.

The effect of Judge Alito's ruling is to undermine the Supreme Court's trilogy in *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365 (1990), *Patterson v. Shumate*, 504 U.S. 753 (1992) and, just last year, *Rousey v. Jacoway*, 125 S.Ct. 1561 (2005), which hold that Congress meant to protect retirement savings, such as IRAs, from the reach of creditors. On the most dubious of legal grounds, Judge Alito's ruling fosters abuses in debt collection through just the kind of strategic manipulation of the law which *Patterson* warned against. IRAs are now ready targets for overreaching debt collectors. As happened to Ms. Maharaj, a creditor could

seize IRAs simply by by inventing allegations of fraudulent transfers into IRAs: During oral argument on Ms. Maharaj's appeal before the Massachusetts Appeals Court last Fall, after I argued that there had been no fraud whatsoever, Judge Graham asked a direct question of counsel for Vanguard: Is there any evidence of fraudulent contributions into Monga's IRAs? Vanguard's counsel replied that there is none.

I find Judge Alito's callous treatment of Ms. Maharaj an ominous sign of how he might treat the over 40 million Americans with IRAs worth over $2.3 trillion. Though Judge Alito professes respect for separation of powers, and in particular the scope of Congress's jurisdiction, his actions in the Monga/Vanguard appeal suggest that he may do so selectively, and that his "default", (using computer terminology), allegiance is to corporate America, here symbolized by Vanguard.

Conclusion

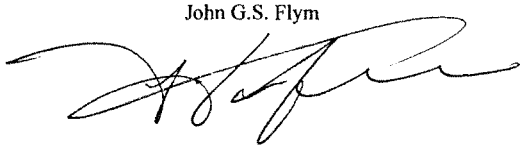
I have found it necessary to write more, and more technically than I had envisaged, because my oral presentation will, understandably, be limited to 5 minutes, and so much misinformation about Judge Alito's role in the Monga/Vanguard appeal has been so widely published. Unfortunately, several of my colleagues in academia have based their arguments in support of Judge Alito's nomination on this misinformation. I hope that this Committee will conduct its own research into Judge Alito's conduct in this case.

I end by concluding that Judge Alito's inaccurate account of his role in the Vanguard appeal, on issues of law and fact sounds like "the 13th stroke of the crazy clock that makes you wonder about the 12 which came before," (a phrase one of my Harvard Law School professors, named Braucher, liked to use when the words fit), meaning you can't trust the clock as to what time it is. Applied to Judge Alito's statements, it means you can't tell what to believe.

I urge this Committee to recommend reject the nomination of Judge Alito for the U.S. Supreme Court.

January 10, 2006

John G.S. Flym



November 9, 2005

The Honorable Bill Frist
Majority Leader
United States Senate
509 Hart Senate Office Building
Washington, DC 20510

The Honorable Harry Reid
Minority Leader
United States Senate
528 Hart Senate Office Building
Washington, DC 20510

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Majority Leader Frist, Minority Leader Reid, Chairman Specter, and Ranking Member Leahy:

We are former law clerks of Judge Samuel A. Alito, Jr. We are writing to urge the United States Senate to confirm Judge Alito as the next Associate Justice of the United States Supreme Court.

Our party affiliations and views on policy matters span the political spectrum. We have worked for members of Congress on both sides of the aisle and have actively supported and worked on behalf of Democratic, Republican and Independent candidates. What unites us is our strong support for Judge Alito and our deep belief that he will be an outstanding Supreme Court Justice.

Judge Alito's qualifications are well known and beyond dispute. Judge Alito graduated from Princeton University and Yale Law School. Prior to his appointment to the bench, Judge Alito had a distinguished legal career at the Department of Justice, which culminated in his appointment as the U.S. Attorney for the District of New Jersey. Judge Alito has served on the United States Court of Appeals for the Third Circuit for 15 years and has more judicial experience than any Supreme Court nominee in more than 70 years. During his time on the bench, Judge Alito has issued hundreds of opinions, and his extraordinary intellect has contributed to virtually every area of the law.

As law clerks, we had the privilege of working closely with Judge Alito and saw firsthand how he reviewed cases, prepared for argument, reached decisions, and drafted opinions. We collectively were involved in thousands of cases, and it never once appeared to us that Judge Alito had pre-judged a case or ruled based on political ideology. To the contrary, Judge Alito meticulously and diligently applied controlling legal authority to the facts of each case after full and careful consideration of all relevant legal arguments. It is our uniform experience that Judge Alito was guided by his profound respect for the Constitution and the limited role of the judicial branch. Where the Supreme Court or the Third Circuit had spoken on an issue, he applied that precedent faithfully and fairly. Where Congress had spoken, he gave the statute its

commonsense reading, eschewing both rigid interpretations that undermined the statute's clear purpose and attempts by litigants to distort the statute's plain language to advance policy goals not adopted by Congress. In short, the only result that Judge Alito ever tried to reach in a case was the result dictated by the applicable law and the relevant facts.

Our admiration for Judge Alito extends far beyond his legal acumen and commitment to principled judicial decision-making. As law clerks, we experienced Judge Alito's willingness to consider and debate all points of view. We witnessed the way in which Judge Alito treated everyone he encountered – whether an attorney at oral argument, a clerk, an intern, a member of the court staff, or a fellow judge – with utmost courtesy and respect. We were touched by his humility and decency. And we saw his absolute devotion to his family.

In short, we urge that Judge Alito be confirmed as the next Associate Justice of the Supreme Court.

Sincerely,

/s/ R. Alexander Acosta

R. Alexander Acosta
Clerk for Judge Alito, 1994-95

/s/ C. Frederick Beckner III

C. Frederick Beckner III
Clerk for Judge Alito, 1994-95

/s/ Scott Bovino

Scott Bovino
Clerk for Judge Alito, 1993-94

/s/ John W. Brewer

John W. Brewer
Clerk for Judge Alito, 1992-93

/s/ Jeffrey S. Bucholtz

Jeffrey S. Bucholtz
Clerk for Judge Alito, 1996-97

/s/ Adam Ciongoli

Adam Ciongoli
Clerk for Judge Alito, 1995-96

/s/ A. Michael Covino

A. Michael Covino
Clerk for Judge Alito, 1991-92

/s/ Nora V. Demleitner

Nora V. Demleitner
Clerk for Judge Alito, 1992-93

/s/ Monica P. Dolin

Monica P. Dolin
Clerk for Judge Alito, 1993-94

/s/ Dana S. Douglas

Dana S. Douglas
Clerk for Judge Alito, 2001-02

/s/ Conor Dugan

Conor Dugan
Clerk for Judge Alito, 2003-04

/s/ Paul C. Gluckow

Paul C. Gluckow
Clerk for Judge Alito, 1995-96

/s/ Craig Gottlieb

Craig Gottlieb
Clerk for Judge Alito, 1994-95

/s/ Paul M. Hauge

Paul M. Hauge
Clerk for Judge Alito, 1995-96

/s/ James A. Hunter

James A. Hunter
Clerk for Judge Alito, 2004-05

/s/ James Killmond

James Killmond
Clerk for Judge Alito, 1999-2000

/s/ Keith Levenberg

Keith Levenberg
Clerk for Judge Alito, 2002-03

/s/ David Loretto

David Loretto
Clerk for Judge Alito, 2002-03

/s/ Amber Spencer Madsen

Amber Spencer Madsen
Clerk for Judge Alito, 2002-03

/s/ Thomas A. Gentile

Thomas A. Gentile
Clerk for Judge Alito, 1996-97

/s/ James A. Goniea

James A. Goniea
Clerk for Judge Alito, 1990-91

/s/ Mitu Gulati

Mitu Gulati
Clerk for Judge Alito, 1996-97

/s/ Katherine K. Huang

Katherine K. Huang
Clerk for Judge Alito, 2000-01

/s/ Jay T. Jorgensen

Jay T. Jorgensen
Clerk for Judge Alito, 1997-98

/s/ Michael S. Lee

Michael S. Lee
Clerk for Judge Alito, 1998-99

/s/ Clark B. Lombardi

Clark B. Lombardi
Clerk for Judge Alito, 1999-2000

/s/ Joan M. Macaulay

Joan M. Macaulay
Clerk for Judge Alito, 1996-97

/s/ Michael Martinez

Michael Martinez
Clerk for Judge Alito, 1998-99

/s/ David C. McPhie

David C. McPhie
Clerk for Judge Alito, 2003-04

/s/ David Moore

David Moore
Clerk for Judge Alito, 2000-01

/s/ Christopher J. Paolella

Christopher J. Paolella
Clerk for Judge Alito, 1999-2000

/s/ Michael R. Potenza

Michael R. Potenza
Clerk for Judge Alito, 1998-99

/s/ Gary M. Rubman

Gary M. Rubman
Clerk for Judge Alito, 2000-01

/s/ Matthew A. Schwartz

Matthew A. Schwartz
Clerk for Judge Alito, 2003-04

/s/ Hannah Clayson Smith

Hannah Clayson Smith
Clerk for Judge Alito, 2001-02

/s/ Cheryl M. Stanton

Cheryl M. Stanton
Clerk for Judge Alito, 1997-98

/s/ David J. Stoll

David J. Stoll
Clerk for Judge Alito, 1991-92

/s/ Geoffrey J. Michael

Geoffrey J. Michael
Clerk for Judge Alito, 2000-01

/s/ Maureen Nakly

Maureen Nakly
Clerk for Judge Alito, 1998-99

/s/ Michael H. Park

Michael H. Park
Clerk for Judge Alito, 2001-02

/s/ Katherine L. Pringle

Katherine L. Pringle
Clerk for Judge Alito, 1993-94

/s/ Mark Schuman

Mark Schuman
Clerk for Judge Alito, 1991-92

/s/ Nathan C. Sheers

Nathan C. Sheers
Clerk for Judge Alito, 1992-93

/s/ John M. Smith

John M. Smith
Clerk for Judge Alito, 2001-02

/s/ Michael A. Stein

Michael A. Stein
Clerk for Judge Alito, 1990-91

/s/ Susan Sullivan

Susan Sullivan
Clerk for Judge Alito, 1990-91

/s/ William Taft

William Taft
Clerk for Judge Alito, 2004-05

/s/ John Tortorella

John Tortorella
Clerk for Judge Alito, 1999-2000

/s/ Jeffrey N. Wasserstein

Jeffrey N. Wasserstein
Clerk for Judge Alito, 1997-98

/s/ Jack White

Jack White
Clerk for Judge Alito, 2003-04

/s/ Michael Yaeger

Michael Yaeger
Clerk for Judge Alito, 2004-05

cc: Senator Orrin G. Hatch
Senator Charles E. Grassley
Senator Jon Kyl
Senator Mike DeWine
Senator Jeff Sessions
Senator Lindsey Graham
Senator John Cornyn
Senator Sam Brownback
Senator Tom Coburn
Senator Edward M. Kennedy
Senator Joseph R. Biden, Jr.
Senator Herb Kohl
Senator Dianne Feinstein
Senator Russell D. Feingold
Senator Charles E. Schumer
Senator Richard J. Durbin

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CHUCK CANTERBURY

JAMES O. PASCO, JR.

18 November 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member
Committee to the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senator Leahy,

I am writing on behalf of the membership of the Fraternal Order of Police to advise you of our strong support for the nomination of Samuel A. Alito, Jr. to be an Associate Justice on the United States Supreme Court.

Judge Alito has a long and distinguished career as a public servant, a practicing attorney, and a Federal jurist. He currently serves as a justice on the U.S. Court of Appeals for the Third Circuit, the very same Circuit where he began his career as a law clerk for Judge Leonard I. Garth. Judge Alito spent four years as an Assistant U.S. Attorney before becoming an Assistant to the U.S. Solicitor General in 1981. During his tenure with the Solicitor's office, he argued thirteen cases before the United States Supreme Court, winning twelve of them. In 1985, he served as Deputy Assistant U.S. Attorney General before returning to his native New Jersey to serve as U.S. Attorney in 1990. Nominated by President George H.W. Bush to the Third Circuit, the Senate confirmed him unanimously on a voice vote.

The F.O.P. believes that nominees for posts on the Federal bench must meet two qualifications: a proven record of success as a practicing attorney and the respect of the law enforcement community. Judge Sam Alito meets both of these important criteria. In his fifteen years as a Federal judge, he has demonstrated respect for the Constitution, for the rights of all Americans, for law, and for law enforcement officers, who often find it very difficult to successfully assert their rights as employees. Judge Alito demonstrated his keen understanding of this in a case brought by Muslim police officers in Newark, New Jersey (*Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 1999) The Newark Police Department sought to force these officers to shave their beards, which they wore in accordance with their religious beliefs. Judge Alito ruled in favor of the officers in this case, correctly noting that the department's policy unconstitutionally infringed on their civil rights under the First Amendment.

The F.O.P. is also very supportive of Judge Alito's decision in a 1993 decision filed by a coal miner seeking disability benefits under the Black Lung Benefits Act (*Cort v. Director, Office of Workers' Compensation Programs*). Judge Alito ruled in favor of the coal miner, holding that

the Benefits Review Board which denied the miner's claim had misapplied the applicable law regarding disability. He ordered that the case be remanded for an award of benefits, instructing that the Board could not consider any other grounds for denying benefits. Members of the F.O.P. and survivor families who have been forced to appeal decisions which denied benefits under workers' compensation laws or programs like the Public Safety Officer Benefit (PSOB) know first-hand just how important it is to have a jurist with a working knowledge of applicable law and a strong identification with the claimants as opposed to government bureaucrats looking to keep costs down.

Judge Samuel A. Alito, Jr. has demonstrated that he will be an outstanding addition to the Supreme Court, and that he has rightfully earned his place beside the finest legal minds in the nation. We are proud to support his nomination and, on behalf of the more than 321,000 members of the Fraternal Order of Police, I urge the Judiciary Committee to expeditiously approve his nomination. Please do not hesitate to contact me, or Executive Director Jim Pasco, through our Washington office if we may be of any further assistance.

Sincerely,

Chuck Canterbury

Chuck Canterbury
National President

Testimony of Charles Fried
Senate Judiciary Committee
The Confirmation of Judge Samuel Alito
as an Associate Justice of
the Supreme Court of the United States
January 9, 2006

In this testimony I shall mainly address what I know of Judge Alito from my work with him in the Office of the Solicitor General from the latter part of 1984 until he left the office at the end of 1985 to become a Deputy Assistant Attorney General in the Office of Legal Counsel. After that time I had little personal contact with him and have not seen him more than once or twice very briefly after he left the Department of Justice.

When I came to the Office of the Solicitor General first as the principal Deputy and shortly afterwards as head of the office the office consisted of some 22 lawyers—sixteen or so assistants and three to five deputies. All but the principal deputy held career civil service posts. The reputation of the office was and continues to be that the lawyers there were as talented, dedicated, and able as any lawyers anywhere. It is often spoken of as the best law office in the nation. Several of the lawyers had been in the office for many years—one deputy coming there, I believe, in the Kennedy administration, another in the Johnson administration. Judge Alito had been in the office for several years when I arrived. His reputation among the other career lawyers was that he was reliable, meticulous, objective, hard-working, a fine writer and an effective oral advocate. (Assistants would generally argue two of three cases a year before the Supreme Court.) Alito was assigned a particularly difficult case, FCC v. League of Women Voters, on a weekend's notice because of the sudden unavailability of the deputy who was to argue it. The high quality of his performance was a legend in the office. It was important for me as principal deputy and then head of the office to learn the reputation of those on my staff. Alito was highly respected. Nor do I recall anyone bothering to mention that he had any particular political coloration. In preparation for this testimony I have checked my recollection with several alumni of the office from that time and they confirm what I report here.

There has been considerable attention in the press and elsewhere to two memoranda he wrote while he was an assistant in the office: one in the Thornburgh case dealing with various state regulation s of abortion providers, and Mitchell v. Forsyth, dealing with the Attorney General's personal liability for wiretaps found to violate the Constitution. It is important to place these memos in their context. The Solicitor General does not bring a case to the Supreme Court unless some other part of the government-whether a division of the Department of Justice or another agency recommends it. In both these cases, Assistant Attorneys General, presidential appointees, and members of the Attorney General's staff had written formal recommendations that the Solicitor General argue to the Supreme Court: in one that Roe v. Wade be overruled, in the other that the Attorney General be held to be absolutely immune from personal suits for his official actions. In those cases, as in every case coming to the Solicitor General, an assistant is assigned the job of analyzing the case and recommending to the Solicitor General a course of action. It fell to Alito to write those memos.

In both cases Alito recommended against taking the position that more senior, politically appointed officials were urging the Solicitor General to take before the Court. In the abortion case, not only the head of the Civil Division but other high and politically highly connected officials were urging that I, as the head of the office at the time, ask the Court to overrule Roe v. Wade. The bottom line of Alito's memo was that I should not do that. Alito did preface that ultimate conclusion by saying that the decisions in the courts below were highly irregular on technical, procedural grounds (a position with which Justice O'Connor in dissent agreed) and that Roe might well be modified--as it has been--in some modest ways over the years. Indeed, the 1992 Casey decision did authorize a number of regulations that the Court found did not impose an "undue burden" on a woman's right to choose to have an abortion.

It is also worth noting that my predecessor, Rex Lee, had been criticized within the Administration for not opposing Roe head on, even though it was a more-or-less official position in the Department that the case had been wrongly decided. Alito's memo may reasonably be taken to express the belief that Roe had been wrongly decided. At the time that was hardly a radical position or outside the mainstream. In the same year that Alito wrote his memo Archibald Cox had repeated his published view that Roe had been wrongly decided. This was also the position of

Professor Paul Freund of Harvard and Dean Ely of the Stanford Law School.

One of the criticisms of Lee was that he was too ready to follow the advice of career lawyers on his staff who were hostile to the Reagan Administration agenda-especially on Roe-and used technical or tactical arguments to undermine it. It is hardly surprising, then, that Alito took pains to deny any personal hostility to the project he was recommending should once again be postponed. His making that point in the memo would have made my life easier vis-a-vis other senior members of the Department had I taken his advice. In the event, I did not follow Alito's advice and did ask that Roe be reconsidered and overruled, because I thought the Administration had the right to have its position put before the Court in a forthright but professionally correct way. Alito in his memo correctly predicted that the Court would react with hostility to such an argument. (My recent reading of the Blackmun papers in the Library of Congress showed me just how hostile that reaction had been.) When it came time to write the brief, I collaborated with Albert Lauber. Lauber wrote the part of the brief dealing with the technical failings in the decisions below and I wrote the part asking the Roe be overruled. It would have been normal for Alito to discuss the brief with Lauber. In our small, collegial office it was normal for the author of the underlying memo to look over the shoulder of the brief writer.

Alito's memo regarding the immunity of the Attorney General from personal liability where a wiretap he authorized is later found to have been illegal was if anything an even clearer example of a career lawyer doing his job correctly and dispassionately. (It should be emphasized that the case had nothing to do with the Attorney General's authority to allow such a wiretap. It was the premise of the case that the eavesdropping was illegal.) The Solicitor General in that case represented not only the Department of Justice but the Attorney General personally, whom the court below had ruled must pay damages out of his own pocket for ordering a wiretap found to be illegal. It is not surprising that the office of the Attorney General had asked the Solicitor General (at that time, Rex Lee) to urge his absolute immunity from personal liability in such a suit. Unlike the wiretap controversy today, the argument was not that a wiretap was constitutional just because the Attorney General had authorized it. Once again it was Alito's job to analyze and recommend and he recommended that the Solicitor General not even ask the Supreme Court to recognize such absolute immunity. It is hardly

surprising that Alito, like many lawyers delivering bad news to a client, expressed sympathy for the client's position. But the bottom line was just what Alito's higher-ups did not want to hear. And here too the Solicitor General did not take Alito's advice and once again Alito was proven right. (I believe the position that the Attorney was not personally, but only institutionally liable in such cases had been taken in the Carter Justice Department as well.)

I also remember working closely with Alito on the amicus brief in Wygant v. Jackson Board of Education, in which we argued that a school board may not fire a white teacher with greater seniority in order to maintain a particular ratio of minority teachers to minority teachers. It was our position that Justice Powell's controlling opinion in the Bakke case established the principle that a government agency's imposing a disadvantage on a person solely because of that person's race, while not categorically forbidden, had to survive what in constitutional law is called strict scrutiny. That position has since been reaffirmed many times, most notably in opinions written by Justice O'Connor in the Croson and Adarand cases. In the Wygant case the Court agreed with our position. Justice White, in a concurring opinion wrote:

> This policy requires laying off nonminority teachers solely on the basis of their race, including teachers with seniority, and retaining other teachers solely because they are black, even though some of them are in probationary status. None of the interests asserted by the Board, singly or together, justify this racially discriminatory layoff policy and save it from the strictures of the Equal protection Clause.

I mention this case because I know that there has been some attention paid to Judge Alito's application for the position of Deputy in the Office of Legal Counsel—a document of which I knew nothing until its disclosure in connection with these proceedings—in which he writes that he is proud of his contribution to cases in which the "Department has argued in the Supreme Court that racial and ethnic quotas should not be allowed . . ." I think very few judges, legislators or lawyers of whatever persuasion defend racial quotas. Certainly the Supreme Court has consistently condemned them. In the recent Michigan affirmative action cases, Grutter and Gratz, the reason that the University Michigan Law School's affirmative action program passed muster (Grutter) and the

undergraduate program (Gratz) was struck down by a 6-3 vote was that the former did not involve a quota and the latter did. In this instance Judge Alito's views are not only in the mainstream but in the very middle of the current. Indeed it is anyone who would defend quotas who is out of the mainstream.

Finally, although I have not made a study of Judge Alito's opinions while a Judge on the Third Circuit, I will comment on two of them, because others have. In Doe v. Groody Judge Alito dissented from an opinion holding that a search of a woman and her young daughter violated the Fourth Amendment. This opinion has been dramatized and caricatured as a display of cruel insensitivity to the dignity of the subjects of the search. An actual reading of the case shows what a mischaracterization that is. The search is described as a "strip search." In that case, after an extensive investigation, state narcotics agents executing a warrant to search premises for amphetamines found the wife and daughter of the owner of the house present in the house at the time and directed a female officer to search them for the illegal drugs. Here is a description of that search from the majority opinion.

> ...the female officer removed Jane and Mary Doe to an upstairs bathroom. They were instructed to empty their pockets and lift their shirts. The female officer patted their pockets. She then told Jane and Mary Doe to drop their pants and turn around. No contraband was found. With the search completed, both Jane and Mary were returned to the ground floor . . .

The only issue in the case was whether the search warrant was broad enough to allow a search of persons on the premises other than the designated owner. The only point that divided the majority and Judge Alito in dissent was whether the words in the sworn affidavit requesting the warrant which did specifically request permission to search any person on the premises carried over to the more general words in the warrant itself. Had the warrant tracked the affidavit there would have been no issue at all about the legality of the search. This case seems to me no more momentous than Judge Roberts's (as he then was) decision declining to find unconstitutional the arrest of a young girl caught eating a french fried potato in a Washington subway station.

The other dissenting opinion which has attracted some comment is the one in which Judge Alito concluded that the Supreme Court's then recent decision in the Lopez case, invalidating the federal Gun Free School Zone Act cast a constitutional shadow on the federal machine gun statute, when there is no requirement of an allegation that the gun had been acquired or traveled in interstate commerce. This case seems to me very similar to Judge Roberts's opinion expressing doubt about the constitutionality of the Endangered Species Act as applied to a "hapless" Arroyo toad. In both cases the judges had to guess about the exact scope of the Supreme Court's rather sweeping but cryptic language in Lopez. Some critics see in Judge Alito's guess in the machine gun case an ominous hostility to national power; that is distinctly odd, as the same critics fault Judge Alito for being too expansive in his views of national power, especially in respect to law enforcement. And in general, it is implausible to imagine that a former United States Attorney from New Jersey would harbor some predilection for restricting the government's power to prosecute offenses involving the gangsters' weapon of choice. No, he was just conscientiously doing his job, which is to apply "without fear or favor" the law as set down by the Supreme Court. And that is the hallmark of his work throughout his legal career.

Everything I have heard or read about Judge Alito confirms my initial experience and that of my colleagues in the Office of the Solicitor General, that Alito is a modest man, scrupulous in his treatment of the law, respectful of precedent, and supremely capable of expressing his conclusions in straightforward, understandable terms. He is, no doubt, a man of conservative disposition. But he is no doctrinaire. Nowhere is there a whiff that he is in the grips of some theory, originalism or any other. He is a man before whom I or any other lawyer should be entirely easy to present a case, confident that he will give a fair hearing. His opinions will add to the predictability, stability and clarity of the law. I hope he will be confirmed.

Friends of the Earth

January 10, 2006

Re: Oppose the nomination of Judge Samuel Alito

Dear Judiciary Committee member:

On behalf of the thousands of members of Friends of the Earth, I urge you to oppose the nomination of Judge Samuel Alito to a lifetime seat on the Supreme Court.

When it comes to the constitutional questions that will determine the ability of Congress to enact environmental laws and that of citizens to access courts to enforce them, Judge Samuel Alito poses a clear threat to the environmental protections that Americans depend on. And because he has been nominated to replace Justice Sandra Day O'Connor, a swing vote who frequently voted to uphold strong environmental laws, Judge Alito could tip the Court's balance against the environment if confirmed. His record includes several troubling aspects:

Narrow view of congressional power threatens environmental laws. In the coming months the Court will decide two cases challenging the authority of Congress to regulate a majority of wetlands, streams, ponds and other waterways now protected by the Clean Water Act. Judge Alito's record demonstrates an untenably narrow view of congressional authority under the Commerce Clause, the backbone of the Clean Water Act, Endangered Species Act, Safe Drinking Water Act and a host of other laws that protect our air, land and water.

Judge Alito's dissent in United States v. Rybar[1] indicates an extremely cramped view of the federal government's ability to legislate in the public interest. Five other appeals courts disagreed with Alito's conclusion that Congress lacked Commerce Clause authority to criminalize the possession of machine guns, placing his restrictive view squarely outside the federalism mainstream. Earlier in his career Alito urged President Regan to veto the Truth in Mileage Act, which criminalized tampering with odometers in used cars and expressly dealt with matters of interstate commerce. Alito stated that the law "violates the principles of federalism," and that "it is the states, not the federal government, that are charged with protecting the health, safety and welfare of their citizens."[2]

Restrictive view of standing doctrine threatens citizen access to courts. In Public Interest Research Group v. Magnesium Elektron, Inc.[3], Judge Alito espoused a restrictive view of the constitutional standing doctrine, making it harder for citizens to sue polluters. Citizen enforcement is an indispensable feature of the Clean Water Act, Clean Air Act, Superfund and many other laws that protect our health and safeguard our natural resources. These citizen suits empower ordinary Americans to sue polluters when government lacks the resources or political will to enforce the law.

The opinion Alito joined in Magnesium Elektron held that environmentalists lacked standing to sue because they hadn't established scientific proof of environmental harm—even though it was

[1] 103 F.3d 273 (3d Cir. 1996)
[2] Available at http://www.reagan.utexas.edu/alito/8097.pdf
[3] 123 F.3d 111 (3d Cir. 1997)

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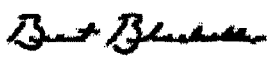
uncontested that the company committed 150 violations of the Clean Water Act, and even though environmental groups had demonstrated injury to the individual plaintiffs they represented. The Supreme Court rejected this reasoning in Friends of the Earth v. Laidlaw[4], holding that the proper measure of standing is injury to the plaintiff—not the environment. However, two dissenting justices and one concurring justice in Laidlaw left open the door to future challenges of environmental citizen suits. Replacing Justice O'Connor, who voted with the Laidlaw majority, with Judge Alito could quickly tip the Court's balance away from support of citizen enforcement of environmental laws.

Favorable EPA decisions overruled despite deferential standard of review. Alito has sided with environmentalists in some cases that turned on interpretation of an environmental statute. But in others he sided with polluters and invalidated pro-environment EPA decisions, despite the fact that courts are supposed to defer to the expertise of agencies. He has not invalidated agency decisions under this deferential standard of review in challenges brought by citizen groups, demonstrating a one-sided willingness to overturn agency actions when it benefits polluters.

For example, in W.R. Grace v. EPA[5] Alito provided the decisive vote to overturn an EPA emergency cleanup order under the Safe Drinking Water Act, siding with a polluter who challenged a health-based plan to remove toxic ammonia pollution from an aquifer providing drinking water to 180,000 people. Alito voted to overturn the plan, which was developed by local, state and federal agencies, despite a highly deferential standard of review.

Judge Alito has been nominated to replace Justice Sandra Day O'Connor, who served as a pivotal vote in favor of the environment. Confirming him to a lifetime appointment would threaten the ability of Congress to enact strong federal environmental laws, and would jeopardize laws such as the Clean Water Act that Americans have depended on for more than 30 years. His record also raises significant concerns about his commitment to upholding citizen enforcement of environmental laws. The stakes are simply too high to entrust a lifetime appointment to Judge Alito. I urge you to oppose his nomination. If you have questions, please feel free to contact me or our legislative director, Sara Zdeb, at 202-222-0728.

Sincerely,



Brent Blackwelder
President

[4] 528 U.S. 167 (2000)
[5] 261 F.3d 330 (3d Cir. 2001)

STATEMENT BY AMANDA FROST

ASSISTANT PROFESSOR OF LAW
AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW

BEFORE THE

SENATE JUDICIARY COMMITTEE

JANUARY 12, 2006

Mr. Chairman and Members of the Committee, I feel honored to have the opportunity to testify at these important proceedings.

My comments today are about reforms that are needed in the procedures and practices that govern recusal of federal judges. I am one of many scholars of the judicial system who believes that the laws governing recusals are failing at their primary objectives: protecting the reputation of the judiciary and fostering public confidence in the work of the judiciary.[1] Your consideration of the nomination of Judge Alito will turn, in part, on your views about whether he should have recused himself from certain cases while sitting on the United States Court of Appeals for the Third Circuit. That is why I want to discuss with you today the problematic recusal practices that have too often led judges and justices into situations in which their recusal decisions undermine public faith in the judiciary.

I. FLAWS IN THE RECUSAL PROCESS

Preserving the reputation of the judiciary is essential to maintaining its legitimacy. Federal judges are appointed to life tenured positions rather than elected through the democratic process, and yet they issue thousands of decisions a year affecting the daily lives of Americans. The public's willingness to abide by these judicial decisions is based in significant part on the public's conviction that they are issued by fair and impartial decisionmakers. When judges fail to recuse themselves in cases in which they have some personal bias or interest, they not only deprive the parties of their

[1] *See, e.g.,* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L. J. 657 (2005); John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43 (1970); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusals*, 53 KANSAS L. REV. 531 (2005); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 236 (1987); Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusals and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107 (2004).

right to an impartial decisionmaker, they also undermine the integrity of the judiciary. Furthermore, when judges sit on cases in which a reasonable observer would question their partiality – even if the judges are themselves certain of their ability to be unbiased – they can do just as much damage to the public's faith in the judicial branch.

Because the reputation of the judiciary is undermined by the *appearance*, as much as the reality, of bias, Congress enacted a statute, 28 U.S.C. 455, that provides: "Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." By using this language, Congress sought to ensure that even if a judge is certain of his or her ability to be impartial, that judge must step aside if a member of the public *might reasonably* disagree. In essence, the law requires judges to recuse even in borderline cases in which the possibility of bias, or the appearance of bias, is slight.

A key problem with the statute, however, is that it provides no procedural mechanisms to govern recusal. It does not say how parties are to seek recusals, it does not say how evidence regarding a judge's potential conflicts of interest are to be shared with the parties, and it does not clarify who should make the decision about recusal and whether that person should articulate any grounds for that decision. This procedural vacuum has, I believe, been the cause for recurring controversies over judges' failure to recuse – controversies that undermine the very goal of section 455 to protect the integrity of the judicial branch.

Normally, when there is a dispute about facts and law that needs to be resolved, that issue will be presented to the judge by the parties, who will each vociferously argue their view about the facts and the law. If the parties do not have enough information at the outset of a proceeding, they will first engage in discovery so that they do have the facts before they make their arguments.

Finally, an impartial decisionmaker will issue a decision and give a reasoned explanation for that decision. The decision then becomes part of the body of law that future judges use to guide their own decisions.

Unfortunately, judicial recusals operate entirely outside of these normal adjudicatory processes, particularly at the Supreme Court level. When making decisions about recusals, justices have eschewed the adjudicatory processes that usually govern legal disputes and instead make decisions in an untransparent and ad hoc manner. In most cases, a party will never be given the information needed to determine whether a justice might not be impartial due to his or her financial connections, relationships to a party or the attorney for that party, or prior work or personal experiences. Sometimes parties do obtain information that leads them to question a justice's partiality. Parties can use that information to file a motion to recuse – although they may well be deterred from doing so because such motions are so rare as to create the perception that filing one, at least in the Supreme Court, is an insult to the Court.[2] Moreover, that motion will be decided by the very justice whose partiality is being questioned[3] – without any input from the other eight justices[4] – and that justice need never explain his or her decision on the matter.[5] Of course, justices

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[2] *See, e.g.,* ALAN J. CHUSET, DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGES 58 (1981) (noting that "[j]udges, like other persons, are likely to resent charges of bias"); Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 260 (1978) ("Counsel who would face a particular judge many times in his career would be hesitant to charge the judge with bias or to refuse a judge's request that he waive his right to disqualify."); Frost, *supra* note 1, at 568-569.

[3] *Cheney v. United States Dist. Ct.*, 124 S. Ct. 1532 (2004) ("In accordance with its historic practice, the Court refers the motion to recuse in this case to [the individual justice being asked to recuse himself] Justice Scalia.").

[4] Letter from Chief Justice William Rehnquist to Senator Patrick Leahy (Jan. 26, 2004) ("[T]here is no formal procedure for Court review of the [recusal] decision of a Justice in an

can and often do voluntarily recuse themselves, but they almost never explain *why* they are doing so, leaving the parties and the public in the dark as to the nature of the conflict of interest.[6] Worse, the lack of explanation means that judges and justices do not get the benefit of their colleagues' wisdom when determining whether they should recuse themselves.

The ad hoc, opaque, and unchecked quality of judicial recusal decisions undermines the public's faith in the judiciary, and thus subverts the very goal of the recusal legislation. Over the last 40 years, a number of different judges and justices have faced significant public criticism due to their failure to recuse themselves in cases in which there is at least a debatable appearance of bias. To give just a few of the most prominent examples:

- In 1969, Supreme Court-nominee Clement Haynsworth was not confirmed for the position, in part due to the revelation that while a member of the Fourth Circuit he had sat on a number of cases in which he had a small financial interest.[7]
- Justice Abe Fortas failed to be elevated to the position of Chief Justice, in part over concern that he had served as counselor to President Johnson while sitting as a Justice on the Supreme Court.[8]

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individual case.").

[5] Leubsdorf, *supra* note 1, at 244-45 ("[A] judge who withdraws usually writes no opinion.").

[6] *Id. See also* Tony Mauro, *Decoding High Court Recusals*, LEGAL TIMES (Mar. 1, 2004). A 2004 study conducted by the Legal Times revealed that the Justices recuse themselves regularly, with Justice Stephen Breyer averaging the most number of recusals each year (42) and Chief Justice William Rehnquist averaging the least (7). *Id.*

[7] JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE (1974), at 81-88.

[8] *Id.* at 24.

- In 1972, then-Justice William Rehnquist faced criticism for his refusal to recuse himself from a case on which he had publicly commented while serving in the Department of Justice.[9] That controversy resulted in an amendment to 28 U.S.C. 455 to prohibit judges and justices from sitting on cases if they had expressed a view about the case while serving as a government lawyer.[10]
- In 2004, Justice Scalia made a controversial decision not to recuse himself from a case in which Vice President Cheney was a party despite having gone on a vacation with the Vice President shortly after the Supreme Court agreed to hear the case.[11]
- Most recently, in the months preceding these confirmation hearings, Judge Samuel Alito has been questioned about his failure to recuse himself from a case in which Vanguard was a party because he owns mutual funds with Vanguard, and because he stated in his 1990 Judiciary Committee questionnaire that he would recuse himself from such cases.[12]

Whatever one's views are about whether these individual judges should have recused themselves, I think most would agree that the process by which the recusal decisions were made did not work to foster public confidence in the judiciary in these cases.

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[9] *Laird v. Tatum*, 409 U.S. 824 (1972).

[10] Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609, at 1609 (now codified as 28 U.S.C. 455(b)(3)).

[11] *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004). I note that I was an attorney at Public Citizen Litigation Group at the time that Alan Morrison, another Litigation Group attorney, served as counsel of record for Sierra Club in the *Cheney* case. I did not participate in the litigation, however, and this testimony reflects no one's views but my own.

[12] *Monga v. Ottenberg*, 43 Fed. Appx. 523 (3d Cir. 2002); *see also* Letter from Judge Samuel A. Alito, Jr. to Senator Arlen Specter (undated).

The problems I have just described concerning judges' failure to follow the normal adjudicatory procedures when deciding whether to recuse themselves are particularly disturbing in regard to recusal decisions by Supreme Court justices. The Supreme Court provides the very last forum for judicial review in any case. If a district court or circuit court judge chooses not to recuse him or herself, that failure to recuse can at least theoretically be appealed to a higher court, which will review the decision and may reverse it. But when a single Supreme Court justice refuses to recuse, there is no review of that decision by anyone.

Furthermore, the stakes are simply that much higher in the Supreme Court. The cases that the Supreme Court reviews often present highly divisive issues that have split the lower appellate courts and will divide the Supreme Court. The opinion announced by the Court will then govern the entire nation, likely for decades to come. If a justice who arguably should have recused him or herself is part of a slim majority, that decision may be viewed as suspect by those who must abide by it.

Finally, the Supreme Court justices are the public face of the judiciary, and thus their recusal practices are subject to the greatest scrutiny and are the decisions that inevitably come to the attention of the general public. For example, anyone reading the newspaper in the Spring of 2004 became aware of the controversy over Justice Scalia's refusal to recuse himself in the *Cheney* litigation.

For all these reasons, the absence of transparency and consistency in the recusal process, particularly at the Supreme Court level, is undermining the reputation of the judiciary.

II. PROPOSED SOLUTION

The solution I suggest is to import into recusal law the normal adjudicatory processes by which parties get notice, have a chance to be heard, and are given a reasoned explanation for the decision reached. These procedural reforms could be made either by the justices themselves issuing a rule regarding recusal policy, or by Congress through amendments to the statute governing recusal.

First, revised procedures should make it clear that the parties are entitled to file motions for recusal when they believe that a judge or justice should step aside. Because section 455 is silent on that issue, and because Supreme Court practice in particular discourages such motions, very few are filed even when they would be justified.

Second, the laws should require greater transparency on issues relating to recusal. Judges and justices should be required to inform the parties and the public of any information that they believe might be considered relevant to the question of recusal, even if they do not think recusal is warranted. Indeed, Canon 3E of the American Bar Association's Model Code of Conduct for Judges already suggests that judges disclose "on the record information that the judge believes the parties or their lawyers might consider relevant" to their potential disqualification. This Canon should be codified into law or adopted as a part of judicial practice.

Third, when judges and justices do decide to recuse themselves – either in response to motions or on their own volition – they should issue at least a brief explanation for their decision. By doing so, they will create a body of precedent that will provide a guide for litigants and judges facing thorny recusal questions, and will enable Congress to monitor recusals to determine whether any changes in the law are required.

Fourth, when a judge or justice does not feel certain that he has an obligation to step aside, he should not make that decision entirely on his own, but rather should either refer the question to

his colleagues or, at the very least, should make that decision together with his colleagues. If a judge's interest in a case is being questioned, the appearance of justice is compromised unless a neutral third-party concludes that the judge has no reason to step aside.

Had these proposals already been in place, I believe that many of the recusal controversies of the past would have been avoided. For example, the recent controversy involving Justice Scalia's refusal to recuse himself from the *Cheney* litigation was almost entirely due to the lack of transparency and procedural structure in the recusal process. The controversy began when the L.A. Times reported that, shortly after the Supreme Court had agreed to hear the *Cheney* case, Justice Scalia had gone on a duck-hunting trip with the Vice President and had accepted a ride on Air Force Two with him.[13] As details emerged, more and more newspapers covered the story on their front pages, and ran editorials criticizing the Justice and calling for his recusal.[14] The situation quickly became fodder for political cartoons and even jokes on late-night television. One of the parties moved to recuse Justice Scalia, and the public attention inspired Justice Scalia to write an extraordinary 21-page memorandum decision in which he vociferously defended his right to sit on the case and provided many new facts about the trip that had been previously unknown.[15] In his memorandum decision, Justice Scalia for the first time informed the parties (and the public) that he

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[13] David G. Savage, *Trip With Cheney Puts Ethics Spotlight on Scalia*, L.A. TIMES, Jan. 17, 2004, at A1.

[14] *See* Frost, *supra* note 1, at 573.

[15] *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004).

had never been alone with the Vice President during the trip, had never discussed the case, and did not save any money by traveling with the Vice President on Air Force Two.[16]

Now, imagine for a moment that Justice Scalia had made a short public statement about the details of his trip with Vice President Cheney immediately as it happened, and before newspapers had a chance to report it as a "breaking" story. I believe that this voluntary disclosure of all the facts at the very beginning of the case would have prevented a controversy that tarnished – albeit in a small way – the reputation of the judiciary.

I will give one more example directly relevant to these hearings today. Judge Alito has been criticized for failing to recuse himself in a case in which Vanguard was a party after he had promised in his 1990 confirmation hearings to recuse himself in all such cases. In a letter to Senator Specter, Judge Alito wrote that after he had served on the bench for a period of time he came to view this pledge as "unduly restrictive" and no longer wished to abide by it.[17] If Judge Alito had fully disclosed his change in views to the parties in any case involving Vanguard, he could have avoided the appearance of impropriety that followed from his hearing a case that he had previously stated he would recuse himself from.

In conclusion, the recusal process is failing to protect the reputation of the judiciary because recusal decisions are made in secret, are made without explanation, and are made without the benefit of the adversarial process. Reforms to recusal laws should require that the question whether a judge or justice recuse him or herself be made in accordance with the procedures that apply to all other

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[16] *Id.* at 912-15.

[17] Letter from Samuel A. Alito, Jr., to Senator Arlen Specter (undated).

legal disputes. With these reforms in place, I think we would better protect both the reputation of the judiciary and the judges who serve the public.

Thank you for inviting me to share my views with you today.

STATEMENT BY JUDGE LEONARD I. GARTH, Senior Judge

UNITED STATES COURT OF APPEALS

THIRD CIRCUIT

January ____, 2006

Senator Specter, Senator Leahy and Honorable Members of the Senate Judiciary Committee:

I am privileged to appear before you today – albeit by video conferencing rather than in person – to support Judge Samuel A. Alito's nomination to the United States Supreme Court. I cannot be with you in person because I just recently had major spinal surgery and I find it extremely difficult and painful to travel.

I have served as a federal judge for some 36 years: 2 years as a federal District Court Judge in New Jersey, and – since August of 1973 – as a member of the Third Circuit Court of Appeals.

I have known Judge Alito in several different capacities over the course of his career. In 1976-77, following his graduation from law school, he served as one of my two law clerks. Since 1990 he has served as my colleague on the Court of Appeals. During the interim years, because of the relationship we developed during his clerkship and the fact that Judge Alito's home and chambers are in New Jersey (as are mine), we remained close to one another. Hence, I can speak knowledgeably about Sam's qualifications, his talents, his discretion, his honesty, his fairness and his integrity. These are qualities Sam possesses now, and has possessed since the very beginning of his legal career.

Let me first tell you about Sam's clerkship with me. As you may know, a law clerk is a judge's legal advisor and soundboard (if I may use that term). But he or she often becomes much more than that – a member of the judge's extended family. As a result, a judge gets to know his law clerk in a

particularly personal way. I knew Sam in this personal way at the very beginning of his career as a lawyer. For that reason, I have a unique perspective to share with you about Sam.

I chose Sam to be my law clerk in 1976 from among the literally hundreds of applicants who sent their resumes to me and the other judges on our court that year. Sam was still a law student when I interviewed him, but he struck me in that encounter as fiercely intelligent, deeply motivated and capable.

I did not know at the time that Sam was the son of Samuel Alito, Sr., who had impressed me very much as a witness in a New Jersey redistricting case that I heard around 1972. Once I made the connection, however, I fully understood why Sam was so impressive, and why he regarded – and regards today – his father as a role model.

During his tenure with me, Sam bore out all my initial impressions of

his excellence – impressions which had led me to engage him. He was a brilliant and exceptional assistant to me, enabling me to test judicial theories and to fashion appropriate judgments in each case that came before our court.

I have had some 85 law clerks assisting me in chambers over the course of my career on the bench. They have all been extremely well-qualified in all ways to serve a Court of Appeals judge. Sam stands out even among that elite group.

During the year he was my law clerk, Sam and I frequently took an afternoon walk near the courthouse and discussed the cases while we walked. I can tell you that the recommendations and arguments that Sam made about those cases were always reasoned, principled, and supported by precedent. I developed then a deep respect for Sam's analytical ability, his legal acumen, his judgment, institutional values, and yes, even his sense of humor (which, if he is confirmed, might compete with that of other justices).

Few of the cases that come before our court are "slam dunks" one way or the other; most involve difficult questions on which reasonable people can disagree. Generally Sam and I reached agreement after discussing the cases, but more than once we did not. Even in those latter cases, I understood and respected the positions Sam advanced, and the contours of his analyses.

Our afternoon walks invariably ended at a neighborhood store – T. M. Ward Coffee Company – where we purchased peanuts and coffee. I note parenthetically that Ward's has since honored Sam by naming the special blend of coffee that he favors "Judge Alito's Bold Justice Blend."

After he left my chambers, Sam continued on in public service. In a letter to the then Deputy Assistant Attorney General Arnold Burns, I endorsed Sam's candidacy for United States Attorney for the District of New Jersey. I wrote:

> I can certify to Mr. Alito's integrity, ability, discretion and honesty. Above and beyond those qualities,

> however, I believe his talents as a lawyer are exceptional. I am sure that his tenure in government service since he has left my chambers has reflected the fact that he is a thorough, meticulous, intelligent and resourceful attorney and that his judgments are mature and responsible. Indeed, he was one of the finest law clerks I have had the privilege to engage. If I were to rate him on the basis of 1-10 – 10 being the highest rating – he would, without question, receive a 10+ rating.

I stressed these same attributes when I endorsed Sam for membership on our court several years later. He has more than lived up to my rating and praise, and the qualities I attributed to him, in the fifteen years since he joined the court and became my colleague.

Sam is an intellectually gifted and morally principled judge. We have not always agreed on the outcome of every case. Just this fall, for example, Sam dissented from a majority opinion I wrote in an Employee Retirement Income Security Act (ERISA) case. In that case, Sam and I disagreed about how two provisions of the statute interact. I and the other majority judge were attracted in large part to the reasoning of the Second Circuit. Judge Alito, on the other hand, was attracted by the reasoning of the Seventh

Circuit. Even in the cases on which we disagree, however, I always respect Sam's opinion, just as I did during our afternoon walks when he was my law clerk.

Sam is also a prudent judge. He is no revolutionary. He is a sound jurist – always respectful of the institution and the precepts that led to decisions in the cases under review.

I have heard concerns expressed about whether Judge Alito can be fair and evenhanded – in effect, an impartial umpire. Let me assure you from my extensive experiences with Judge Alito and my knowledge of him – going back, as I have stated, over thirty years – that he will always vote in accordance with the Constitution and laws as enacted by Congress. His fairness, his judicial demeanor and actions, and his commitment to the law do not permit him to be influenced by individual preferences or by any personal predilections. I feel free to make this assertion and prediction because of my

intimate knowledge of Judge Alito and the experiences I have had with him on our court.

As you may know, when the judges of our court meet in conference after hearing oral argument on the various cases before us, we are the only individuals in chambers – no law clerks, assistants, administrative personnel, or indeed anyone else attend these conferences. I can tell you with confidence that at no time during the 15 years that Judge Alito has served with me on our court – and the countless number of times that we have sat together in private conference after hearing oral argument – has he ever expressed anything that could be described as an "agenda." Nor has he ever expressed any personal predilections about a case or an issue or a principle that would affect his decisions. Therefore I do not believe the concerns expressed about Sam's impartiality by several of the members of the Committee over the past few days have merit.

Sam has a deep and abiding respect for the role of *stare decisis* and established law. I appreciate, of course, that the Supreme Court can retreat from its earlier decisions, but it does so rarely and only in very special circumstances. I am convinced that if Judge Alito is confirmed as an Associate Justice of the Supreme Court, he will continue to honor *stare decisis* as he did as a law clerk, and as he has done as a member of our court. He will sit among those jurists whose qualities of fairness and principles are the lodestar of the judiciary. In my opinion, Sam is as well-qualified as the most qualified Justices currently sitting on the Supreme Court.

A word about Sam's demeanor is in order. Sam is and always has been reserved, soft-spoken, and thoughtful. He is also modest and, I would even say, self-effacing. These are the characteristics I think of when I think of Sam's personality. It is rare to find humility such as his in someone of such extraordinary ability.

Over the 30 years I have known Sam, I have seen him grow professionally into the reserved, mature, independent and apolitical jurist that graces our court today. I regard him as the most qualified member of our court to be considered as an Associate Justice of the Supreme Court. I know that just as Judge Alito has brought and brings grace and luster to the Third Circuit, so too will he bring grace and luster to the United States Supreme Court if he is confirmed.

Written Statement of

Michael J. Gerhardt,

Samuel Ashe Distinguished Professor of Constitutional Law,

University of North Carolina at Chapel Hill Law School

Hearing before the

United States Senate Judiciary Committee

On the Nomination of Judge Samuel A. Alito, Jr., to be an Associate Justice of the

Supreme Court of the United States

January 12-13, 2006

We meet at a special moment in American history. The stakes in this week's hearings are no secret. First, and foremost, what is primarily at stake in these hearings is the nomination of Judge Samuel Alito, Jr., to be an Associate Justice of the Supreme Court. Second, it is impossible to ignore the enormous transformative potential of Judge Alito's nomination to replace Justice O'Connor. For the past 25 years, the Court might have gone by different names – the Burger, Rehnquist, and Roberts Courts, but the justice throughout that time that has embodied the Court's center is Justice O'Connor. Indeed, between 1995 and the present, Justice O'Connor was in the majority in 148 out of 193 cases that the Court decided by a 5-4 majority in whole or in part. She was, in other words, in the majority in almost 77% of the Court's 5-4 decisions during the past 10 years. In nominating Justice O'Connor's replacement, President George W. Bush made no secret of his intentions to appoint someone with a very different approach to judging than Justice O'Connor has had. In particular, President Bush pledged to nominate appoint justices who were "strict constructionists" and who were in the mold of Justices Antonin Scalia and Clarence Thomas. If Judge Alito were to fit that mold, then his appointment would decisively shift the Court's ideological balance. Third, the Senate's stature and power are at stake. Senators fully appreciate that how they handle Judge Alito's confirmation hearings will establish an important precedent. Every senator appreciates that whatever considerations they take into account will help to guide and to inform subsequent Supreme Court confirmation hearings. With so much at stake, these hearings have been filled, as the Chairman has suggested, with a good deal of "drama." These are anxious moments, and I do not take this occasion -- or the extraordinary privilege and honor of addressing you – at all lightly. I hope that I may be able to do my

small part in extending to the present hearings the high standards of decorum, civility, and candor set by the Senate in its confirmation hearings for Justices Ruth Bader Ginsburg and Stephen Breyer and Chief Justice John Roberts.

I..

The Appointments Clause of the Constitution, which empowers the Senate with the authority to give its "Advice and Consent" on Supreme Court nominations, needs no introduction. Neither the plain language of the Appointments Clause nor the structure of the Constitution requires senators to simply defer to a president's Supreme Court nomination(s). Nor does the text or the structure of the Constitution require hostility to a president's Supreme Court nomination(s). Nor, for that matter, does the text of the Appointments Clause require either the President or the Senate to employ certain criteria in discharging their respective authorities in the federal appointments process. Indeed, the text, the structure, and the history of the Appointments Clause (including the Senate's historical practices) allow senators to take anything into consideration that you deem appropriate or necessary to discharge your unique constitutional authority. There is, in short, ample support for your entitlement to make your own separate evaluation of a nominee's fitness to serve as an Associate Justice. How you make that evaluation is your choice. You may choose, as senators have always chosen, to take into account the nominee's experience, integrity, collegiality, temperament, legal acumen, and craftsmanship. But, you may do more than that, if you choose. Our history is replete with senators' taking Supreme Court nominees' likely judicial philosophies or ideologies into account. Senators, particularly the members of the Judiciary Committee, may do this

as an exercise of their functions as gatekeepers, for they are ultimately responsible for filtering out the personnel and the particular constitutional views they do not wish to see reflected on the Supreme Court. Their function as gatekeepers extends to determining which views are in the mainstream of constitutional law and which views are acceptable on the Court. The question is not whether you may take judicial philosophies and ideologies into account; the question is how you may do this, if you are so inclined.

We are fortunate to have some exemplary models of Supreme Court confirmation hearings to follow. The present hearings mark the fourth straight set of Supreme Court confirmation hearings that have, at least to date, been exemplary in their tone, civility, decorum, and focus. And there is every indication to expect that the Alito hearings will be conducted with the same kind of respect that the Ginsburg, Breyer, and Roberts confirmation hearings demonstrated for the important constitutional values of judicial independence, the President's prerogative to set the terms for Supreme Court confirmation hearings through the kinds of nominees he chooses, and the Senate's ability to evaluate these terms.

By all accounts (and all the evidence we have seen so far), Justice O'Connor and Judge Alito appear to be very different kinds of judges. They appear to have very different approaches to judging. Consequently, a critical question for this Committee, then, is whether the differences between Justice O'Connor and Judge Alito ought to be significant in these hearings? Should these differences make any difference? Different senators may answer the question differently. The important thing for each senator is to answer the question.

In my judgment, Sandra Day O'Connor has been distinctive as a Supreme Court justice in at least four respects. As best I can tell, Judge Alito differs from her with respect to each of these. First, Justice O'Connor's resignation will leave the Court without a member with first-hand experience as a legislator. (Justice O'Connor's resignation leaves Justice Breyer as the only justice with extensive legislative experience but not as an elected representative.) To her credit, Justice O'Connor's experience as a state legislator never led her to defer reflexively to Congress or state legislatures or to be disdainful of the legislative process. Nor did she ever apparently feel the need to over-compensate for her experience by deferring excessively to the other branches, including the presidency.

An obvious question, for the Senate, is whether Judge Alito can be as successful as Justice O'Connor in not allowing his extensive experience in one branch to color his judgment in separation-of-powers conflicts. The question is whether he can avoid allowing the primary professional experience he has had other than judging – working for the Justice Department – to lead him into giving undue and maybe even absolute deference to the executive branch or the presidency in separation-of-powers disputes.

If he were confirmed to the Court, Judge Alito would become one of four justices on the Roberts Court with significant experience working in the executive branch of the federal government. (The others are Chief Justice Roberts and Justices Scalia and Thomas. Judge Souter, who was once Attorney General of the State of New Hampshire, would make a fifth justice with significant executive experience.) The Court has rarely had as many (or, for that matter, more) justices with significant executive experience. Consequently, it makes sense for senators so disposed to consider the impact of the net

loss of Justice O'Connor's first-hand experience as a legislator, coupled with her failure to defer unduly to the executive branch or the presidency.

A number of senators (and Americans) have expressed the concern that, because of his extensive experience in the Justice Department , Judge Alito may be disposed to be more disdainful of the Congress (or of state legislatures) than Justice O'Connor ever was or to be more deferential to the President than Justice O'Connor ever was in cases involving questions about the scope of executive authority. As we all know, the Court is likely to face serious questions of executive power, particularly during a time of war, in the foreseeable future. Given Judge Alito's background, many senators (and Americans) expect him to have the burden in these hearings to persuade the Senate and the public of his impartiality in adjudicating disputes between the President and either of the other branches.

Judge Alito's apparent endorsement of the theory of the unitary executive (in a speech before the Federalist Society) intensifies his need to demonstrate to the Senate's satisfaction that he will be an impartial arbiter of disputes between the President, or the executive branch, and the other branches. Moreover, his endorsement of the unitary theory of the executive raises a question about what he considers to be the scope of congressional authority to constrain executive power, even in a time of war. In a nation that chose to rebel against a king and tyrannical authority, it is not surprising that the Constitution does not establish a limitlessly powerful chief executive. Consequently, it is appropriate to consider to what extent, if any, Judge Alito would be disposed to give special deference to the President in conflicts with Congress, the courts, or the individual rights of American citizens. There is no indication that Justice O'Connor ever played

favorites in separation-of-powers disputes, and senators are entitled to explore, if they choose, the constitutional limitations on executive power that Judge Alito is disposed to recognize if he were to be confirmed to the Court.

A second distinctive feature of Justice O'Connor's legacy is her commitment to pragmatic, bottom-up judging. In his confirmation hearings last September, Chief Justice Roberts characterized himself as a "bottom-up" judge. A "bottom-up judge" decides cases incrementally, one-at-a-time, and infers the principles to be deployed in constitutional adjudication from the records and decisions of the lower courts. "Bottom-up" judges are distinct from "top-down" judges, such as Justices Scalia and Thomas, who tend to infer principles directly from the Constitution (and what they each regard as synonymous with the Constitution) that they then impose onto the lower courts (and, if need be, the other branches).

Based on my reading of Judge Alito's opinions, I am not sure whether he is a "bottom-up" or "top-down" judge. These hearings provide an important opportunity to learn which kind of judge he may be. To be sure, Judge Alito has mentioned that the justices he most admires are Chief Justice John Marshall and Justices Byron White, William Rehnquist, and William Brennan. I assume Judge Alito mentioned Justice Brennan not because Judge Alito actually approves of Justice Brennan's judicial methodology but rather because he admires Justice Brennan personally as a Catholic from New Jersey appointed to the Supreme Court. As for the other three justices Judge Alito most admires, only one – Byron White – was a consistently bottom-up judge, who tended to decide cases incrementally and as narrowly as possible and tended to defer to precedent. Though Chief Justice Marshall was trained in the common law methodology

of the times, he was not consistently either a top-down or bottom-up judge. Sometimes Chief Justice Marshall inferred principles directly from the Constitution and its original understanding (in a top-down fashion), and sometimes he did not. Chief Justice Rehnquist, for at least much of his tenure, appears disposed to have been more top-down than bottom-up, particularly in cases in which state sovereignty was at issue. In discussing the justices he most admires in these hearings, senators may wish to clarify the extent to which Judge Alito admires, or intends to emulate, their respective judicial methodologies.

The third distinctive feature of Justice O'Connor's legacy is her solid commitment to the traditional approach to constitutional stare decisis. Justice O'Connor never seemed eager to go out of her way to overrule precedent. Throughout her tenure, she adhered to the Court's traditional approach for deciding whether to overrule wrongly decided cases. Under this approach, justices do not overrule prior decisions that they deem wrongly decided, unless they can demonstrate their reversals as being required because of lessons of experience, changed circumstances, the absence of societal reliance, or inconsistency with intervening line(s) of decisions. In his confirmation hearings, Chief Justice Roberts expressed a similar attitude toward stare decisis. Moreover, he acknowledged that overruling a precedent caused "a shock to the legal system," and he implied that too many shocks – too many overrulings – would be bad for the legal system. Justice O'Connor put a premium on maintaining stability, predictability, and consistency in constitutional law as much as possible. This approach oftentimes put her at odds with most of her colleagues. In Lawrence v. Texas, for instance, she refused to concur in the overruling of the Court's 1986 opinion in Bowers v. Hardwick. In other

cases, she refused to join the entreaties of Justice Scalia and particularly Justice Thomas to overrule cases which one or the other and sometimes both deemed wrongly decided. Indeed, my survey of the Rehnquist Court indicates that over the course of its 18-year lifespan the two justices urging the largest numbers of precedents were Justices Scalia and Thomas. Obviously, an important question to pursue with Judge Alito is whether he agrees with the approach of Chief Justice Roberts and Justice O'Connor or with the approach of Justices Scalia and Thomas on the level of deference he expects to give to the precedents with which he disagrees. The institutional values promoted by fidelity to precedent are difficult to achieve without a healthy degree of such respect.

A related question is whether Judge Alito recognizes the phenomenon of super-precedent, discussed in Chief Justice Roberts' confirmation hearings. As I understand it, super-precedent refers to prior Supreme Court decisions that are so deeply entrenched in constitutional law (and consistently supported by the other branches) that they have become effectively immune to reconsideration and overruling. The possible existence of super-precedent raises the question whether there are some constitutional issues that are simply off the table and are so firmly settled as to be effectively sacred in American constitutional law.

Super-precedent is not necessarily a new notion. Abraham Lincoln was one of the first public figures to acknowledge the possibility of super-precedent. In the famous debates he had in his Senate race with Stephen Douglas in 1857, Lincoln spoke at some length about why the Court's tragic decision in Dred Scott v. Sanford deserved little or no respect from the other branches. While it is popular to quote the speech for what it says about the obligation of either of the political branches to adhere to, or respect, a precedent

like Dred Scott, many people rush past the part of the speech quote in which Lincoln acknowledges the conditions for universally respecting Supreme Court precedent. At that point in the speech, Lincoln declared, that "if this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout history, and had been, in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent . . ." Lincoln never used the words "super-precedent," and it is likely few decisions ever would meet his criteria for universal acquiescence or respect. Nevertheless, the kind of precedent he suggested would be "revolutionary" to ignore or not to follow is consistent with the phenomenon of super-precedent.

Super-precedent arises as a concern in these hearings for the simple reason that some of Judge Alito's stated personal beliefs are at odds with a number of landmark opinions that could be fairly described as super-precedent. Among the decisions I regard as super-precedent are the Court's reapportionment decisions (now apparently supported by the leadership of the political branches and by all the Court's justices) as well as the Court's decisions upholding the constitutionality of the 1964 Civil Rights Act and 1965 Voting Rights Act, and Miranda v. Arizona (reaffirmed not long ago in an opinion by Chief Justice Rehnquist). There are a number of other decisions – both liberal and conservative – that could qualify as super-precedent, including, for instance, the Court's 1883 decision in The Civil Rights Cases. The question is the extent to which Judge Alito

acknowledges the possibility that any cases have achieved something akin to the status of super-precedent.

Another distinctive aspect of Justice O'Connor's tenure on the Court is her pivotal voting in a number of areas of constitutional law in flux. Her resignation arguably leaves in flux some of the many 5-4 decisions in which she joined the majority. As I have already suggested, one obvious question for Judge Alito is whether he would defer to most or all of these decisions based on the institutional values promoted by fidelity to precedent, including stability, predictability, consistency, and continuity. A related question is whether Judge Alito agrees, or will work to weaken or undo, many of the decisions in which Justice O'Connor cast decisive votes. Neither time nor space allow an exhaustive account of all these decisions, but I will mention just three for illustrative purposes. In particular, we know that in 2000 the Court struck down Nebraska's partial-birth abortion law 5-4, and more recently it struck down 5-4 a public display of the Ten Commandments at a courthouse in Kentucky. In both opinions, Justice O'Connor was in the slim majority, and an obvious question for Judge Alito is the extent to which his deference to precedent may depend on the kinds of factors Chief Justice Rehnquist once recognized as pertinent for reconsidering precedent in Payne v. Tennessee – namely, the voting margins in particular cases, the interests at stake in cases, and the longevity of the cases at issue.

In yet another opinion, decided 6-3 not 5-4, the Court in an opinion by the late Chief Justice upheld the Family Leave Act, a law whose constitutionality Judge Alito had questioned in the lower court. The case in question, Nevada v. Hibbs is important, because it demonstrates that the Court took seriously its oft-repeated recognition that

section five of the Fourteenth Amendment was the Congress' only power to abrogate state sovereignty. It should come as little or no surprise that the Court's stance on this point makes eminent sense. The Reconstruction Amendments clearly were designed in part to restrict state sovereignty more than it had been limited by the original Constitution, and section five of the Fourteenth Amendment provides the Congress with the "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. One matter to explore with Judge Alito is whether he agrees with the Court's repeated recognition of section five of the Fourteenth Amendment as the exclusive power through which it may abrogate state sovereignty.

II.

I cannot improve upon the account of the evolution of judicial conservatism given by University of Chicago law professor David Strauss in Chief Justice Roberts' confirmation proceedings. When President Bush pledged to nominate "strict constructionists" to the Court and to model his Supreme Court appointments on Justices Scalia and Thomas, he plainly signaled that his Supreme Court nominees would have a distinct judicial philosophy. Professor Strauss pointed out, quite rightly I believe, that in promising to appoint a "strict constructionist" to the Court President Bush had different criteria and models in mind than did President Richard M. Nixon who similarly pledged to appoint "strict constructionists." President Nixon's apparent model was Justice John Marshall Harlan (the Younger), whose hallmarks Professor Strauss describes as "deference to Congress and respect for precedent." President Bush's model Supreme Court appointee is a conservative of a very different kind than Justice Harlan; "[t]he

hallmarks of the new conservatism," Professor Strauss noted, is "a skeptical attitude toward the work of Congress, and a willingness to overturn precedent."

An important question for Judge Alito is which kind of conservative (or strict constructionist) he may be. Is his judicial philosophy more akin to Justice Harlan's practice to defer to the kinds of laws Congress has been enacting for most of the past century to protect consumers, the environment, workplace safety, and the rights of the disabled? Or, is Judge Alito deeply skeptical of the constitutionality of many of these laws and share the beliefs of Justices Scalia and Thomas that the Supreme Court's privacy decisions have been almost all wrongly decided?

Moreover, President Bush's model Supreme Court appointees Justices Scalia and Thomas (and Justice O'Connor, too, for that matter) suggested in their dissent in The Term Limits Case that they employed a default rule in federalism cases requiring them to construe any constitutional ambiguities, silences, or gaps in favor of state sovereignty. Hence, another important question before the Judiciary Committee is whether Judge Alito is committed to employing a default rule like the one deployed by the dissenting justices in The Term Limits Case? Alternatively, he may be asked whether he agrees with the default rule employed by the majority in that case, requiring in federalism cases that the gaps and ambiguities in the text of the Constitution to be resolved in favor of the exercise (and protection) of federal power.

Even if Judge Alito were to reject the label of strict constructionist, the question remains whether, if he were confirmed, his confirmation could be construed as endorsing a particular kind of judicial philosophy. Some senators have characterized the Senate's confirmation hearings for Justices Ginsburg and Breyer and Chief Justice Roberts as

precedents to follow, and I am confident that, regardless of the outcome of the present hearings, they will inevitably become an important precedent, too. The question is what kind of precedent.

The Senate has the power to decide this question. At the very least, there is little or no doubt that Judge Alito's confirmation hearings will establish a precedent on the kinds of questions senators may ask a Supreme Court nominee and the kinds of questions he chooses to answer or to avoid. As such, there is nothing unique about these hearings. In his confirmation hearings, Chief Justice Roberts once refused to answer a question based on "the precedent" of prior nominees' testimony in their confirmation hearings. We all expect Judge Alito to hew closely to the precedent set by Chief Justice Roberts and other recent nominees in answering questions during their confirmation hearings.

Nevertheless, these hearings have the potential to establish a precedent of even greater significance than just what questions the nominee chooses to answer or to avoid. These hearings will follow a string of prior ones in which senators on the Judiciary Committee asked pointed questions to the nominee about his or her judicial philosophy. Thus, the present hearings will help to extend a tradition within the Senate to take Supreme Court nominees' likely judicial philosophies into account in the confirmation process.

You clearly have the power to shape the kind of precedent these hearings will become. I respectfully urge each of you to consider which one, if any, of the following possibilities best encapsulates what you believe the hearings to signify. Candor will be critical in this endeavor. It is important not only to clarify what you believe these hearings to be about. What happens here will also go a long way toward erasing the

concerns that many Americans have that the confirmation process is broken. They are concerned, frankly, that senators say they believe a nominee's judicial philosophy is irrelevant unless they think otherwise.

The first possibility is that these hearings could be a precedent for confirming, or not confirming, a Supreme Court nominee primarily based on his judicial ideology. I have heard expressed some interest in using these hearings as the opportunity to establish a precedent for endorsing a nominee who has been outspoken critic of Roe v. Wade. A variation on this is that the hearings may provide the opportunity for the Senate to demonstrate that the kind of judicial philosophy that Judge Alito has got fits within the mainstream of constitutional law. These hearings may, in other words, provide an important opportunity to define the mainstream of constitutional law.

If this is what you believe these hearings are about or if you disagree that these hearings are about endorsing a particular ideology, I respectfully urge you to say so. Your candor will help to increase the transparency of this process. The problem with making Judge Alito's judicial philosophy the central issue in his confirmation hearings is that he must not only state his philosophy clearly and unambiguously but also most senators will need to expressly address it. There is no guarantee that this will happen, particularly because Judge Alito may be reticent about specifying in much detail his approach to deciding cases and many senators may not agree with every aspect of his judicial philosophy. Moreover, taking the position that these hearings are primarily about endorsing (or rejecting) a particular judicial philosophy may conflict with positions some senators may have already staked out. Some senators may already be on record against doing this, and thus may feel constrained from appearing to be indecisive or inconsistent

in the hearings. Others may distinguish between Judge Alito's personal beliefs and judicial ideology or philosophy (and other qualifications as a justice) and thus make it harder for what are the most controversial opinions of the judge to be fairly (or unambiguously) included as linked to his judicial philosophy. (Indeed, his opening statement strongly emphasized the distinction between his personal opinions about constitutional law and his judicial philosophy. Still other senators may believe that focusing primarily on the judge's philosophy may be likely to increase, rather than diminish, the friction in judicial confirmation hearings. The divergent opinions of senators about the relevance (or the propriety) of the nominee's judicial philosophy makes it hard for these hearings to be construed as a complete endorsement, or rejection, of it.

Secondly, these hearings could become a precedent for confirming, or not confirming, a Supreme Court nominee, in spite of his judicial philosophy. I believe much of the rhetoric of these proceedings, at least as of the time I write this statement, are consistent with this understanding of the proceedings. But, if I am right that this is the kind of precedent many senators would like to see created here (or not created here), they need to say so. Once again, candor will increase respect for the process by increasing its transparency. If there is a problem with trying to ensure these proceedings become a precedent for endorsing a nominee in spite of his judicial philosophy, it is that, first, many senators may be careful in how they disown, or criticize, Judge Alito's judicial philosophy. Those disposed to support the judge are not likely to be critical of him. Thus, the burden falls mainly to critics of the nominee's judicial philosophy to express

their disapproval. In doing so, they make it harder to construe the hearings as an unequivocal endorsement of the nominee's judicial philosophy.

Third, Judge Alito's confirmation hearings could become a precedent for confirming, or not confirming, a Supreme Court nominee, regardless of his likely judicial philosophy or ideology. A number of senators have expressed concerns not so much about Judge Alito's judicial philosophy but rather his credibility. These senators appear skeptical about his attempts to distinguish statements about strongly held personal views from his performance, or qualifications, as a Supreme Court justice. It is not by any means unprecedented for Supreme Court nominations to falter on grounds other than ideology, particularly on the basis of possible ethical improprieties. If senators believe that these hearings ought to become, or ought not to become, a precedent for this kind of focus, they ought to say so.

This past Saturday, January 7th, a law school classmate of Judge Alito's wrote an elegant column in The New York Times in which she suggested, among other things, that, "Since announcing the nomination of Judge Alito, the Bush administration has conducted a high-powered marketing campaign to sell him to the public. Such efforts anticipate and seek to thwart hostile confirmation hearings like those that sank Robert Bork. But neither a witch hunt nor a hard sell from the White House will afford Samuel Alito the confirmation process he, or the country, deserves: one as thoughtful and measured as the legal mind it considers." This is, to be sure, an admirable sentiment. I would just respectfully add that the President's nomination of Judge Alito is not the end of the appointment process; it merely marks the end of one important phase within it. I do not believe that it diminishes this great institution, or poses any separation-of-powers

problem, for senators to be as open and as thorough as possible in their examination of Judge Alito's nomination. Anyone who seeks to exercise the Court's awesome power, vested with life tenure, asks a great deal of the nation. It is not asking too much in response that the Senate be as careful as possible in ensuring the fitness (and even the propriety of the judicial philosophy) of a particular nominee to serve for decades on the Court. The fact that the stakes in Supreme Court appointments has increased with the years requires senators to take as much care as possible in giving their Advice and Consent to a particular nomination. How you do your job will be ultimately as important as how you ultimately vote on the nomination of Judge Alito as an Associate Justice.

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It is possible that these hearings may not unfold in any clear direction. That will leave subsequent generations to make sense of them. Even so, they will be important for the lessons they teach us about the Supreme Court confirmation process. As I have prepared for these hearings, I have wondered what my students may learn from them. Ironically, the first televised confirmation hearings were for Justice Sandra Day O'Connor. Since then, the nation has watched subsequent hearings closely, and much of what we all have learned – and will learn-- about a particular nominee, the Court, and the Senate is based on these hearings. Supreme Court confirmation hearings provide a rare opportunity for the American people to get a glimpse inside the Supreme Court and particularly to get to know, at least to some extent, the people entrusted to discharge the awesome responsibilities of the nation's highest tribunal. The critical question, apart from whether the Senate will vote to confirm Judge Alito to replace Justice O'Connor, is

what do you want the American people to learn from these proceedings? They will undoubtedly get to know Judge Alito, and that is good. But they will also get to judge for themselves whether the confirmation process is broken. I believe these hearings allow the Senate to showcase a dignified dialogue on Judge Alito's qualifications, including his judicial philosophy, and the future of the Supreme Court. If you are able to ensure that the Senate does at least that much, you will have created a precedent worthy of enduring respect.

APPEARANCE BEFORE
SENATE JUDICIARY COMMITTEE RE: JUDGE ALITO
JANUARY, 2006

Mr. Chairman and Members of the Judiciary Committee:

I welcome the opportunity to appear here and express my personal view that the Committee should vote in favor of Senate confirmation of Samuel Alito as a member of the United States Supreme Court. As you probably all know, for twenty years I was a member of the Court of which Judge Alito is now a member. Indeed, it was my retirement from that Court sixteen years ago that created the vacancy which Judge Alito filled on the Third Circuit Court of Appeals. Since his appointment, lawyers in the firm of which I am a member have been regular litigators in the Courts of the Third Circuit, not only on behalf of those clients that pay us handsomely for representation, but also frequently through the firm's Gibbons Fellowship Program on behalf of non-

paying clients whose cases have presented those Courts with challenging human rights issues. That the Gibbons Fellowship Program is a significant part of our practice is amply demonstrated by the fact that since 1990, Gibbons Fellows lawsuits have resulted in 115 reported judicial decisions.

This Committee should appreciate that the Court of Appeals for the Third Circuit has been, for the fifty-plus years that I have followed or participated in its work, a centrist legal institution. An important reason why that is so is that many years ago, that Court adopted the requirement that all opinions intended for publication must (prior to filing) be circulated by the opinion writer, not only to members of the three-judge panel, but also to the other active judges on the Court. The purpose of this internal operating rule was to permit each active judge not only to

comment about the opinion writer's treatment of Third Circuit and Supreme Court precedent, but also to vote to take the case *en banc* for rehearing by the full court if the judge thought the opinion was outside the bounds of settled precedent. Thus, the level of interaction among the Third Circuit appellate judges has for a half-century been unusually high.

This Committee should also appreciate that appointment to an appellate court where one has life tenure is a transforming experience. I remember a former judicial colleague saying to me once, after several years on the bench, "John, what other job in the world is there in which you can look in the mirror while shaving and say to yourself, all I have to do today is the right thing according to the law." A good judge puts aside interests of former clients, interests of organizations one may have belonged to, and interests of

the political organization that may have been instrumental in one's appointment. I personally experienced that transformation, and I witnessed it repeatedly in judicial colleagues who joined the court after I did.

These two points--the unusual internal cohesion in the Third Circuit Court of Appeals, and the transformative experience of serving on a court protected by life tenure--suggest to me that Committee members in determining whether to vote in favor of confirming Judge Alito should concentrate not on what he thought or said as a Princeton undergraduate, or as a young lawyer seeking advancement as an employee of the Department of Justice, but principally, if not exclusively, on his record as an Article III Appellate Judge.

If you look, as you should, at that fifteen-year record as a whole, you cannot in good conscience conclude that

Judge Alito will bring to the Supreme Court any attitude other that the one held by my colleague who thought important thoughts about judging every morning while shaving. He has consistently followed the practice of carefully considering both Supreme Court and Third Circuit precedents. Very few of the opinions he has written for a unanimous panel or for a panel majority have moved his colleagues among the active judges to vote to take the case en banc. The cases in which he participated that produced dissenting opinions by him or from him, all, it seems to me, were close cases in which either the law or the evidentiary record were such that equally conscientious judges could quite reasonably disagree about the outcome.

Take, for example, cases presenting challenges to state regulation of abortion; a hot-button topic for many people and organizations opposing Judge Alito's nomination.

There are four in which he participated. In Elizabeth Blackwell Health Center for Women v. Knoll. Judge Alito voted to uphold a ruling by the Pennsylvania Department of Health and Human Services that Pennsylvania could not burden Medicaid funding for abortions in case of rape or incest with difficult verification requirements. He also concurred in Alexander v. Whitman, applying the Supreme Court's abortion caselaw to a challenge to the constitutionality of New Jersey's Wrongful Death and Survival Statute that denied recovery on behalf of stillborn fetuses. In Planned Parenthood of Central New Jersey v. Farmer, Judge Alito voted to invalidate New Jersey's partial-birth abortion statute because the statute could not be reconciled with the Supreme Court's caselaw holding a similar Nebraska statute unconstitutional. Thus, in three of

four cases he voted against state-imposed limits on access to abortion.

In the fourth case, Planned Parenthood of Southeastern Pennsylvania v. Casey, Judge Alito dissented from a majority opinion holding unconstitutional Pennsylvania's spousal consent provision for an abortion. It is that dissent upon which opponents of his confirmation seek to focus the Committee's attention. Those opponents stridently urge that the Planned Parenthood v. Casey dissent clearly places Judge Alito so far out of the mainstream of Constitutional law that his confirmation will endanger Constitutional protection of civil rights across the board.

In your consideration of that dissent, I suggest that you should take into account these points: first, at the time the Third Circuit considered the Pennsylvania spousal consent statute, the Supreme Court had not yet decided whether

states could impose such a requirement; and second, the Court of Appeals majority invalidated the statute. Had the Supreme Court simply denied certiorari, that invalidation would have remained in place. Instead, at least four justices voted to grant certiorari. If the issue of the statute's Constitutionality was so overwhelmingly clear, why was certiorari granted to endorse the Third Circuit majority position? Clearly Planned Parenthood v. Casey was, at the time the Court of Appeals acted, a case over which conscientious judges could reasonably disagree. Otherwise, the Supreme Court would simply have denied certiorari. Nothing in the Supreme Court's caselaw dealing with abortion relieves appellate judges in intermediate appellate courts from the duty of making a conscientious effort to fit a case before them within that caselaw. The four abortion

cases in which he participated show that this is exactly what Judge Alito did.

Another opinion that has caught the attention of those clamoring for Judge Alito's scalp is his dissent in United States v. Rybar, in which he would have held that the Supreme Court decision in United States v. Lopez prohibited Congress from regulating mere possession of a machine gun. The majority opinion upheld the statute. Unlike Casey, the Supreme Court did not review the case. Thus the question of the reach of Lopez was left open, and when the issue reached the Ninth Circuit, in United States v. Stewart (2003), it adopted Judge Alito's dissenting position. Some opponents of his confirmation have relied on that dissent in suggesting that Judge Alito is a captive of the right wing gun lobby. This Committee, after actually reading Lopez, Rybar, and the Ninth Circuit case, cannot in good

conscience find the dissent to be anything more than a good-faith effort to somewhat unenthusiastically apply the perhaps unfortunate Supreme Court precedent of Lopez. Indeed, in his Rybar dissenting opinion Judge Alito suggested how Congress could cure the Lopez violation.

The extent to which opponents of Judge Alito's confirmation largely ignore his overall fifteen-year record as a judge suggests, at least to me, that the real target for many of the vitriolic comments on the nomination is less him than the Executive Branch Administration that nominated him. The Committee members should not think that I support Judge Alito's nomination because I am a dedicated defender of that Administration. On 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

chagrined at the positions being taken by the administration with respect to those detainees.

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

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VIA FACSIMILE and OVERNIGHT MAIL

December 7, 2005

Honorable Edward M. Kennedy
United States Senate
520 Dirksen Senate Office Building
Washington DC 20010
Fax: 202 228 0464

Dear Senator Kennedy:

The President has nominated Judge Samuel A. Alito, Jr., currently a judge on the United States Court of Appeals for the Third Circuit, to be an Associate Justice of the United States Supreme Court. Your office has asked for my views regarding Judge Alito's participation on the Circuit Court in a case entitled Monga v. Ottenberg (Docket No. 01-1827). The defendants in that case included Vanguard Group, Inc., and two other Vanguard entities. I understand that the claims against the Vanguard entities sought compensatory and punitive damages. Judge Alito was part of a three judge panel which, in affirming the decision of a lower court, among other holdings rejected the claims against the Vanguard entities "as a matter of law."

The case was submitted to Judge Alito's panel on April 12, 2002 and decided on July 30, 2002. At the time the case was before him, Judge Alito held shares in 12 Vanguard mutual funds, with a value between $360,010 and $830,000 according to the judge's financial disclosure report for the 2002 year. When that report became public, the unsuccessful plaintiff (appellant) moved to vacate the opinion on the ground that Judge Alito had a statutory conflict of interest that prohibited him from sitting on the appeal. In a December 10, 2003, letter to Chief Judge Scirica of the Third Circuit, Judge Alito wrote that "I do not believe that I am required to disqualify myself based on my ownership of the mutual fund shares." But he added that it was his "personal practice to recuse in any case in which any possible question might arise." He then "voluntarily" recused himself. The decision on the appeal was vacated and the appeal was assigned to a new panel, which also affirmed in favor of the Vanguard entities.

Several other events provide additional context.

In connection with Judge Alito's 1990 hearings for confirmation to the Third Circuit, the Senate Judiciary Committee questionnaire asked him to "[i]dentify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated." Judge Alito's response included the statement that he "would disqualify myself from any cases involving the Vanguard companies...." I understand that the Vanguard companies appear on the standing recusal list that Judge Alito thereafter provided to the Circuit Court clerk's office and that, as a result, the clerk's office did not send Judge Alito cases in which the name "Vanguard" appeared as a party (although apparently on

two occasions the particular "Vanguard" was unaffiliated with the Vanguard Group). I understand that Vanguard has continued to appear on Judge Alito's standing recusal list because the clerk's office has refrained from sending him cases in which Vanguard is a party as late as this year.

Judge Alito and the White House have offered various explanations for Judge Alito's failure to recuse himself in *Monga*, including that a "computer screening program" at the Court had failed to identify the conflict (Washington Post, November 1, 2005, at page A11); that the statute did not in any event require recusal on these facts; that the representation Judge Alito made to the Committee in 1990 only addressed his "initial" service on the Court and the appeal was heard in 2002, twelve years after his service began; that Judge Alito had been "unduly restrictive" on his 1990 questionnaire; and that the failure to notice that "Vanguard's status in the matter might call for my recusal" was an "oversight." The last four explanations (and quotations) appear in an undated letter from Judge Alito to Senator Specter, faxed on November 10.2005.

I assume that Judge Alito knew that Vanguard entities were parties to the appeal before him (the name "Vanguard" appears in the caption three times and numerous times through out the Court's opinion); and that Judge Alito knew that he owned substantial shares of Vanguard funds. Indeed, his financial disclosure report for 2002 shows that he continued to invest in Vanguard funds throughout the year although it is not possible to tell whether these investments were automatic reinvestments of dividends or new money.

In addressing the legal and ethical issues raised in the inquiry from your office, I am not offering a view on whether Judge Alito should be confirmed to sit on the Supreme Court or on what weight, if any, the Senate should give to these issues. I am also not addressing any obligation that arise solely from the promises Judge Alito made to the Committee during his confirmation hearings for the Third Circuit. My opinion is limited to the question whether Judge Alito was statutorily disqualified from sitting in the *Monga v. Ottenberg* appeal.

An answer to that question requires an understanding of the relationship between the Vanguard Group, Inc., one of the parties before Judge Alito, and its fundholders. Vanguard promotes itself by declaring that its fundholders are "owners" of Vanguard, not merely shareholders in the funds in which they invest. While the company's website describes the relationship in various brief ways, a sample prospectus describes the relationship in greater detail:

> The Vanguard Group is truly a mutual mutual fund company. It is owned jointly by the funds it oversees and thus indirectly by the shareholders in those funds. Most other mutual funds are operated by for-profit management companies that may be owned by one person, by a group of individuals, or by investors who own the management company's stock. The management fees charged by these companies include a profit component over and above the companies' cost of providing services. By contrast, Vanguard provides services to its member funds on an "at cost" basis, with no profit component, which helps to keep the funds' expenses low.

An even more detailed description appears in the disclosure statement that court rules required the Vanguard entities to file in connection with the appeal. The purpose of this statement is to inform judges of corporate relationships so that judges can comply with statutory rules for disqualification. The Vanguard disclosure statement identifies the Vanguard Group, Inc., as "a wholly-owned subsidiary of the mutual funds that comprise The Vanguard Group of Investment Companies." The disclosure statement then says that "the various Vanguard Funds (identified on the attached list) are all owned by individuals and institutions that own share of those funds." The

attached list includes funds owned by Judge Alito. Finally, the statement discloses that "[a]ll expenses of Vanguard are paid for by the funds that own it and all revenues are returned to those funds. To the extent that Vanguard or any of its subsidiaries, including Vanguard Fiduciary Trust Company [also a party to the appeal], would be the subject of any judgment, that payment would be spread across the member funds given the expense-sharing structure."

So to recapitulate: the Vanguard Group, Inc., is a wholly owned subsidiary of the mutual funds that comprise it; those funds are owned by their respective investors, including Judge Alito. As stated, the plaintiff in the appeal was seeking compensatory and punitive damages against the Vanguard Group, Inc. It follows that any damages it would be required to pay by virtue of an adverse judgment or settlement would in turn be borne by "the funds that own it."

I now turn to the question whether Judge Alito as a Vanguard fundholder was disqualified from hearing a case in which the Vanguard Group, Inc., was a party.

The issues raised by the question are addressed both in the Code of Conduct for U.S. Judges and 28 U.S.C. §455. The statute, like the Code of Conduct, derives from the American Bar Association's Model Code of Judicial Conduct (1990). Because the statute and the Code of Conduct for U.S. Judges contain substantially the same language in so far as the issues here are concerned, I will mainly address the statute.

In 28 U.S.C. §455(b)(4) and (d)(4), Congress decided that a "financial interest" (legal or equitable) in a party is a basis for recusal, "however small" that interest may be (even one share of stock, say). This is a categorical rule, a bright line. The statute makes the disqualification non-waivable. §455(e).

There are good reasons to have the categorical or bright line language here, rather than a flexible standard that would, for example, disqualify a judge only if his or her interest in a litigant could be "substantially affected." A bright line avoids satellite hearings to determine the size of a judge's holdings, which the judge may find invasive of his or her privacy. And a bright line assures that the same rule of recusal will apply to all judges regardless of their personal wealth. Last, for all federal courts below the Supreme Court, recusal of a judge means only that the matter will be assigned to another judge on the judge's court. Consequently, any disruption is minimal.

Congress created four exceptions to the categorical rule of disqualification. Two concern us. In §455(d)(4)(i), Congress decided that "[o]wnership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates" in the fund's management. So if a judge owns 100 shares of Fund X and Fund X has 10,000 share in Company Y, the judge can sit in a case where Y is a party. The reason for this is that the judge, as an investor, has no power to buy or sell stock that the fund holds if the judge does not participate in managing the fund.

The other relevant exception is for a "proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, *or a similar proprietary interest*...." (Emphasis added.) In that situation, a "financial interest" exists only if "the outcome of the proceeding could substantially affect the value of the interest." §455(d)(4)(iii). Here we have a fluid standard, not a bright line.

The question in the case of Judge Alito's Vanguard holdings is this: Are his holdings governed by the bright line rule of §455(b)(4) and (d)(4) or are his holdings within the fluid standard

of §455(d)(4)(iii)? If the latter, then Judge Alito could sit in the Vanguard case at issue because his interest in his investments could not have been "substantially affect[ed]" by the decision in the case. If, however, the bright line rule governs, then he could not sit.

I understand that Judge Alito and others take the position that even if Vanguard fundholders have a financial interest in Vanguard itself because of how the company is structured, nonetheless the judge's interest in Vanguard is "a similar proprietary interest" within the meaning of paragraph §455(d)(4)(iii) and therefore the bright line test (that is, the "however small" test) does not apply. If §455(d)(4)(iii) does govern, then Judge Alito was entitled to sit in the case under the statute and the Code of Conduct for U.S. Judges because the decision could not have affected the value of the judge's Vanguard shares "substantially." But I believe this position is wrong.

First, as background, it is important to realize that Congress identified in the first exception above - §455(d)(4)(i) - the extent to which it was prepared to exempt "mutual or common investment fund" interests from the "however small" test. I believe it misreads the statute then categorically to expand §455(d)(4)(iii)'s reference to "similar proprietary interest" to a type of investment (i.e., mutual funds) that Congress had already (and narrowly) addressed in §455(d)(4)(i). It is relevant to my analysis that Congress, in using the "however small" language, chose a very strict rule of recusal for the valid reasons noted above. It then took care to define the exceptions to this strict rule quite narrowly.

I next look to Advisory Opinion 57 of the Advisory Committee on Judicial Activities of the Judicial Conference, issued in 1978 and revised in 1998. This is the Committee that advises federal judges on the equivalent language in the Code of Conduct for U.S. Judges. The Committee is now called the Committee on Codes of Conduct. The Committee was asked whether a judge who owns stock in a parent company must recuse himself if a "controlled subsidiary" of the parent (but not the parent) is a party before the judge.

The Committee quoted legislative history from the reporter for the ABA Code of Judicial Conduct, which was the source for the Code of Conduct for U.S. Judges. The language it quoted recognizes the exception that eventually became (in somewhat different text) the exception preserved in §455(d)(4)(iii) for mutual savings banks and insurance companies, the exception on which Judge Alito also relies.

And just as §455(d)(4)(iii) uses the term "similar proprietary interest," the legislative history language used the term "and other similar" interests.

Notwithstanding the looser test for mutual insurance companies, mutual savings banks, "and other similar" interests, however, the Committee concluded that "the owner of stock in a parent corporation has a direct legal or equitable interest in a controlled subsidiary, and where a judge knows that a party before him is controlled by a corporation in which the judge owns stock, he should disqualify in the proceeding."

In other words, the Committee refused to expand the exception for mutual insurance companies and mutual savings banks and "similar" interests to the facts before it – ownership of stock in a parent whose controlled subsidiary was before the judge. As a result, a judge who owned even one share of stock in the parent could not knowingly sit in a case in which a controlled subsidiary (which may not even be wholly owned by the parent) was a party.

This refusal to expand the exception for mutual insurance companies and mutual savings banks – through use of the catchall for "other similar" interests – supports the view that §455(d)(4)(iii)'s reference to "similar proprietary interest" cannot properly be used to bring Judge Alito's mutual fund interest within the looser exception in §455(d)(iii), especially as Congress had specifically and narrowly addressed the "mutual or common investment fund" exception to the bright line rule in §455(d)(4)(i). Instead, Judge Alito's ownership of Vanguard funds made him an investor in a "parent" entity whose "subsidiary," the Vanguard Group, Inc., was a litigant before him, precisely the situation that Opinion 57 concluded required disqualificaiton.

Direct support for this reading of the statute appears in "Checklists for Financial and Other Conflicts of Interest," which the Administrative Office of the United States Courts issued for the guidance of federal judges in 1999. Footnote 3 of the Checklist (which construes parallel language from the Code of Conduct for U.S. Judges) describes the relationship between the Vanguard Group, Inc., and the funds that comprise it and concludes that disqualification is required when that relationship exists:

> Shares in mutual funds do not constitute a financial interest in the companies whose stock is held by the mutual fund, unless the judge participates in management of the fund. However, shares in some mutual funds may convey an ownership interest in the mutual fund management company (in which case that company should be included on the conflicts list).

Perhaps, notwithstanding the revealed relationship between the Vanguard Group, Inc., and its fundholders, and the statutory recusal language and other authorities, Judge Alito concluded that the governing standard was 28 U.S.C. §455(d)(4)(iii) – that is, that his right to sit was controlled by the less demanding standard that the statute applies to depositors in mutual savings banks and policyholders in mutual insurance companies. If so, Judge Alito should nevertheless have alerted the parties to his Vanguard investments so that, if advised, any could seek his recusal. Any such recusal motion may have persuaded Judge Alito that the statute did require his recusal; or may have led to his recusal even if he was not persuaded (as eventually he did recuse himself following issuance of the opinion); or if recusal were denied, would have enabled the moving party to make its record and preserve its claim for further review. See the Commentary to Canon 3E, ABA Code of Judicial Conduct:

> A judge should disclose on the record information that the judge believes the parties of their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

See also Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 867 (1988)(criticizing district judge for "his silence" that "deprived respondent of a basis for making a timely motion for a new trial and also deprived it of an issue on direct appeal").

I hope this letter adequately addresses your request.

Sincerely yours,

Stephen Gillers

Stephen Gillers

Testimony of U.S. Representative Charles A. Gonzalez (D-TX)
Before the United States Senate Committee on the Judiciary
Thursday, January 12, 2006

Confirmation Hearing of Judge Samuel A. Alito, Jr.
to the United States Supreme Court

Chairman Specter, Ranking Member Leahy and Members of the Committee. On behalf of the Congressional Hispanic Caucus (CHC), I thank you for the opportunity to testify on the confirmation of Judge Samuel A. Alito, Jr. to the Supreme Court of the United States. Today, I am representing the Caucus in my capacity as the Chairman of its Hispanic Judiciary Initiative and Task Force on Civil Rights.

Let me begin my remarks by stating the Congressional Hispanic Caucus' disappointment that in three separate instances President Bush had the opportunity to make a history-making appointment to the bench yet could not identify a single qualified Hispanic judge to be nominated to the Supreme Court. We did not expect a Hispanic to be nominated for the sake of being Hispanic. We did expect the Administration to have recognized the need for our nation's highest court to also reflect the nation's diversity, in all its forms – thought, experience and expression, so that Hispanics could have a full voice in ensuring the protection of our civil liberties and civil rights. Given the size of the Hispanic community in the United States, the under-representation of Hispanics in the judiciary and the abundance of Hispanics qualified for appointment, it is difficult to comprehend the President's decision.

The Congressional Hispanic Caucus' policy with respect to the evaluation of nominees for judicial vacancies requires an extensive examination of each nominee's record and background in order to assess the following: his or her commitment to equal justice and right of access to the courts, his or her support for Congress' constitutional authority to pass civil rights legislation, and his or her efforts in support of protecting employment, immigrant and voting rights, as well as educational and political access for all Americans. Although we originally adopted this process to consider Hispanic nominees we now apply this process to all nominees for judicial posts including Supreme Court vacancies.

Due consideration is given to the nominee's honesty, integrity, character and intellect with special emphasis on concerns specific to the Latino community such as equal justice and advancement opportunities for Hispanics. We require each nominee have a demonstrated commitment to protecting the rights of ordinary residents of the United States, through professional work, pro bono work, and volunteer activities. We also require a commitment to preserving and expanding the progress that has been made on civil rights and individual liberties. These include rights protected through core provisions of the Constitution, such as the Equal Protection and Due Process Clauses, First and Fourth Amendments, and the right to privacy, as well as statutory provisions that protect Latinos' legal rights in such fundamental areas as education, voting, affirmative action, employment and contracting. In all, we make every effort to research a nominee's background and examine his or her decisions and writings. We then discuss the relevant findings to decide on whether to favor or oppose a nominee's confirmation or to remain neutral and take no position.

Our process is also assisted by the excellent work of many legal and advocacy organizations. They provide a critical service by further evaluating and commenting on the nominees' legal opinions and background, and the consequences for the Latino community. Their work has afforded our members the opportunity for more in-depth discussions about nominees and their qualifications for judicial posts.

Congressional Hispanic Caucus members know that the nomination of a new Supreme Court Justice has significant ramifications not just for Hispanics but for all Americans. Therefore, great effort is made through our Initiative and Task Force to consider fully a nominee's qualifications for the Court, as well as the implications his or her ascendancy would have on the civil and constitutional rights of all Americans and their expectation of equal protection under the law. Our positions on nominations are not arrived at lightly or without thorough deliberation.

As part of my responsibilities as Chair of the Hispanic Judiciary Initiative, I evaluated Judge Alito's qualifications and background, applied the Caucus' stated criteria and considered the opinions of respected Latino leaders and members of the legal, academic and advocacy community. Allow me to highlight a few areas that cause the

Hispanic Caucus great concern for they provided significant insight into how Judge Alito's approach and philosophy would determine his rulings from the bench:

Discrimination in Jury Selection

Pemberthy v. Beyer 19 F. 3d 857 (3d Cir. 1994)

In the 1994 case of *Pemberthy v. Beyer*, Judge Alito issued a decision as a member of the Third Circuit Court of Appeals that had the effect of barring many Latinos from serving on juries in cases in which Spanish-language evidence is at issue. In *Pemberthy*, the prosecution's case featured testimony in Spanish that was translated by the police and used in translation by prosecutors in presenting their case. In selecting jurors, prosecutors exercised peremptory challenges to strike five jurors who understood Spanish. The prosecutors indicated they barred these jurors because jurors who speak Spanish might not credit the official, State-provided translations of the evidence and may use their special knowledge to glean additional information from the evidence.

After being convicted in New Jersey state court, the defendants petitioned the federal district court for review. The district court in New Jersey overturned the convictions, holding in part that dismissing Latino jurors because they can understand Spanish is tantamount to dismissing them based on race and is therefore unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

The State of New Jersey appealed to the Third Circuit, where Judge Alito heard the case and wrote the majority opinion, which reinstated the convictions. Judge Alito held that the Constitution does not prohibit a trial attorney from dismissing jurors because of their proficiency in Spanish when translations of evidence are at issue.

Clearly, not all Americans who are proficient in Spanish are Latinos, and not every potential juror dismissed on this basis will be Latino. But a clear majority of Spanish-speakers in America are Hispanic, and a substantial segment of the Latino community in this country is Spanish speaking. The rule of law applied in *Pemberthy*, therefore, clearly acts to prevent Spanish-speaking Latino litigants from enjoying equal access to justice in America by not being heard by a jury of their peers and allows language to serve as a pretext to discriminate on the basis of ethnicity.

Voting Rights Act

Jenkins v. Manning 116 F.3d 685 (3d Cir. 1997)

In this case African-American voters brought an action against the Red Clay school district in Delaware, contending that, as the courts have found in many other cases, the district's at-large voting system improperly diluted the voting strength of minorities. After reversing and remanding the District Court's ruling that no violation of the VRA took place, the District Court considered additional evidence and again found no violation. The lower court found that although all of the criteria for such a claim established by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986) were met, and even though there was evidence of racial polarization and that the lingering effects of discrimination could depress voter turnout, section 2 of the Voting Rights Act had not been violated. Judge Alito appears to have joined the majority in affirming the District Court's ruling. Judge Rosenn (a Nixon appointee) vigorously dissented. He explained that the majority had improperly "placed its imprimatur on a system which only by a series of flukes and anomalies has permitted any minority representation at all" contrary to Congress' intent and had "overlooked the broad sweep of the Voting Rights Act." *Id.* at 701, 700. The "Senate Factors" (after finding Gingles factors present) were additional and necessary considerations and consisted of (1) the extent to which minority group members had been elected to public office in the jurisdiction and (2) the extent to which voting in the elections of the political subdivision is racially polarized. Judge Alito found that the Senate Factors were met when historically only 3 of 10 black candidates over a 10 year period were successful (one in a never-repeated plurality win and one by a black candidate defeating another black candidate). Rosenn pointed out that the court's decision appeared to contradict a previous Third Circuit decision in the case, in which the court had "repeatedly" emphasized the "rarity" of a case in which facts as in *Jenkins* are "not violative" of the Voting Rights Act. *Id.* at 702.

Constitutional Rights of Immigrants

1986 Memo to FBI Director William Webster

In 1986, as an attorney in the Reagan Administration, Judge Alito drafted a legal opinion for then FBI Director William Webster which went beyond the scope of the

question submitted by the FBI Director to the Department of Justice. In his response he provides an overly narrow interpretation of the constitutional protections available to undocumented immigrants in the United States. Judge Alito wrote that case law "suggests" that undocumented immigrants have no claim to nondiscrimination with respect to non-fundamental Constitutional rights. The original question submitted by the FBI related to whether it was constitutionally proper to collect fingerprint and criminal information of nonresident non-citizens.

What is noteworthy in this instance is that Judge Alito's legal opinion in his communication to the FBI Director fails to mention *Plyler v. Doe*, 457 U.S. 202 (1982), a case regarding undocumented immigrant students who were barred from Texas schools in violation of their equal protection rights. The *Plyler* Court expressly held that education is not a fundamental right but that undocumented immigrants have equal protection rights in this context despite the right being "non-fundamental." *Plyler* was decided four years prior to Alito's letter to the FBI Director, but he ignores it entirely and chooses to cite older cases that were not directly relevant to the legal question presented but which suggested limited readings of the availability of constitutional protections for undocumented immigrants.

I am concerned that Judge Alito's misstatement of the law regarding the constitutional rights of non-citizens may reflect a tendency on his part to disfavor constitutional protections for undocumented immigrants, many of whom are Hispanic. The nominee's bias against expansive interpretations of the constitutional protections properly afforded to undocumented immigrants might be considered predictive of a willingness to overturn Supreme Court precedent, like *Plyler*, that has favored expansive views of the constitutional protections afforded to non-citizens of the United States. Furthermore, the effects of the application of Judge Alito's restrictive and aggressive legal analysis raises concerns regarding the extent to which he might, as a Supreme Court Justice, permit the government to mistreat both nonresident aliens outside of the United States and undocumented immigrants within the United States.

Limiting Commerce Clause Application

United States v. Rybar, 103 F.3d 273 (3d Cir. 1996).

Raymond Rybar, a licensed firearm dealer, challenged his indictment for a violation of the federal Firearm Owners' Protection Act. At issue was whether Congress has the authority to regulate the possession and/or transfer of machine guns under the Commerce Clause of the Constitution.

Writing in dissent, Judge Alito noted that the federal statute in question regulated "the purely intrastate possession of firearms" and that Congress made no findings regarding the link between the regulation of machine guns and interstate activity. Purporting to apply *United States v. Lopez*, Judge Alito found that the federal government exceeded its regulatory authority under the Commerce Clause such that indictments under the Firearm Owners' Protection Act are invalid. Judge Alito suggests that Congress could regulate the private possession of machine guns if Congress makes findings that "the purely intrastate possession of machine guns has a substantial effect on interstate commerce."

The *Rybar* majority explicitly rejected Judge Alito's interpretation of the Commerce Clause. Citing a long line of Supreme Court precedent, the majority held that "Supreme Court cases have long sustained the authority of Congress to regulate singular instances of intrastate activity when the cumulative effect of a collection of such events might ultimately have substantial effect on interstate commerce." The majority also holds that the congressional regulation of firearms is supported by substantial historical legislative findings and that "we find no authority" to require that Congress demonstrate a specific link between the subject matter regulated and the regulation in question. "[M]aking such a demand of Congress or the Executive runs counter to the deference that the judiciary owes to its two coordinate branches of government, a basic tenet of the constitutional separation of powers," the *Rybar* majority noted.

If Judge Alito's view of the Commerce Clause as manifested in his *Rybar* dissent becomes settled federal law, it will curtail federal power to regulate civil rights under the Commerce Clause, which has been the constitutional vehicle for much federal civil rights legislation.

Title VII Employment Discrimination

Bray v. Marriott Hotels, 110 F.3d 986 (3d Cir. 1997).

An African American female hotel employee, passed over for a promotion in favor of a white employee sued Marriott Hotels under Title VII of the Civil Rights Act of 1964. The plaintiff employee established a prima facie case of unlawful employment discrimination under Title VII, but when the hotel proffered a nondiscriminatory explanation for her non-promotion, the district court granted the employer's motion for summary judgment. The plaintiff employee appealed to the Third Circuit, alleging that the hotel's proffered reason was merely a pretext that concealed the fact that the employment action was taken on a discriminatory basis.

The Third Circuit majority reversed the district court's order for summary judgment and remanded for further consideration of the motivations of hotel management in not promoting the employee in question. During a deposition of the hotel manager charged with making promotion decisions for the hotel, the manager stated that he "was looking for the best candidate" and passed over the plaintiff for promotion because she was not the "best candidate." Further evidence showed that the hotel did not follow its usual procedures for promoting employees internally. The Third Circuit majority held that the manager's decision not to promote the plaintiff may have been "driven by racial bias" and, as such, the plaintiff's Title VII claim should have survived summary judgment and proceeded to trial.

Faced with uncertainty regarding the motivations of the manager in making a promotion decision, the majority held that "a fact finder should determine why [the employer] felt that [the employee] was not qualified or 'capable of doing the job'" and decide whether the proffered reason was a pretext that concealed discriminatory motivations. The majority noted that "[a] reasonable jury could conclude from [management's statements] that the decision to reject her and interview [the white candidate] was driven by racial bias and not by the explanations offered by Marriott."

In his *Bray* dissent, Judge Alito established an elevated standard that plaintiffs must meet to survive summary judgment in Title VII cases. Even when an employee shows that an employer has not followed its own policies and has made an employment decision based in unclear motivations, the employee's Title VII action should not survive summary judgment. The plaintiff, in essence, is denied an opportunity to explore the employer's underlying motivation in court.

The *Bray* majority strongly criticized Judge Alito's dissenting Title VII analysis:

> "[Title VII] must not be applied in a manner that ignores the sad reality that racial animus can all too easily warp an individual's perspective to the point that he or she never considers the member of a protected class the "best" candidate regardless of that person's credentials. The dissent's position would immunize an employer from the reach of Title VII if the employer's belief that it had selected the "best" candidate was the result of conscious racial bias... Title VII would be eviscerated if our analysis were to halt where the dissent suggests."

Under Judge Alito's Title VII analysis established in *Bray*, minorities' ability to pursue fair employment under Title VII would be severely curtailed.

The CHC wishes to acknowledge the indispensable role the United States Senate plays in determining the composition of the Supreme Court. We know that the nominee will be someone of President Bush's choosing, a Republican, a so called "conservative", and a person acceptable to the president's political base. This is the political reality. However, this does not necessarily mean that the Supreme Court should be a mere extension of the Executive Branch. This nation's Founding Fathers did not intend it to be and therefore subjected the president's nominees to Senate approval by way of advice and consent.

There may be a good faith disagreement as to the appropriate parameters limiting the types of questions asked of the nominee by this committee, but no one would argue that questions establishing a nominee's judicial philosophy are universally contemplated under advice and consent.

The Hispanic Caucus believes the cases earlier cited, Judge Alito's 1986 memo, and other judicial opinions are powerful indicators of his judicial philosophy. We believe it reflects an approach that (1) can conveniently ignore precedent; and (2) favors strained readings of the law to the detriment of individual rights and statutory remedies. It is a judicial philosophy that pushes the judicial envelope of strict constructionism to the point where the letter of the law is viewed and weighed without any consideration for the spirit of the law.

The CHC is aware that political, social and economic forces in any society play to the advantage of the employer over the employee, the able-bodied over the disabled, the

citizen over the immigrant, the majority over the minority, the wealthy over the poor and the state over the individual. But in the United States it has been the third branch of government, the judicial branch, which has countered the tendency to abuse this innate "advantage" by acting as the great equalizer regardless of one's status.

For the CHC, the desired judicial philosophy is a simple one and is best expressed in Bernard Malamud's work "The Fixer":

> "There is so much to be done that demands the full capacities of our hearts and souls, but, truly, where shall we begin? Perhaps I will begin with you? Keep in mind...that if your life is without value, so is mine. If the law does not protect you, it will not, in the end, protect me. Therefore I dare not fail you, and that is what causes me anxiety-that I must not fail you."

The CHC does not believe that Judge Alito's writings and decisions embrace this simple but profound judicial sentiment. We do not argue that he possesses a brilliant legal mind and has had an accomplished career. But this is not the controlling issue, the issue is what judicial philosophy guides and motivates such a gifted and talented person in his decision making process. In the end this should not be a question of party affiliation, or conservative versus liberal beliefs...any Republican, Democrat, conservative or liberal should share a judicial compass that points them to the inevitable truth that indeed "if the law does not protect you" then it protects no one.

Statement of Fred D. Gray
Senate Judiciary Committee Hearing on the
Nomination of Samuel Alito to be Associate Justice
Of the United States Supreme Court
January ___, 2006

Chairman Specter; Senator Leahy; my Senator, Jeff Sessions; Senator Kennedy, and other members of the Committee:

My name is Fred Gray. I reside in Tuskegee, Alabama. I practice law in the State of Alabama, with offices in Tuskegee and Montgomery. I appreciate Senator Leahy's invitation to testify before this Committee.

I am delighted to see Senator Kennedy on this Committee. In 1973, he invited me to appear before a Senate Committee, with several of the participants in the infamous Tuskegee Syphilis Study. With the help of Senator Kennedy, Congress passed laws that strengthened health care for persons involved in health research and clinical trials in this nation.

I appreciate that my Senator, the Honorable Jeff Sessions, also serves on this Committee. He represents us well in the Senate.

I am honored to appear before this Committee. For 50 years, I have filed lawsuits that resulted in the Supreme Court's declaring segregation and discrimination in many areas of the law to be unconstitutional, including voter registration and reapportionment.

As one who has been in the trenches, I appear today to attest to the tremendous importance of the reapportionment cases decided by the Warren Court, one of which I actually litigated, *Gomillion v. Lightfoot*[1]. In a job application to the Reagan Justice Department, Samuel Alito wrote that his "deep interest in constitutional law" was motivated in large part by disagreement with Warren Court decisions," including those involving "reapportionment."[2] I consider Judge Alito's comments to be extremely troubling. The reapportionment cases decided by the Warren Court made certain that that federal courts had the power to ensure that voting rights were meaningfully protected. These rights had been violated by many states since reconstruction. The

[1] 364 U.S. 339 (1960).

[2] Job Application of Samuel Alito, Nov. 15, 1985.

cases eliminated the inequities of mal-apportionment which deprived African Americans of voting strength all across the South. In my view, there is no more important body of law.

Senator Sessions is familiar with my legal career, which began with my representing Mrs. Rosa Parks and Dr. Martin Luther King, Jr. in the Montgomery Bus Boycott. The Bus Boycott gave rise to the case of *Browder v. Gayle*,[3] in which the Supreme Court declared that ordinances and statutes requiring racial segregation on Montgomery city buses were unconstitutional. This was a unanimous decision by the Warren Court.

Prior to *Browder v. Gayle*, African Americans in Alabama and other southern states were actively working toward obtaining the right to vote. In Tuskegee, Alabama – the home of Tuskegee University where Dr. Booker T. Washington was its first president and where Dr. George Washington Carver made many of his scientific discoveries – African Americans filed lawsuits as far

[3] 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd* 353 U.S. 903 (1956).

back as 1945 in order to obtain the right to vote. While the population of Macon County was about 75% African-American, only a handful of African Americans were registered to vote.

After years of litigation, we were able to get approximately 400 African Americans registered in the City of Tuskegee. In 1957, however, the Alabama Legislature passed a law which changed the city limits of Tuskegee from a square to 28 sides, excluding all but three or four African Americans who were registered to vote, but leaving all the white citizens. That law gave rise to the case of *Gomillion v. Lightfoot.* This was my brainchild, and substantially changed the law in securing the right to vote for African Americans.

Gomillion was the first significant reapportionment case decided during the tenure of Chief Justice Earl Warren. In a unanimous decision, the Court held that the boundary change violated the Fifteenth Amendment. Just as importantly, the Court rejected the argument that impairment of voting rights could not be challenged in the face of a state's unrestricted power to realign its

political subdivisions. The Court stated: "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. . . . Apart from all else, these considerations lift this controversy out of the so-called 'political arena' and into the conventional sphere of constitutional litigation."[4]

There is no question in my mind that *Gomillion v. Lightfoot* laid the foundation for the concept of 'one man, one vote.' Fifth Circuit Judge John Brown, whose dissenting opinion provided the foundation for the Supreme Court's ruling, considered his dissent to be his most important opinion.[5] Judge John Minor Wisdom would later write that "*Gomillion* had a prompt and decisive effect on reapportionment and the right to vote generally."[6]

Only two years later, the Supreme Court cited *Gomillion* in its seminal ruling in *Baker v. Carr*.[7] There, the Supreme Court

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[4] 364 U.S. at 346-47

[5] Wisdom, *In Memoriam: One of a Kind*, 71 TEX. L. REV. 913, 916 (1993).

[6] *Id.* at 918.

[7] 369 U.S. 186 (1962).

held that federal courts could review a challenge under the Equal Protection Clause to the apportionment of seats in state legislatures. The Court relied on its holding in *Gomillion* that the power of a state lies within the scope of limitations imposed by the Constitution.[8]

Shortly thereafter, in *Gray v. Sanders*,[9] the Court invalidated a Georgia system that provided more voting power to rural voters than urban voters. Again, the Court quoted from *Gomillion*: "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."[10] Immediately after the *Gomillion* quote, Justice William O. Douglas set forth the famous principle: "The conception of political equality from the Declaration of Independence, to the Gettysburg

[8] *Id.* at 230.

[9] 372 U.S. 368 (1963).

[10] *Id.* at 381 (citation omitted).

Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing – one person, one vote."[11]

Finally, in *Reynolds v. Sims*,[12] the Court held that the Equal Protection Clause required Alabama's legislative districts to be apportioned on the basis of population, so that the weight of a citizen's vote would not depend on where he or she lived. Chief Justice Warren held that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[13] Once more, the Court relied on *Gomillion* in holding that "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."[14]

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[11] *Id.*

[12] 377 U.S. 533 (1964).

[13] *Id.* at 555.

[14] *Id.* at 566 (citation omitted).

I cannot overstate the importance of these cases for they are the foundation of our modern democracy. In recognizing the concept of "one person, one vote," the reapportionment cases enshrined the principle that every citizen has the right to an equally effective vote, rather than the right to simply cast a ballot. State legislatures could not dilute the votes of racial minorities by perpetuating unequal voting districts. Importantly, the reapportionment cases also established principles for challenging "at-large" and "multi-member" electoral systems enacted by many southern jurisdictions after passage of the Voting Rights Act in order to dilute the African-American vote. The concept that no group of voters should wield more power in the election of candidates than another was an essential component.

When I filed the *Gomillion* case, we had very few African Americans registered to vote in Alabama. We had no elected African Americans on city councils, school boards, county commissions, in the legislatures or in Congress. As a result of the Warren Court's decisions in *Gomillion*, *Baker*, *Gray*, *Reynolds* and

other cases, and the enactment of legislation, we now have thousands of African Americans and other minorities serving in elected and appointed positions, from city council persons to members of Congress.

I respectfully suggest that this Committee carefully scrutinize Judge Alito's disagreement with these cases. A nominee to the Supreme Court who has a judicial philosophy set against the Warren Court and against the reapportionment cases is, in effect, saying that he would turn the clock back. If this occurred, not only would African Americans lose, the entire nation would lose the great richness of their contributions as currently enjoyed. In my opinion, a Supreme Court Justice with these views would impede the effective protection of the right to vote.

In conclusion, I submit that the next appointee to the Supreme Court should favor the protection of voting rights and should strengthen, not weaken, the voting rights case law developed by the Warren Court.

Thank you very much. I will be happy to answer questions.

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November 3, 2005

Honorable Arlen Specter
United States Senate
Washington, D.C.

Re: Judge Samuel Alito: Vanguard Recusal

Dear Senator Specter:

This responds to your inquiry as to whether Judge Alito properly handled the situation in which a panel of the Third Circuit Court of Appeals, of which he was a member, was presented with a case involving a claim against Vanguard.

In my opinion Judge Alito handled it quite properly, in correcting a situation in which he can be said to have made a mistake about recusal.

The case coming before the panel was a claim that Vanguard had improperly disbursed proceeds of a fund account, which the claimant said she was entitled to. Vanguard refused to make the disbursement, relying on a judgment of a Massachusetts court directing the disbursement. Hence, the case involved the effect of the Massachusetts judgment, not the Vanguard disbursement as such. Judge Alito was assigned to the panel, which had unanimously decided against the claimant. The claimant then asserted that he should not have participated because the case

involved Vanguard and he had funds in a Vanguard mutual fund. Judge Alito immediately asked that he be removed from the panel and that the case be reassigned. It was reassigned to a panel without him, which also rejected the claimant's appeal.

In my opinion Judge Alito's initial participation in the appeal was not improper under 26 U.S.C.§455, which establishes the governing rules. A mutual fund is a diversified pool of securities managed by an investment company. The investment company has managerial responsibility for investing the funds and fiduciary responsibility for doing so in accord with principles of trust law. The investors do not share that responsibility and have no authority to make decisions about the investments or distributions or disbursements. Hence, having a Vanguard mutual fund is not owning an interest in the Vanguard managing company, any more than having a bank account in a commercial or savings bank involves an ownership interest in the bank. On the contrary, investors in a mutual fund, like depositors in a bank, are creditors or potential creditors against the fund managers.

The claim against Vanguard was in the thousands of dollars, whereas the Vanguard investment management companies are worth millions. Hence, there was no practical possibility that the claim could create risk to Judge Alito's mutual fund investment.

On this basis, Judge Alito had no conflict of interest and should not have recused himself. Balanced against the requirement that a judge recuse himself or herself, where required under §455, is the duty of a judge to sit and decide in all other case. This concept is commonly called the "duty to serve." In busy courts, such as the Third Circuit, the duty has real significance.

Some of the discussion of this situation has pointed out that Vanguard advertises that its fund investors are the "owners" of the company. The fund investors are in economic terms in substance owners of the funds, although technically they are not even that: For example, the fund participants could not redirect the portfolio holdings in a fund, which they could if they were really owners. Technically, they are beneficiaries of trust obligations owed by

Vanguard to the investors. The Vanguard advertising is harmless, and indicates the dedication the company has had to its investors. But statements in the Vanguard advertisements do not transform the trustee-beneficiary relationship into one of company and stockholder.

I was directly involved in the discussions leading to the model on which 28 U.S.C.§455 was adopted. It was recognized that investing in mutual funds is a very appropriate way for judges to put away savings in securities without becoming owners in the companies whose shares are held in a mutual fund. Many judges do that, and properly so.

In any event, the amount involved in the claimant's dispute with Vanguard was not enough in my opinion to create an "appearance of impropriety" even if Judge Alito had been an owner of stock in Vanguard. The practice with federal judges has been that they recuse if they own any shares in a company involved in a case coming before them. However, Judge Alito did not stand in that situation.

A different issue is presented concerning Judge Alito's statement about his Vanguard holdings during his confirmation hearing as Circuit Judge fifteen years ago. He said he would recuse himself in cases involving "Vanguard." That statement can reasonably be interpreted as covering the situation that subsequently arose and which has drawn this attention. So it can be said that he thereby promised to recuse himself in cases where the legal standard in §455 did not require doing so, and, on the contrary, would require fulfillment of the "duty to serve."

In my opinion, Judge Alito was incautious in making the statement in such nontechnical terms, because it did not take into account the important difference between being a depositor in a mutual fund and a stockholder in a mutual fund manager. In my opinion that statement is a basis for mild criticism. In my opinion it is not a basis for substantial criticism, and certainly not for serious criticism about Judge Alito's standards of judicial ethics. On the

contrary, when the situation was called to his attention, he recused himself even though he was not, in my opinion, required to do so.

We should reflect on whether any of us has led a life without making mistakes, particularly mistakes as insignificant as this.

I should add that I have known Judge Alito since he was a law student, and that he participated in a seminar with me. My other information about him is that his character is and has been exemplary.

I am willing to make whatever presentation of these views might be considered appropriate.

Sincerely,

Geoffrey C. Hazard, Jr.

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January 12, 2006

The Honorable Patrick Leahy
Ranking Minority Member
Senate Judiciary Committee
152 Senate Dirksen Office Building
Washington, DC 20510

Dear Senator Leahy:

Since President Bush nominated Judge Samuel Alito to the Supreme Court, there has been much interest in what his colleagues on the Third Circuit Court think of him. One name in particular—the late A. Leon Higginbotham, Jr., Chief Judge when Judge Alito joined the court—has been invoked, with the suggestion that Judge Higginbotham might have supported Judge Alito's nomination to the Court.

I am a law professor who is related to Judge Higginbotham. I worked closely with him on racial justice issues for more than a decade. With Judge Higginbotham, I taught "Race and the Law" at the University of Pennsylvania Law School and New York University Law School. I co-authored three law review articles with the Judge concerning race in the American justice system. I co-authored with Judge Higginbotham a casebook on race in America. Because of my close relationship with Judge Higginbotham that provided me with insight into his views on racial justice, I feel compelled to set the record straight.

First appointed to a federal judgeship by President Lyndon B. Johnson in 1964, Judge Higginbotham was known as the conscience of the American judiciary on race issues. While Judge Higginbotham undoubtedly shared a collegial relationship with Judge Alito, it is my firm belief that Judge Higginbotham's substantive differences with the nominee on civil rights jurisprudence would have prevented his support.

The only race case on which Judges Higginbotham and Alito sat together illustrates the differences in their judicial philosophy. In *Grant v. Shalala*, 989 F.2d 1332 (3d Cir. 1993), Judge Alito authored an opinion, which held against a class action alleging racial bias by an Administrative Law Judge in deciding appeals of denials of Social Security benefits. The plaintiffs alleged the Administrative Law Judge adopted a biased policy under which he believed that claimants living in Hispanic, black or poor white communities are only "attempting to milk the system," that they are "perfectly capable of going out and earning a living," and that they "preferred living on public monies." *Id.* at 1347.

The district court had certified the class and set the case for trial. When the government appealed, Judge Alito held that the district court could not make its own findings on the bias claims, but had to defer to the agency findings of no bias. Judge Alito wrote that "we are convinced that the plaintiffs' right to an impartial administrative determination can be fully protected through the process of judicial review of the Secretary's determination." *Id.* at 1346.

Judge Higginbotham, however, issued a strong dissent: "The determination of whether or not plaintiffs' constitutional right has been violated is the province of the courts and not that of an agency." *Id.* at 1357. "What the majority proposes to do in its holding is effectively have courts take a back seat to bureaucratic agencies in protecting constitutional liberties. This . . . is a radical and unwise redefinition of the relationship between federal courts and federal agencies. . . ." *Id.* at 1359.

The district court remanded the case to the agency, which again found no bias. The district court then ruled that the agency's decision was not supported by substantial evidence, and concluded that the Administrative Law Judge "harbored biases which rendered him unable to fulfill his duty to develop the facts and to decide cases fairly." 111 F. Supp. 2d 556, 563 (M.D. Pa. 2000).

Judge Higginbotham strongly believed that the federal courts had a duty to give full effect to the civil rights laws that were being passed just as he was joining the federal judiciary. To him, civil rights laws had little meaning unless federal courts were willing to enforce them.

Sadly, Judge Alito's civil rights record does not reflect such a commitment to the role of the courts in protecting our rights and liberties. Across the subject areas of voting rights, employment discrimination, fair housing, and criminal justice, Judge Alito has demonstrated a narrow, cramped view of laws protecting against discrimination. Although he has served on the bench for fifteen years, Judge Alito's rulings in favor of African Americans number only in the single-digits.

Unfortunately, Judge Higginbotham is not here to share his views. But having known him my entire life, both personally and professionally, I can say unreservedly that he would be deeply concerned that the Supreme Court's civil rights jurisprudence would take a dramatic shift in the wrong direction with the confirmation of Judge Alito.

Thank you for allowing me to share my thoughts with you.

Respectfully submitted,

Michael Higginbotham
The Wilson Elkins Professor of Law



HUMAN
RIGHTS
CAMPAIGN

Testimony of Joe Solmonese, President,
Human Rights Campaign
On the Nomination of Samuel Alito as Associate Justice of the Supreme Court of the United States

Before the United States Senate Judiciary Committee

January 12, 2006

Members of the Committee:

I appreciate the opportunity to offer the Human Rights Campaign's testimony to this Committee. The Human Rights Campaign is the nation's largest bipartisan organization working to advance equality based on sexual orientation and gender identity and expression, to ensure that gay, lesbian, bisexual and transgender ("GLBT") Americans can be open, honest and safe at home, at work and in the community.

You are now considering Samuel Alito to succeed Justice Sandra Day O'Connor, whose tenure on the bench has been marked not only by a common-sense approach to tough issues, but by a clear understanding of the impact that the Court's decisions can have on real people.

America deserves a justice in that model, because although a Supreme Court justice must address complex legal issues requiring a brilliant mind and extraordinary legal experience, he or she also bears the burden of making decisions that will affect real human beings in profound ways—often for decades to come. As the late Justice Felix Frankfurter wrote, "there comes a point where this Court should not be ignorant as judges of what we know as men."[1] Quite simply, a justice must see the human side of the cases before him or her.

The GLBT community has seen the impact that this basic human understanding can have upon the judicial process. Less than three years ago, the Court affirmed that GLBT people cannot be branded criminals because of who we are.[2] Its decision showed a shift

[1] *Watts v. State of Indiana*, 338 U.S. 49, 52 (1949).
[2] *See Lawrence v. Texas*, 539 U.S. 558 (2003).

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from *Bowers v. Hardwick*,[3] in which the court focused so intently on the *conduct* at issue that it failed to consider GLBT people as human beings. In *Lawrence*, the Court to which Samuel Alito has been nominated has accepted what most fair-minded Americans know: that GLBT people exist, that we are entitled to constitutional protection, and that laws based on mere disapproval have no place in this country's legal system.

A review of Judge Alito raises serious concerns about whether, when he looks across the bench, he will see the faces of the people whose lives his decisions will affect. The following cases illustrate our concern:

In *Cai Luan Chen v. Ashcroft*,[4] Alito authored an opinion upholding the denial of an asylum petition for the fiancé of a woman who had been granted asylum. The fiancée's application for asylum had been approved because she had been forced to have an abortion 8 months into her pregnancy under China's population-control policies. In such cases, spouses are ordinarily also granted asylum. The woman's fiancé, the petitioner in this case, noted that the couple *would have* married but for the very high minimum age requirements for marriage (25 for men and 23 for women). Neither the applicable statute nor regulations were clear about unmarried partners, but the INS nonetheless concluded that the petitioner was not eligible for asylum.

On appeal, Judge Alito upheld this decision, concluding that the agency's interpretation of its regulations was reasonable. The opinion contrasts the spousal relationship with non-spousal ones, noting "the persecution of one spouse by means of a forced abortion or sterilization causes the other spouse to experience intense sympathetic suffering that rises to the level of persecution."[5] In concluding that the agency's distinction (not required by the statute) between spouses and non-spouses was reasonable, Alito adopted a chillingly clinical approach to the real-world impact of this policy, stating "we may say that BIA 'logically concluded that aliens who are [married] are more likely than aliens not so situated' to be severely injured in the ways noted above when their partners are forced to endure forced abortions or sterilization."[6] The Court of Appeals for the Ninth Circuit later reached the opposite conclusion.[7]

Although Alito claimed, throughout the *Cai Luan* opinion, simply to be adhering to very strict standards of deference to agencies, this opinion conflicts with his application of this standard[8] in a different asylum case involving a married couple (claiming persecution under the forced-abortion policy and as Christians). In a seemingly results-oriented opinion, Alito reversed an agency's interpretation of its regulations and a fact-finder's determination regarding credibility—both of which entail similar extraordinarily high standards of deference.[9]

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[3] 478 U.S. 186 (1986).
[4] 381 F.3d 221 (3d Cir. 2004).
[5] *See id.* at 225.
[6] *See id.* at 228.
[7] *See Zheng v. Ashcroft*, 382 F.3d 993 (9th Cir. 2004).
[8] Called the *Chevron* standard after the case that established it. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).
[9] *See Gui Cun Liu and Xiu Ding Liu v. Ashcroft*, 372 F.3d 529 (3d Cir. 2004).

In all but one state in this country, there are GLBT people who *would* marry but legally cannot. Consequently, they are denied basic protections that others take for granted—including the right to sponsor a partner for immigration purposes. Alito's asylum cases show a callousness toward the real-world impact of the law, and this is cause for grave concern to the GLBT and all Americans.

Alito's decision to strike down a school district's harassment policy is another example of his failure to comprehend the dangers that face ordinary Americans. Harassment and bullying plague an alarming number of GLBT students. Thirty-three percent of students polled report that GLBT students are subjected to harassing or bullying behavior at school. Nonetheless, in *Saxe v. State College Area School District*[10] Alito struck down a policy that would protect GLBT students, among others, from such harassment. The policy was narrowly tailored to encompass only actions or words that had the intent or effect of impeding a student's education or creating a hostile environment. Nonetheless, when it was challenged by a group of students who claimed that it infringed their right to speak out about the "sinful nature of homosexuality," Alito ruled that it violated the students' First Amendment rights. The Family Research Council, an anti-gay advocacy group, gave Alito its 2001 Golden Gavel Award for this case, an honor that Alito noted in his responses to this Committee's questionnaire.

Because the GLBT community is particularly vulnerable to bias-motivated violence and to employment discrimination, Congress's power to legislate to prevent these social ills is of vital importance to GLBT Americans. In voting to strike down a portion of the Family and Medical Leave Act and to strike down the federal assault weapons ban, Alito took an extremely narrow view of Congress's authority to protect Americans. Congress's power to legislate has a profound impact on real lives—and Judge Alito has a record of disregarding this impact.

Many civil rights groups will come before this committee to discuss Judge Alito's troubling civil rights record in great detail. The Human Rights Campaign stands by its allies in the civil rights community in opposing this nomination. America deserves a justice who will understand the power he or she can exercise over real human beings, respecting and considering the day-to-day impact of judicial decisions on millions of lives.

For all of the reasons set forth in this testimony, we urge you to vote not to confirm Samuel Alito to the Supreme Court of the United States.

[10] 240 F.3d 200 (3d Cir. 2001).

DIVIDED THIRD CIRCUIT PANELS

In the areas of criminal justice and immigration, Judge Alito has participated in 52 cases resulting in a panel that divided on whether to grant relief on an individual's claim of unlawful government power. In these disputed cases, he sided with the individual four times (in **bold** below)—three times joining an *en banc* majority, once writing a dissent. In the other 48 cases, including 13 search and seizures cases and 4 death penalty cases, he sided with the government, dissenting 13 times from opinions written or joined by a Republican appointee. Below are the cases, with the following notations:

† Judge Alito wrote the majority opinion.

* Judge Alito dissented.

** Judge Alito dissented from an opinion written or joined by a Republican appointee.

Fourth Amendment search and seizure

** Doe v. Groody, 361 F.3d 232 (3d Cir. 2004)

† United States v. Lee, 359 F.3d 194 (3d Cir. 2004)

Feldman v. Community College of Allegheny, 85 Fed. Appx. 821 (3d Cir. 2004)

Grazier ex rel. White v. City of Philadelphia, 328 F.3d 120 (3d Cir. 2003)

† United States v. $92,422.57, 307 F.3d 137 (3d Cir. 2002)

United States v. Nelson, 284 F.3d 472 (3d Cir. 2002)

** United States v. Zimmerman, 277 F.3d 426 (3d Cir. 2002)

Pryer v. C.O. 3 Slavic, 251 F.3d 448 (3d Cir. 2001)

Torres v. McLaughlin, 163 F.3d 169 (3d Cir. 1998)

† Mellott v. Heemer, 161 F.3d 117 (3d Cir. 1998)

United States v. Brown, 159 F.3d 147 (3d Cir. 1998)

** Baker v. Monroe Township, 50 F.3d 1186 (3d Cir. 1995)

† Bolden v. Southeastern Pa. Transp. Authority, 953 F.2d 807 (3d Cir. 1991) (en banc)

Misleading or erroneous jury instruction

** United States v. Russell, 134 F.3d 171 (3d Cir. 1998)

** Smith v. Horn, 120 F.3d 400 (3d Cir. 1997) (*capital case*)

* United States v. Edmonds, 80 F.3d 810 (3d Cir. 1996) (en banc)

† Flamer v. Delaware, 68 F.3d 736 (3d Cir. 1995) (en banc) (*capital case*)

United States v. Zehrbach, 47 F.3d 1252 (3d Cir. 1995) (en banc)

Geschwendt v. Ryan, 967 F.2d 877 (3d Cir. 1992) (en banc)

Rock v. Zimmerman, 959 F.2d 1237 (3d Cir. 1992) (en banc)

** Virgin Islands v. Smith, 949 F.2d 677 (3d Cir. 1991)

Sentencing

† United States v. Santo, 87 Fed. Appx. 818 (3d Cir. 2004)

** United States v. Shoupe, 35 F.3d 835 (3d Cir. 1994)

† United States v. Shoupe, 929 F.2d 116 (3d Cir. 1991)

United States v. Dixon, 982 F.2d 116 (3d Cir. 1992)

* United States v. Bierley, 922 F.2d 1061 (3d Cir. 1990)

United States v. Askari, 159 F.3d 774 (3d Cir. 1998) (en banc)

Racial discrimination in jury selection

** Riley v. Taylor, 277 F.3d 261 (3d Cir. 1997) (en banc) (*capital case*)

Ramseur v. Beyer, 983 F.2d 1215 (3d Cir. 1992)

Ineffective assistance of counsel

† Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004), *rev'd*, 125 S. Ct. 2456 (2005) (*capital case*)

** United States v. Kauffman, 109 F.3d 186 (3d Cir. 1997)

Other criminal issues

United States v. Pharis, 298 F.3d 228 (3d Cir. 2002) (en banc)

† United States v. Gricco, 277 F.3d 339 (3d Cir. 2002)

United States v. Cepero, 224 F.3d 256 (3d Cir. 2000) (en banc)

United States v. Universal Rehabilitation Servs., 205 F.3d 657 (3d Cir. 2000) (en banc)

Coss v. Lackawanna County Dist. Att'y, 204 F.3d 453 (3d Cir. 2000) (en banc)

Matteo v. Superintendent, 171 F.3d 877 (3d Cir. 1999) (en banc)

United States v. Parise, 159 F.3d 790 (3d Cir. 1998)

† United States v. Lake, 150 F.3d 269 (3d Cir. 1998)

** United States v. Palma-Ruedas, 121 F.3d 841 (3d Cir. 1997), *rev'd*, 526 U.S. 275 (1999)

† Government of Virgin Islands in Interest of A.M., 34 F.3d 153 (3d Cir. 1994)

† United States v. McDade, 28 F.3d 283 (3d Cir. 1994)

Robinson v. Arvonio, 27 F.3d 877 (3d Cir. 1994)

Burkett v. Fulcomer, 951 F.2d 1431 (3d Cir. 1991)

United States v. Soberon, 929 F.3d 935 (3d Cir. 1991)

Deportation and asylum

† Singh-Kaur v. Ashcroft, 385 F.3d 293 (3d Cir. 2004)

* Lee v. Ashcroft, 368 F.3d 218 (3d Cir. 2004)

* Dia v. Ashcroft, 353 F.3d 228 (3d Cir. 2003) (en banc)

** Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999)

** **United States v. Igbonwa, 120 F.3d 437 (3d Cir. 1997)**

** Chang v. INS, 119 F.3d 1055 (3d Cir. 1997)

** Tipu v. INS, 20 F.3d 580 (3d Cir. 1994)



HUMAN
RIGHTS
CAMPAIGN

January 10, 2006

Dear Member of the Senate Judiciary Committee:

On behalf of the Human Rights Campaign ("HRC"), America's largest civil rights organization advocating for the gay, lesbian, bisexual and transgender ("GLBT") community, I write to oppose the nomination of Judge Samuel A. Alito, Jr. to the Supreme Court of the United States. As a community that is particularly vulnerable to discrimination and bias-motivated violence, and that has recently been the target of discriminatory legislation, GLBT Americans, like all Americans who rely on a fair and independent judiciary, are profoundly affected by shifts in the Court's balance. Based upon our review of his record, HRC believes that Judge Alito would shift the Court to the right, departing from Justice O'Connor's moderate, fair-minded approach to civil rights issues.

When his nomination was announced on October 31, HRC expressed concern that Alito's known positions on privacy, separation of church and state, and congressional power were cause for great concern. We were particularly troubled by Judge Alito's opinion striking down a school's anti-harassment policy covering sexual orientation and his defense of a Department of Justice opinion permitting discrimination based on HIV status even if it is based on "irrational" fears.

Evidence about Judge Alito's record has mounted in recent weeks, leading HRC to formally oppose his nomination. For instance, in documents released since his nomination, Judge Alito indicated that he believed that there was no constitutional right to an abortion, and that he was proud of working to overturn *Roe v. Wade*. This is of particular importance to GLBT Americans because the constitutional right to privacy that underlies *Roe* is linked to the liberty rights that enable GLBT Americans to live as equal citizens and not as criminals.

Because religion is often wrongly used as proxy for discrimination against GLBT people, it is critical that the Court preserves the wall of separation of church and state. We are therefore particularly concerned that Alito also disagrees with Warren Court precedents on the Establishment clause.

The circumstances surrounding Alito's appointment and his approval by anti-GLBT activists are further cause to believe that his appointment would threaten hard-won constitutional rights upon which the GLBT community, like all Americans, rely. We therefore urge you to vote against the confirmation of Judge Alito to the Supreme Court of the United States.

Thank you for your consideration. If you have any questions, or need more information, please contact David Stacy at 202.572.8959 or Lara Schwartz at 202.216.1578.

Sincerely,

Joe Solmonese
President

Independent Living Center of Kern County

Encouraging and Empowering Persons with Disabilities and Seniors with Disabling Conditions since 1995

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January 9, 2006

The Honorable Arlen Specter,
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Bldg.
Washington, D.C. 20510

The Honorable Patrick Leahy,
Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Re: Independent Living Center of Kern County OPPOSES Judge Samuel Alito's Nomination

Dear Chairman Specter and Senator Leahy:

We write to inform you that the Independent Living Center of Kern County (ILCKC) strongly opposes the nomination of Judge Samuel Alito to replace Justice Sandra Day O'Connor as an Associate Justice of the United States Supreme Court. The Independent living Center of Kern County is an organization run by and for people with disabilities. Our membership is comprised of people with disabilities. ILCKC advances independent living and the rights of people with disabilities through consumer-driven advocacy. ILCKC envisions a world in which people with disabilities are valued equally and participate fully. Judge Alito's 15-year track record on the Third Circuit Court of Appeals compels ILCKC to formally oppose a US Supreme Court nominee for the first time.

Judge Alito's apparent hostility to the *Olmstead* precedent, his activist attacks on Congress' power to enact key civil rights legislation that would endanger laws such as the Americans with Disabilities Act, and his discomfort with enforcement of key safeguards in the Medicaid statute make his confirmation a grave and direct threat to the civil rights of persons with disabilities. A key part of our work is to eliminate the institutional bias of Medicaid by moving persons with disabilities out of institutions and into community settings so they can control their own

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destinies and live independently. ILCKC also works tirelessly to ensure that the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, the Fair Housing Act Amendments, the Individuals with Disabilities Education Act and other crucial civil rights laws are fully implemented and enforced.

A thorough review of Judge Alito's long record has demonstrated to persons with disabilities that as a Supreme Court Justice, he would be ideologically predisposed to use the law to roll back the rights we fought so hard to secure and to eliminate recourse for persons with disabilities who are subjected to illegal discrimination. His record on the Third Circuit Court of Appeals is full of examples of results-oriented judicial activism on federalism and access to justice cases and of inordinately rigid interpretations of civil rights statutes. His ideological agenda is undeniable. We are convinced that the same approach to federalism found in Alito's ruling in *Chittister v. Department of Community & Economic Development* in which he ruled that Congress lacked the power to pass the Family and Medical Leave Act (FMLA) would lead an Associate Supreme Court Justice Alito to strike down the Americans with Disabilities Act. His decision in *Chittister* places him to the right of the justice he has been nominated to replace, Sandra Day O'Connor, as well as the late Chief Justice William Rehnquist, who both were part of the 6-3 Majority that upheld the FMLA's leave provisions in *Nevada v. Hibbs*. Rehnquist was unwilling to even hold states responsible for providing access to justice for persons with disabilities. What kind of a chance would persons with disabilities possibly have with an Associate Justice Alito?

If this was not problematic enough, consider the interpretation of the Commerce Clause exemplified by Judge Alito's contention that machine gun sales cannot be regulated under the Commerce Clause in *United States v. Rybar*. This interpretation, which contradicts over 60 years of precedent, poses a direct threat to the ADA's regulatory scheme.

Judge Alito's decisions in housing cases have deprived persons with disabilities of the accessible housing that they need to liberate them from incarceration in institutions and allow them to live independently in the community. His 1999 ruling in *ADAPT v. HUD* gave a free pass to federal

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agencies to ignore the rules and regulations they have promulgated and has contributed to a trend that has severely undermined fair housing enforcement in the 3rd Circuit, despite rampant non-compliance with these requirements by public housing authorities. Also, in *Lapid Laurel, L.L.C. v. Zoning Board of Adjustment of Scotch Plains* (2002), Judge Alito joined a decision seriously weakening the protections of the Fair Housing Act. This ruling excused local zoning boards from engaging in an interactive process to identify reasonable accommodations needed to provide equal access for people with disabilities. A 2005 HUD PD&R study has found that people with disabilities face discrimination in up to half of all rental inquiries. It is evident that Judge Alito is more concerned with protecting state and local governments from litigation than he is with enforcing the fair housing laws.

Judge Alito's vote to rehear *Helen L. v. DiDario* (1995) *en banc* raises grave doubts as to whether Judge Alito supports, and would fully uphold, the ADA's integration mandate. The Supreme Court held in *Olmstead v. L.C.* (1999) that unnecessary institutionalization is a form of discrimination. In *Helen L*, a key predecessor of the *Olmstead* decision, the Third Circuit ruled in favor of plaintiffs who had been denied community placements by Pennsylvania's Department of Public Welfare. The ruling held that "the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled." When Pennsylvania moved for the Third Circuit to rehear the case and reverse its ruling, the motion was rejected for lack of votes. However, Judge Alito favored rehearing the case, strongly suggesting that he objected to its core holdings. Justice O'Connor was a part of the *Olmstead* majority. The *Olmstead* decision has become a crucial touchstone of public policy – and with good reason. When we have hardly turned the corner on the institutional bias in the Medicaid system, we cannot afford to have a justice who would roll back our rights to community integration on the Supreme Court.

In a concurrence in *Sabree v. Houstoun* (2003), Judge Alito reluctantly agreed that individuals who have been denied services under Medicaid were permitted to sue to enforce their rights, but seemed to question that proposition. He described the present rights of beneficiaries as "currently

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binding precedent" but suggested that he expected that this would change in time. The current environment has seen draconian budgetary cuts in a number of states' Medicaid programs, which are often being done without regard to the impact on the health and welfare of beneficiaries or the institutional bias in the Medicaid system. Individuals with disabilities on Medicaid need judges who are not looking to push the envelope to narrow their legal recourse or to prevent individuals from holding states accountable for violations of the Medicaid statute. Judge Alito's concurrence raises grave concerns that he presents a clear and present danger to the rights of people with disabilities using Medicaid.

Finally, too many of Alito's decisions reflect an activist, hostile and unacceptably restrictive reading and application of disability rights statutes including the Rehabilitation Act of 1973 and the Americans with Disabilities Act. In *Nathanson v. Medical College of Pennsylvania* (1991), Judge Alito's dissent from a Third Circuit ruling that a medical student could take her school to trial for failure to reasonably accommodate her back injury was condemned by his colleagues. They stated, "...[F]ew if any Rehabilitation Act cases would survive summary judgment if such an analysis were applied to each handicapped individual's request for accommodations." Moreover, In *Katekovich v. Team Rent A Car of Pittsburgh, Inc.*, (2002) Judge Alito joined in a troubling decision that ignored Congress' clear intent and permitted an employer to fire an employee with a disability who had been hospitalized for three weeks due to depression and a sleep disorder. In an example of legislating from the bench in its purest form, Judge Alito joined the Third Circuit in ruling that neither the ADA nor the FMLA covered the employee. The court failed to consider whether she was regarded by the employer as having a disability. The Third Circuit also effectively reversed the burden of proof under the FMLA by ruling that Katekovich had not presented sufficient evidence that she was capable of returning to work. In fact, the FMLA explicitly places the burden of proof on the **employer** to demonstrate that the worker is **unable** to return.

ILCKCKC refuses to stand idly by as a President who has promised us a "New Freedom Initiative" to implement the *Olmstead* decision and to uphold the Americans with Disabilities Act nominates a judicial activist

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whose record strongly suggests that he is predisposed to dismantle many of these landmark civil rights achievements. His nomination, which would dramatically shift the ideological balance of the US Supreme Court, presents a stark threat to the fundamental rights of persons with disabilities that were only won recently through great effort. Our commitment to the belief that people with disabilities are to be valued as equals in American society requires that we take an unprecedented act in our 23-year history to formally, and without reservation, oppose a nominee to the Supreme Court of the United States. We strongly and without hesitation urge you to reject this nomination. By doing so, you would send a message to President Bush that he needs to nominate judges committed to honoring his father's legacy by upholding the Americans with Disabilities Act and guaranteeing access to the courts for persons with disabilities to vindicate their fundamental rights.

Respectfully,

Norris Ledbetter,
Systems Change Coordinator

Bonita Coyle,
Executive Director

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January 10, 2006

The Honorable Patrick J. Leahy, Ranking Democratic Member
United States Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510

RE Nomination of Samuel J. Alito to the United States Supreme Court

Dear Senator Leahy:

We are writing to you because as a member of the Senate Judiciary Committee you will be voting on a nomination that could affect the lives of people with disabilities for several years to come.

The Independent Living Resource Center San Francisco (ILRCSF) is a non-profit organization whose core values include choice, consumer leadership, and full access to and inclusion in the community. We serve people with all types of disabilities by providing direct services and educating the community. As members of the National Council on Independent Living (NCIL) we also broadly advocate for people with disabilities throughout our nation. We oppose Judge Alito's nomination to the Supreme Court primarily because of his past narrow interpretations of Congress' authority to pass civil rights laws.

Although Judge Alito has a mixed record on disability issues we believe that his past decisions and opinions regarding the powers that authorize Congress to pass civil rights laws to enforce the Fourteenth Amendment's guarantee of equal protection, due process of law, etc. provides a strong basis for our concerns regarding the future of disability legislation such as:

- The Americans with Disabilities Act (ADA)
- Section 504 of the Rehabilitation Act
- The Fair Housing Amendments Act
- The Family and Medical Leave Act (FMLA)
- The Individuals with Disabilities Education Act (IDEA)

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There are several examples of rulings that cause us concern. In the interest of time we are choosing to only cite a couple of examples in this letter:

Chittister v. Department of Community and Economic Development – In this case Judge Alito ruled that Congress lacked the power to pass the Family and Medical Leave Act (FMLA). In a similar case the Supreme Court, including Justice O'Connor, upheld Congress' power to enact this provision. This narrow view could result in the Americans with Disabilities Act being at risk.

Lapid Laurel, L.L.C. v. Zoning Board of Adjustment of Scotch Plains – In this case Judge Alito joined a decision that excused local zoning boards from engaging in an interactive process to determine reasonable accommodations required to provide equal access to people with disabilities in the rental process. This decision weakened the protections of the Fair Housing Amendments Act and showed Judge Alito's concern with protecting state and local governments from litigation over protecting people with disabilities from discrimination.

We urge you to oppose Judge Alito's nomination to the Supreme Court. The history of disability rights legislation has been one of bipartisan support for the last three decades. If Judge Alito becomes an Associate Justice of the Supreme Court it could put at risk legislation whose purpose is to level the playing field and allow people with disabilities to live full and productive lives. This is an opportunity for Senators on both sides of the aisle to prevent the freedoms and benefits of living in America from being taken away from people with disabilities and others who have fought for their rights as Americans.

Sincerely,

Herb Levine

Herb Levine
Executive Director

- There are many instances of judges testifying during Supreme Court confirmation hearings. To take just a few examples:
    - Walter E. Craig, a U.S. district judge for the District of Arizona, testified during the confirmation hearings of Lewis Powell and William Rehnquist in 1971.
    - Two judges – Joan Dempsey Klein, the Presiding Justice of the California Court of Appeals; and Dick C.P. Lantz, a judge in Florida's circuit court – testified during the confirmation hearings of Sandra Day O'Connor in 1981.
    - In 1987, former Chief Justice Burger testified on behalf of Robert Bork in his confirmation hearing.
    - Jack Tanner, a U.S. district judge for the Western District of Washington, testified during the confirmation hearings of Clarence Thomas in 1991.
- There are additional examples of judges testifying at the confirmation hearings of lower court judges.
    - On Feb. 25, 2004, during the confirmation hearing for Roger Benitez to be a district court judge for the Southern District of California. The chief judge of the Southern District, Marilyn L. Huff, testified on behalf of Mr. Benitez.
    - During the confirmation hearing of David L. Bunning to be a district court judge for the Eastern District of Kentucky, three sitting district judges in that jurisdiction testified in support of his nomination. (Karl S. Forester, Joseph M. Hood, and Henry R. Wilhoit)



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January 11, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
711 Hart Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate
433 Russell Office Building
Washington, D.C. 20510

Dear Senators:

I write on behalf of Ipas to express our opposition to the confirmation of Judge Samuel A. Alito, Jr. as Justice of the Supreme Court of the United States. Ipas is an international non-profit organization that has worked for three decades to increase women's ability to exercise their sexual and reproductive rights and to reduce deaths and injuries of women from unsafe abortion.

The Supreme Court is responsible for upholding principles established by the Constitution which protect the rights of all Americans. Counter to these principles, Judge Alito has demonstrated hostility to reproductive rights throughout his career.

A woman's right to terminate a pregnancy is established by the Supreme Court and states are prohibited from placing an undue burden on this right. However, Judge Alito has shown that he would allow particularly heavy burdens, such as a Pennsylvania requirement that a woman must notify her husband before obtaining an abortion. While sitting on the Third Circuit Court of Appeals, in Planned Parenthood of Southeastern Pennsylvania v. Casey, Alito authored a dissenting opinion which argued to uphold the Pennsylvania law, on the grounds that the undue burden standard does not apply when only a "small group" of women are affected. But it is in just these cases — when a woman fears abuse, is estranged, or for other personal reasons can not involve her husband in the decision — that protection is most needed.

In his work for the Reagan administration, Alito helped to craft a strategy to dismantle the protections afforded by Roe v. Wade. This 1973 Supreme Court ruling eliminated hundreds of annual deaths and many more injuries from unsafe abortion. While applying for a promotion, Alito expressed pride in his contribution to cases in which the administration argued "that the Constitution does not protect a right to abortion."

In parts of the world where abortion laws are still restrictive, nearly 70,000 women die from unsafe abortions every year. Ipas works with partner organizations and healthcare providers to end these deaths through improved health care services, laws and policies. In order to save women's lives and fulfill their rights, a number of countries – including Nepal and Ethiopia – have recently made abortion legal or significantly loosened restrictions.

If Alito is confirmed and thereby allowed to tip the balance against Roe v. Wade, we will not see the end of abortion in this country. We will only see the end of safe abortions.

Sincerely,

Charlotte Hord Smith

Charlotte Hord Smith
Policy Director
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Testimony of Professor Samuel Issacharoff, NYU School of Law

On the Nomination of Judge Samuel A. Alito, Jr. to the United States Supreme Court

Submitted, January 9, 2006

For over 40 years, the Supreme Court has recognized a profound judicial obligation to protect the integrity of the electoral process, the right to vote, and the right to run for office. The Court's insistence on rigorous compliance with the constitutional requirements of electoral equality has provided – and continues to provide – an invaluable foundation for American democracy. The Court has energized the American political system through its enforcement of the guarantees of the First, Fourteenth and Fifteenth Amendments, as well of its protections of the right of the People to elect effectively their representatives to Congress, as guaranteed by Article 1 of the Constitution.

No Justice of the Supreme Court over the past 35 years has hesitated to assume the responsibilities so well articulated by the Supreme Court in the famous *Carolene Products* footnote in 1938.[1] Justice Stone, on behalf of the Court, recognized a special need for exacting judicial review in the case of laws that "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." Structural flaws in the legislative process were not only undeserving of judicial deference; they unsettled the premises upon which judicial deference to most legislation was founded. Moreover, the Court recognized that blockages that compromised the democratic legitimacy of the political process were not self-healing, for they were often the product of legislative self-dealing.

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[1] *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

In the 40 years that have passed since the Supreme Court bravely entered into the political thicket, the Court's oversight role has encompassed the seemingly routine, such as access to the ballot and the polling place, and the truly extraordinary, as with *Bush v. Gore.*[2] The result of these interventions, though not without controversy, is a political system that is more open and more participatory than at any time in our history.

The Reapportionment decisions of the 1960s, which appear to have deeply concerned Judge Alito as a young man, were the realization of the *Carolene Products* insights. Those cases involved, as the late Professor and Dean John Hart Ely wrote, "rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo."[3] In those early Reapportionment cases and in four decades of evolving case law, when the infirmity lay at the core of the electoral process, time and again, the Court proved to be the only institution that could rise above these political process failures and intervene effectively.

It is well to recall the facts presented by the Reapportionment cases of the 1960s. The willful failure to reapportion state legislatures had transformed American legislative districts into self-perpetuating fiefdoms, and state legislatures into grossly unrepresentative institutions in which the voters of growing cities and suburbs found themselves unable to participate effectively in a political process controlled by rural minorities. In Tennessee, the site of *Baker v. Carr,*[4] one county had 23 times as many representatives per person as another county in the state. In Alabama, the site of *Reynolds v. Sims,*[5] the disparities were as high as 41-to-1. That pattern repeated itself across the country. In California, to pick just one, Los Angeles County had one state senator, as did another county 1/100th its size.

For those primarily rural areas that benefitted from this distortion of democratic representation, the gains from engorged representation were protected through a stranglehold on the legislative process and, through it, on the redistricting process. Those whose votes were discounted to the point of irrelevance were repeatedly frustrated by that entrenched political power. The intervention of the Supreme Court was not only decisive, it was indispensable. Indeed, it was perhaps the single most successful remedial effort in the history of the Court, for it set in motion a fundamentally more democratic legislative process, one that was deserving of judicial deference.

The Reapportionment cases were indeed a bombshell at the time, for they did a great deal to destabilize political power that had immunized itself from political accountability. But

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2 531 U.S. 98, 107, 109 (2000).

3 John Hart Ely, Democracy and Distrust 117 (1980).

4 369 U.S. 186 (1962).

5 377 U.S. 533 (1964).

when I teach these cases to students today, it is difficult even to convey to them the controversy that these decisions provoked. For my students, and even for me and my law school classmates in the early 1980s, the idea of equality among voters, of one-person, one-vote, appears so elemental, so in keeping with the most rudimentary sense of democracy and legitimacy, that they cannot even fathom that a democratic society could be organized on any other basis.

I do not know how a young college student might have reacted to these cases ten years earlier, particularly when presented with the formidable writings of Alexander Bickel. Bickel captured well the tension between a commitment to popular sovereignty and the overriding commands of the Constitution. And it is well to remember that, although our attention is drawn to the Court by these hearings, Congress has also played a crucial role in expanding our democratic horizons, especially with the Voting Rights Act of 1965 and its subsequent amendments.

Nonetheless, that such doubts about the Reapportionment cases should reappear on a job application in the 1980s is at least a curiosity. Perhaps it was the recounting of an intellectual path, perhaps an indication of a continuing view that courts have no business in the superintendence of the political process. If the latter, it should be deeply troubling. For the issue of the day is not the intellectual trajectory of a thoughtful college student, but the implications of the Reapportionment cases for the vital role the Supreme Court plays in our democratic life.

It is difficult to imagine in this day and age any serious objection to the rights identified in the Reapportionment cases. In *Reynolds v. Sims,* for example, Chief Justice Warren wrote that "Full and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature."[6] These basic democratic principles are by now so deeply imbedded in our political culture as seemingly to defy any controversy. Unfortunately, while these principles may be well-honored at an abstract level, they are hardly self-executing.

Critical issues in the organization of our democratic life remain unsettled and are certain to arise before the Court in the years to come. Our system of redistricting has run amok, the competitive lifeblood drained by self-perpetuating insiders. This may prove to be the same sort of structural obstacle to democratic reform as that which had to be dislodged by the reapportionment decisions of 40 years ago. The answer may not be as seemingly simple as "one-person, one-vote," but the problem is widespread and perhaps even more corrosive. So too, our campaign finance system continues to be a source of practical and constitutional difficulties without easy resolution. Even the mechanics of our electoral system are increasingly a source of legal concern.

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[6] 377 U.S. at 565.

In all of these areas there is reason to doubt that incumbent officials are able to rise above self-interest to fix the political process that elected them. As Justice Scalia has wisely cautioned, "the first instinct of power is the retention of power."[7] While not without controversy or difficulty, our collective experience over the past 40 years confirms that the Nation is much the better for the robust attention of the Court to the health of our democracy.

Before confirming any nominee to the Supreme Court, the Senate of the United States should be able to conclude with confidence that, regardless how a nominee may vote on any given case, there is no doubt that he or she will assume the responsibility of protecting the integrity of our democratic processes.

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7 *McConnell v. FEC*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part).

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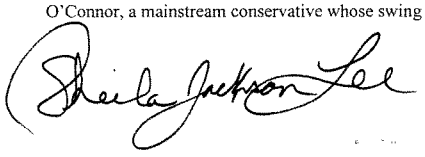
Statement by Congresswoman Sheila Jackson Lee

Confirmation Hearing for Judge Samuel A. Alito

Senate Judiciary Committee

January 18, 2006

Allow me to acknowledge Chairman Specter and Ranking Member Leahy in their respective capacities and for overseeing these hearings. The appointment of a Supreme Court Justice is an important issue and for that reason I am submitting this written testimony in as much as my request to provide oral testimony was not responded to. I would like to begin by noting that if confirmed as the next Associate Justice, Judge Samuel A. Alito would bring dramatic, sweeping change to the Supreme Court. While his words are carefully chosen and his demeanor is measured, Judge Alito's ultraconservative judicial philosophy is nothing short of radical. He would join other Justices who are at the center of a radical right-wing bloc that would change the direction of the Court and the country for decades to come, and threaten fundamental rights and legal protections. He stands in sharp contrast to the justice he would replace: Sandra Day O'Connor, a mainstream conservative whose swing vote has helped to preserve hard-won



progress on civil rights, reproductive freedom, environmental protections, and a host of other issues preserving equality and justice for every American. The White House has tried to distance Judge Alito from his lengthy record, which demonstrates he is among the most extreme members of the federal bench. His nomination has been unanimously acclaimed by the leaders of the Radical Right. He has shown a pronounced willingness to impose a narrow right-wing ideology from the bench, and has compiled an extraordinary record of dissents to mainstream opinions. He has the largest number of dissents on the Court of Appeals on which he currently sits. My testimony will focus on areas which are very important to my constituents and I believe all Americans. These include civil rights, immigration, privacy issues, the Voters Right Act, and Judge Alito's record on civil liberties.

As a government lawyer and a federal judge, Judge Alito has consistently failed to protect civil rights. He has said he disagrees with historic Supreme Court decisions articulating the "one person – one vote" principle. As a judge, he has rarely sided with individuals seeking relief from discrimination on the basis of race, age, gender, or disability, and he has opposed efforts to redress the historic effects of discrimination in the workplace. Indeed, in civil rights cases where the Third Circuit was divided, Judge Alito advocated positions detrimental to civil rights 85 percent of the time. He once argued that it was permissible to seat an all-white jury in a case in which the evidence indicated that prosecutors had rejected black jurors on the basis of race. As part of a 1985 application for promotion in the Justice Department, he highlighted his membership in a reactionary Princeton alumni group that opposed the admission of women and attempts

by the university to increase minority enrollment. Also in his 1985 application, Judge Alito expressed pride in his contributions, as Assistant Solicitor General, to cases in which "the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed." In fact, Judge Alito erroneously conflated "quotas" with permissible affirmative action programs and remedies that courts appropriately order in cases of egregious discrimination. It is important to note that the Supreme Court specifically rejected Reagan Administration efforts to restrict such remedies in two cases that Alito participated in.[1] Later, Judge, Alito wrote several dissents demonstrating a similar disregard for victims of sex and race discrimination. In one case, ten other appeals court judges, Republican and Democratic, agreed that a victim of sex discrimination had enough evidence to at least present her case to a jury; Judge Alito alone disagreed.[2] In another case involving race discrimination in employment where Alito again tried to prevent a case from even going to a jury, the court majority sharply criticized Alito's dissent, stating that "Title VII would be eviscerated if our analysis were to halt where [Alito's] dissent suggests."[3] All of these actions by Judge Alito have served to erode civil rights in this country that have been fought so hard far and in many cases lives have been lost.

Turning to immigration, it goes without saying that immigration is a specialized area of the law with important civil rights implications. As a Member of the House Homeland Security Committee and the Ranking Member on House Judiciary Subcommittee on Immigration, this is a very important issue to me. Although the

[1] See PFAW, Samuel Alito: 1985 Application Reveals Right-Wing Ideology"
[2] Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061 (3d Cir. 1996), cert. denied, 521 U.S. 1129

Supreme Court has often issued rulings that have limited the rights of immigrants, Judge Alito's record suggests that his confirmation would likely make matters even worse. Judge Alito's record as a government lawyer and federal judge raise serious concerns about his views on immigrants' rights. In his capacity as Deputy Assistant Attorney General, in 1986 Judge Alito advised William Webster, Director of the Federal Bureau of Investigation (FBI), that the FBI's desire to document fingerprint and criminal information of nonresident non-citizens of the U.S. was constitutionally proper. He went further and issued a broad legal opinion regarding the constitutional protections that should properly be afforded to undocumented immigrants living in the United States. He argued that the Supreme Court's decision in Matthews v. Diaz,[4] suggests that "illegal aliens have no claim to nondiscrimination with respect to nonfundamental rights," and the Constitution "grants only fundamental rights to illegal aliens within the United States. In fact, Alito's analysis rests on a flawed interpretation of *Matthews* and ignored a more recent case in which the Supreme Court had held to the contrary. In Plyler v. Doe,[5] the Court held that the Fourteenth Amendment prohibited states from discriminating against undocumented immigrant children in the provision of public education, even though the Supreme Court has held that education is not considered a "fundamental right" under the Constitution. Even the dissenting Justices in *Plyler* indicated that they "ha[d] no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment applies to aliens, who, after their illegal entry into this country, are indeed physically

[3] *Bray v. Marriott Hotels*, 100 F.3d 986 (3d Cir. 1997) at 993.
[4] 426 U.S. 67 (1976) (addressing whether Congress may condition a non-citizen's eligibility for Medicare's supplemental insurance program upon continuous residence in the United States for a 5 year period and permanent residency status).
[5] 457 U.S. 202 (1982)

'within the jurisdiction' of a state."[6] None of the Justices on the *Plyler* Court would have gone as far as Judge Alito to restrict equal protection rights of undocumented immigrants. It is clear that Judge Alito has issued troubling dissents from decisions protecting immigrants' rights. As a Member of the House Homeland Security Committee and the House Judiciary Subcommittee on Immigration, this strongly concerns me.

As it relates to privacy rights and reproductive freedoms, Judge Alito's opinions are very troubling. When the Third Circuit upheld most of Pennsylvania's very restrictive anti-abortion law in 1991 in Planned Parenthood of Southeastern Pennsylvania v. Casey. In this case, Judge Alito wrote separately to say that he would have upheld the whole law, including restrictions requiring a woman to notify her spouse before obtaining an abortion. The Supreme Court majority disagreed with Alito, but justices who sought to overrule Roe v. Wade agreed with his view. This case raises key questions about whether, if confirmed to a seat on the Supreme Court, Alito would be a vote for overturning Roe v. Wade. In addition, in the late 1980's, the Pennsylvania state legislature passed a number of amendments to the Pennsylvania Abortion Control Act of 1982 which placed restrictions on the right of women to obtain an abortion. For example, the amendments required: 1) women to wait for 24 hours after being given certain information about abortion before undergoing the procedure; 2) minors to obtain parental consent or a judicial bypass; 3) women to inform their spouses of their decision to seek an abortion except in very narrow circumstances; 4) reporting requirements for abortion clinics and public disclosure of those reports. The district court found that all of these provisions were unconstitutional, and the state appealed. On appeal, a three-judge panel

[6] Id. At 243.

of the Third Circuit, including Judge Alito, upheld the district court on every issue except the spousal notification provisions, which they found unconstitutional. Specifically, the panel found that none of the provisions -- except spousal notification -- subjected women seeking abortions to an undue burden. A majority of the panel agreed that the spousal notification provision did pose an undue burden on women seeking an abortion and was unconstitutional.

Judge Alito went even further and dissented in part because he felt that none of the provisions, even the spousal notification provision, posed an undue burden on women seeking abortions. Judge Alito argued that any minimal burden posed by the spousal notification provisions was justified by Pennsylvania's legitimate interest in furthering the husband's interest in the fetus carried by his wife. Part of Judge Alito's decision appeared to rest on the fact that, according to him, those challenging the provision "failed to show even roughly how many of the women in this small group would actually be adversely affected by" the spousal notification provisions. Since no undue burden was imposed by the statute, argued Judge Alito, the regulation needed only to meet a lower level of scrutiny. Given the state's legitimate interest, Judge Alito believed the spousal notification requirement was constitutional. This dissenting view demonstrates Judge Alito's extremely narrow construction of what constitutes an undue burden on a woman's right to obtain an abortion.

Before closing, let me take a moment to discuss Judge Alito's record on voting rights in general and apportionment in particular. There are few citizens or scholars who would deny that the Supreme Court's interpretations of the Constitution as a shield against the excesses of unchecked power have often crystallized the Court's intended and imperative role. For many, the Court's civil rights and voting rights jurisprudence capture the essence of these tests of the measure of our commitment to equality. The most significant Supreme Court decisions in the area of voting have elevated and not shrunk from the principle of equality embodied in the Constitution. Accordingly, a discussion of Judge Alito's record on voting rights must begin with his comments on judicial usurpation of authority and the Supreme Court's reapportionment cases. These statements appeared in Judge Alito's 1985 Department of Justice application to become Deputy Assistant Attorney General. In his application, Judge Alito wrote: "In the field of law, I disagree strenuously with the usurpation by the judiciary of decisionmaking authority that should be exercised by the branches of government responsible to the electorate."[7] He also wrote that he had developed in college "a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions," including those involving "reapportionment."[8]

It is clear that during her years on the Rehnquist Court, Justice Sandra Day O'Connor has manifested an awareness of the centrality of the Court's voting rights jurisprudence that led her to deliberative case-by-case assessments. Given the stakes involved in filling the replacement for Justice O'Connor, Judge Alito's statements are of

[7] PPO Non-Career Appointment Form, Nov. 15, 1985, Bates No. WH-120.
[8] Id.

grave concern to me. At the very least, Judge Alito should be thoroughly questioned during his hearing before the Senate Judiciary Committee about which cases decided by the Warren Court animated his strenuous objections, and about the precise grounds for his disagreement with the principles enunciated by the Court. The Warren Court, spanned the years from 1953 to 1969, and presided over a series of seminal cases involving voting rights generally, and apportionment in particular. The cases largely addressed the power of the federal courts to ensure that voting rights were meaningfully protected. Among other things, the Warren Court's reapportionment decisions are lauded for their role in barring state legislative schemes that dilute the voting strength of racial minorities by perpetuating inequitably drawn voting districts – districts in which the votes of citizens in one part of a state would be afforded, in some cases two times, five times or even ten times more weight than the votes of citizens in another part of a state. Recognizing the concept of "one person, one vote," the Court enshrined the principle that every citizen has the right to an equally effective vote, rather than the right to simply cast a ballot. In doing so, the Court set into motion a process that led to the dismantling of a political system infected both by prejudice and other forms of patent electoral manipulation.

In conclusion, Judge Alito's quiet demeanor cloaks a far right ideology that places him among the most conservative judges on the federal bench. If he replaces Justice O'Connor, he would be a consistent vote to turn back the clock on decades of progress in civil rights, civil liberties, health and safety, environmental protection and religious liberty. His extreme judicial philosophy threatens fundamental rights and legal

protections for all Americans – for decades to come. The Senate should reject his confirmation to a lifetime seat on the Supreme Court. In the alternative, those of us who believe in a balanced U.S. Supreme Court in which all Americans would be able to receive a fair and objective review of their petitions. We are asking that committed Members of the Senate engage in a principled filibuster to ensure that the integrity and balance of the U.S. Supreme Court.

Japanese American Citizens League
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January 8, 2006

Honorable Patrick J. Leahy
United States Senate
Ranking Minority Member, Senate Judiciary Committee
433 Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

The Japanese American Citizens League (JACL), the nation's oldest and largest Asian American civil rights organization, wishes to express our strong opposition to the nomination of Judge Samuel Alito to the United States Supreme Court.

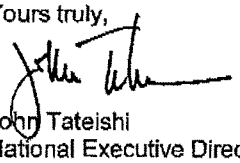
Judge Alito's legal opinions and writings over the past several years have left a clear record of an individual whose legal views could have serious negative impact on the nation's Asian American communities. As a civil rights organization, we are not only troubled by Judge Alito's ideological brand of conservatism, but also by his judicial leanings that would make tenuous the constitutional protections of American citizens.

The record shows that Judge Alito once stated proudly his opposition to affirmative action; as a lawyer for the government, he has argued that immigrants can be denied basic protections and rights guaranteed by the Constitution; he has shown little regard for individuals who have sought sanctuary in the U.S. through the political asylum appeal process; he has expressed a legal opinion that would support racial discrimination in employment cases; he has written an opinion that would have denied a gender discrimination case to be heard by the court; he has raised serious concerns about the "one person one vote" concept of democracy; he has shown a proclivity to undermine due process and privacy protections

The Supreme Court is in many instances the final arbiter in protecting the rights of Americans and therefore should not be a vehicle for those who would push for a political agenda, be it from the left or the right of the political spectrum. Given the early pronouncements in his career and his legal opinions either as a government attorney or from the bench, we are not convinced that Judge Alito can serve the interests of the people as a member of the highest court of the land.

The Japanese American Citizens League urges you, as a member of the Senate Judiciary Committee, to vigorously question Judge Alito on his past record and to carefully examine his current legal positions. The JACL strongly opposes Judge Alito's nomination and does not believe that his confirmation as an Associate Justice of the Supreme Court serves the best interest of all the people of this great nation.

Yours truly,



John Tateishi
National Executive Director

Via Facsimile 202-224-3479

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JUDGE ALITO IS AN ACTIVIST JUDGE WHO LEGISLATES FROM THE BENCH, OFTEN LIMITING LEGISLATIVE EFFORTS TO END DISCRIMINATION AND PROTECT INDIVIDUALS.

We, the undersigned American Jewish organizations, devoted to civil rights and social justice, impelled by the core teachings of our ancient tradition, call upon the Senate to carry out its constitutional responsibility and reject the nomination of Samuel Alito as an Associate Justice of the Supreme Court of the United States.

With the selection of Judge Samuel Alito as his nominee for the Supreme Court seat resigned by Sandra Day O'Connor, President Bush has put the rights, opportunities, and security of all Americans in jeopardy. Justice O'Connor has been a pragmatic conservative and has been often a pivotal vote to preserve basic rights and landmark laws relied upon by generations of Americans. Judge Alito, by contrast, has a long activist record of hostility to established guarantees of equal opportunity for women, older Americans, racial, religious, and ethnic minorities, security for families, protection of the environment, and privacy and reproductive rights, and religious freedom for all.

Judge Alito's fifteen years service on the Court of Appeals for the Third Circuit provides ample data from which to gain the measure of his constitutional philosophy. Unfortunately, many of Judge Alito's opinions show that he does not share the values of the American mainstream. He has voted consistently to shrink protections against discrimination, to limit women's right of choice, and to erode the wall of separation between church and state, and he has been chastised on several occasions by his colleagues for his refusal to follow established precedent. He would have made it harder for victims of discrimination in the workplace and victims of discrimination based on disability to prove their case by making it much harder for cases to ever make it to trial. He sided with corporate polluters in a ruling that made it much harder for victims of pollution to sue, even when the polluters were guilty of breaking the law. The Supreme Court eventually rejected Alito's position. Alito's questioning of the right of the Congress to give citizens the authority to sue polluters could be a serious limitation in federal environmental legislation. Most troubling is his willingness to overturn legislation passed by the U.S. Congress by a very narrow and archaic reading of the interstate commerce clause, a reading that harks back to the pre-New Deal decisions of the Court. If its logic were followed, it could invalidate such New Deal laws as Social Security." Despite his repeated lip service to "strict construction" and "original intent," in Judge Alito the President has indeed chosen a radical judicial activist.

As Jews, we are members of a community whose laws command us to take care of the disadvantaged among us. Everything in Judge Alito's record suggests that he lacks

a commitment to preserving civil rights and civil liberties, to maintaining the rights of the less powerful, and to rectifying the historical racial inequities of this country. His past decisions do not encourage the belief that he will either diligently protect the free exercise of religion, or ensure that government respects citizens of every religion, and of none, by endorsing no particular creed. His opinions suggest that he cannot be counted on to honor the Court's precedents on the rights of privacy, gender equality, and individual self-determination, whether in medical treatment and research or elsewhere.

It is clear that Alito's confirmation would put Americans' rights at risk. Our Jewish tradition recognizes that the well-being of a society depends largely on the strength of its legal system. Among the first commands that God gives the Jewish people when they prepare to establish a new society in the land of Israel is "Appoint judges and chiefs in all of your dwellings. . . and they shall govern the people with due justice." (Deuteronomy 16:18) The rabbinic tradition understands the term "due justice" as a requirement to appoint fair judges (Sifrei Devarim Shofetim) and even goes so far as to compare appointing an inappropriate judge to spreading idol worship, considered the root of all evil behavior, among the people. (Talmud Sanhedrin 7b) In contrast, according to the rabbis "all who judge faithfully are considered as partners with God in creation." (Talmud Shabbat 10a) These traditions, combined with our knowledge of the significance and history of the U.S. Supreme Court, make us aware of the potential power of Alito to move the Court in a direction that may determine U.S. policy for years to come.

We ask that our Senators take seriously their right and duty of advice and consent; that they reject his nomination as one out of consonance with the mainstream traditions of American jurisprudence. We encourage our Senators to employ every means at their disposal to block his confirmation.

Sincerely,

Vic Rosenthal, Executive Director
Jewish Community Action



Statement of National Jewish Social Justice Groups on the Nomination of Judge Samuel Alito to the U.S. Supreme Court

JUDGE ALITO IS AN ACTIVIST JUDGE WHO LEGISLATES FROM THE BENCH, OFTEN LIMITING LEGISLATIVE EFFORTS TO END DISCRIMINATION AND PROTECT INDIVIDUALS.

We, the undersigned American Jewish organizations, devoted to civil rights and social justice, impelled by the core teachings of our ancient tradition, call upon the Senate to carry out its constitutional responsibility and reject the nomination of Samuel Alito as an Associate Justice of the Supreme Court of the United States.

With the selection of Judge Samuel Alito as his nominee for the Supreme Court seat resigned by Sandra Day O'Connor, President Bush has put the rights, opportunities, and security of all Americans in jeopardy. Justice O'Connor has been a pragmatic conservative and has been often a pivotal vote to preserve basic rights and landmark laws relied upon by generations of Americans. Judge Alito, by contrast, has a long activist record of hostility to established guarantees of equal opportunity for women, older Americans, racial, religious, and ethnic minorities, security for families, protection of the environment, and privacy and religious freedom for all citizens.

Unlike Harriet Miers and John Roberts, President Bush's two previous nominees, Judge Alito's fifteen years service on the Court of Appeals for the Third Circuit provides ample data from which to gain the measure of his constitutional philosophy. Unfortunately, many of Judge Alito's opinions show that he does not share the values of the American mainstream. He has voted consistently to shrink protections against discrimination, to limit women's right of choice, and to erode the wall of separation between church and state, and he has been chastised on several occasions by his colleagues for his refusal to follow established precedent. He would have made it harder for victims of discrimination in the workplace and victims of discrimination based on disability to prove their case by making it much harder for cases to ever make it to trial. He sided with corporate polluters in a ruling that made it much harder for victims of pollution to sue, even when the polluters were guilty of breaking the law. The Supreme Court eventually rejected Alito's position. Alito's questioning of the right of the Congress to give citizens the authority to sue polluters could be a serious limitation in federal environmental legislation. Most troubling is his willingness to overturn legislation passed by the U.S. Congress by a very narrow and archaic reading of the interstate commerce clause, a reading that harks back to the pre-New Deal decisions of the Court. If its logic were followed, it could invalidate such New Deal laws as Social Security." Despite his repeated lip service to "strict construction" and "original intent," in Judge Alito the President has indeed chosen a radical judicial activist.



As Jews, we are members of a community whose laws command us to take care of the disadvantaged among us. Everything in Judge Alito's record suggests that he lacks a commitment to preserving civil rights and civil liberties, to maintaining the rights of the less powerful, and to rectifying the historical racial inequities of this country. His past decisions do not encourage the belief that he will either diligently protect the free exercise of religion, or ensure that government respects citizens of every religion, and of none, by endorsing no particular creed. His opinions suggest that he cannot be counted on to honor the Court's precedents on the rights of privacy, gender equality, and individual self-determination, whether in medical treatment and research or elsewhere.

It is clear that Alito's confirmation would put Americans' rights at risk. Our Jewish tradition recognizes that the well-being of a society depends largely on the strength of its legal system. Among the first commands that God gives the Jewish people when they prepare to establish a new society in the land of Israel is "Appoint judges and chiefs in all of your dwellings. . . and they shall govern the people with due justice." (Deuteronomy 16:18) The rabbinic tradition understands the term "due justice" as a requirement to appoint fair judges (Sifrei Devarim Shofetim) and even goes so far as to compare appointing an inappropriate judge to spreading idol worship, considered the root of all evil behavior, among the people. (Talmud Sanhedrin 7b) In contrast, according to the rabbis "all who judge faithfully are considered as partners with God in creation." (Talmud Shabbat 10a) These traditions, combined with our knowledge of the significance and history of the U.S. Supreme Court, make us aware of the potential power of Alito to move the Court in a direction that may determine U.S. policy for years to come.

We ask that our Senators take seriously their right and duty of advice and consent; that they reject his nomination as one out of consonance with the mainstream traditions of American jurisprudence. We encourage our Senators to employ every means at their disposal to block his confirmation.

Signed:

Jewish Community Action (Minneapolis/St. Paul)
Jewish Council on Urban Affairs (Chicago)
Jews for Racial and Economic Justice (New York)
Progressive Jewish Alliance (Los Angeles/San Francisco)
Tekiah – A Jewish Call to Action (Boston)
The Shalom Center (National)

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Abortion in young women and subsequent mental health

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Background: The extent to which abortion has harmful consequences for mental health remains controversial. We aimed to examine the linkages between having an abortion and mental health outcomes over the interval from age 15–25 years. **Methods:** Data were gathered as part of the Christchurch Health and Development Study, a 25-year longitudinal study of a birth cohort of New Zealand children. Information was obtained on: a) the history of pregnancy/abortion for female participants over the interval from 15–25 years; b) measures of DSM-IV mental disorders and suicidal behaviour over the intervals 15–18, 18–21 and 21–25 years; and c) childhood, family and related confounding factors. **Results:** Forty-one percent of women had become pregnant on at least one occasion prior to age 25, with 14.6% having an abortion. Those having an abortion had elevated rates of subsequent mental health problems including depression, anxiety, suicidal behaviours and substance use disorders. This association persisted after adjustment for confounding factors. **Conclusions:** The findings suggest that abortion in young women may be associated with increased risks of mental health problems. **Keywords:** Abortion, pregnancy, mental disorder, depression, anxiety, suicidal behaviour, substance dependence.

There have been ongoing debates about the issue of abortion as a response to unwanted pregnancy. These debates have centred around a series of ethical, religious and other issues concerning the rights of the fetus and the mother in circumstances of unwanted pregnancy (Blanchard, 2002; Chen, 2004; Major, 2003). Although much of the debate in this area has focused on ethical issues, it has also involved empirical concerns about the linkages between unwanted pregnancy, abortion and long-term mental health.

Specifically, a number of authors have proposed that abortion may have longer-term adverse mental health effects owing to feelings of guilt, unresolved loss and lowered self-esteem (Ney, Fung, Wickett, & Beaman-Dodd, 1994; Speckhard & Rue, 1992). These concerns have been most clearly articulated by Reardon and colleagues who claim that abortion may increase risks of a wide range of mental disorders, including substance abuse, anxiety, hostility, low self-esteem, depression and bipolar disorder (Cougle, Reardon, & Coleman, 2003; Reardon & Cougle, 2002; Reardon et al., 2003). Despite such claims, the evidence on the linkages between abortion and mental health proves to be relatively weak with some studies finding evidence of this linkage (Gissler, Hemminki, & Lonnqvist, 1996; Reardon & Cougle, 2002; Reardon et al., 2003) and others failing to find such linkages (Gilchrist, Hannaford, Frank, & Kay, 1995; Major et al., 2000; Pope, Adler, & Tschann, 2001; Zabin, Hirsch, & Emerson, 1989). Furthermore, the studies in this area have been marked by a number of design limitations, including the use of selected samples, limited length of follow-up, retrospective reports of mental health prior to abortion, and failure to control confounding (Adler, 2000; Major et al., 2000).

Perhaps the most comprehensive analysis of this topic is provided by an analysis of the National Longitudinal Study of Youth (NLSY) reported by Cougle et al. (2003). This analysis found that women who reported induced abortion were 65% more likely to score in the high-risk range for clinical depression than women whose pregnancies resulted in birth. This association was evident after control for a number of prospectively assessed confounders including pre-pregnancy psychological state. However, there were potential limitations of this study. First, the study failed to provide comprehensive control of pre-pregnancy factors, with the analysis being limited to the data available from the NLSY. Second, there was evidence of substantial under-reporting of abortion in the study, with an estimated 60% of those undergoing induced abortion failing to report this (Cougle et al., 2003).

A threat to study validity in this area arises from uncontrolled confounding (Major, 2003). In particular, evidence linking abortion to higher rates of subsequent mental disorder is consistent with two explanations. The first is that these associations reflect a cause and effect linkage in which exposure to abortion has adverse effects on subsequent mental health. The alternative is that the association arises because abortion is associated with third or confounding factors that are also related to mental health outcomes. There are several potential sources of confounding relating to pre-abortion background. These include: socio-economic factors; childhood and family factors; mental health and personality factors. To date, the control of such factors in studies

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of the mental health effects of abortion has been limited. A further class of factors that may also confound the association may relate to the woman's circumstances at the time of pregnancy, including age, the planning of pregnancy, and the stability of partnerships (Adler, 1992; Major, 2003).

In most studies to date, comparisons have been made between those who became pregnant but did not seek abortion and those who became pregnant and sought an abortion. Those women who were not (yet) pregnant were excluded from the analysis. Whilst it may seem intuitively reasonable to exclude the not pregnant group from analysis, the omission of this group leads to a problem of interpretation. In particular, the finding that rates of mental health problems are higher amongst those women having abortions than those women becoming pregnant and not seeking abortion is consistent with two quite different interpretations. First, the results are consistent with the view that exposure to abortion leads to an increased susceptibility to subsequent mental health problems. However, the alternative explanation is that pregnancy without abortion is beneficial for mental health. To distinguish between these alternatives requires that results for the not pregnant group are included in analysis to provide a reference by which the direction of association may be determined.

Against this background, this paper reports an analysis of the linkages between abortion in young women aged 15–25 and subsequent mental health in a birth cohort of young women studied to the age of 25. The specific aims of this analysis were:

1. To examine the extent to which mental health outcomes in the interval 15–25 years varied between the three pregnancy status groups: not pregnant by age 25; pregnant no abortion; pregnant abortion.
2. To adjust any association between mental health outcomes and pregnancy status groups for confounding pre-pregnancy factors, including social background, childhood and family history; mental health and personality factors.
3. To use the results of a covariate adjustment method to estimate the adjusted rates of mental disorders in the pregnant no abortion and not pregnant groups relative to rates of mental disorders in the pregnant abortion group.

Methods

The data used in this analysis were gathered over the course of the Christchurch Health and Development Study (CHDS). The CHDS is a longitudinal study of a birth cohort of 1265 children born in the Christchurch (NZ) urban region who have been studied from birth to age 25 years. The present analysis is based on the cohort of female participants for whom information on pregnancy history and mental health outcomes was available. The sample sizes used in the analysis range between 506 and 520 depending on the timing of assessment of pregnancy history and mental health. These samples represent between 80% and 83% of the original cohort of 630 females. All data were collected only on the basis of signed consent from research participants. The study had ethical approval from the Canterbury Ethics Committee.

Pregnancy and abortion 15–20 years

In New Zealand, the provision of legal abortion is determined by the Contraception, Sterilisation and Abortion Act, 1977 and overseen by the Abortion Supervisory Committee. The Act requires that certain criteria are met before allowing a woman to undergo a legal abortion. Firstly, women must approach their doctor and are then referred to specialist consultants. Two certifying consultants must then agree: 1) that the pregnancy would seriously harm the life, physical or mental health of the woman or baby; or 2) that the pregnancy is the result of incest; or 3) that the woman is severely mentally handicapped. An abortion will also be considered on the basis of age, or when the pregnancy is the result of rape. Abortions in New Zealand are free, and legal for all ages, and parental consent is not required for women under the age of 16. Counselling is required for all women considering an abortion (Ministry of Health, 1998).

Sample members were interviewed at ages 15, 16, 18, 21 and 25 about pregnancy and abortion occurring since the previous assessment. These reports showed that by age twenty five, 205 women (41% of the cohort) had become pregnant on at least one occasion and 74 (14.6%) reported seeking and obtaining an abortion at least once. In total there were 422 pregnancies reported prior to age 25. Of these, 90 were terminated. To cross-validate self-report data, the study estimates were compared with officially recorded pregnancy and abortion statistics for New Zealand (Abortion Supervisory Committee, 2002). These comparisons suggested some underreporting of abortion. The observed rate of abortion by age 25 in the cohort (178 per 1,000) was 81% of the rate expected based on population figures (220 per 1,000). This difference was statistically significant ($p < .05$).

Mental health 15–25 years

At ages 16, 18, 21 and 25 years, participants were questioned about mental health issues since the previous assessment using questionnaires based on the Diagnostic Interview Schedule for Children (DISC) (Costello, Edelbrock, Kalas, Kessler, & Klaric, 1982) at age 16 years and the Composite International Diagnostic Interview (CIDI) (World Health Organization, 1993) at ages 18–25 years, supplemented by additional measures. From this questioning it was possible to ascertain the proportion of young women who met DSM-IV criteria for the following disorders during the intervals 15–18, 18–21 and 21–25 years: a) major depression; b) anxiety disorders (including generalised anxiety, panic disorder, agoraphobia, social phobia and

specific phobia); c) alcohol dependence; d) illicit drug dependence. In addition, measures of DSM-IV disorders were supplemented by measures of self-reported suicidal ideation and attempts.

Covariate factors

Measures of family socio-demographic background. (a) Maternal education was assessed at the time of the cohort member's birth using a 3-point scale (no formal qualifications/secondary qualifications/tertiary qualifications). (b) Family socio-economic status was assessed at birth using the Elley–Irving revised index of socio-economic status for New Zealand (Elley & Irving, 1976).

Measures of family functioning. (a) Changes of parents (0–15 years): Using detailed information on patterns of family change gathered over the interval from birth to 15 years, a measure of family instability was constructed on the basis of a count of the number of changes of parents experienced by the child by age 15. (b) Parental history of criminality: When sample members were aged 15 years parents were questioned about their involvement in criminal offending. Sample members were classified as having a parental history of criminality if any parent reported a history of offending. (c) Childhood sexual abuse (0–16 years): At age 18 and 21 years, sample members were questioned about their experience of sexual abuse in childhood (<16 years) (Fergusson, Lynskey, & Horwood, 1996). For the purposes of the present analysis, sample members were classified as having experienced childhood sexual abuse if they reported at either age 18 or 21 any episode of abuse involving physical contact with a perpetrator. (d) Childhood physical abuse (0–16 years): At age 18 and 21 years sample members were questioned about the extent to which their parents used physical punishment during childhood (<16 years) using a 5-point scale (Fergusson & Lynskey, 1997). Sample members were classified as having experienced physical child abuse if they reported at either age 18 or 21 that at least one parent had regularly used physical punishment, had used physical punishment too often or too severely, or had treated them in a harsh and abusive manner.

Childhood conduct problems (7–9 years). At age 7, 8, 9 years the extent to which sample members exhibited tendencies to conduct disordered and oppositional behaviours was assessed using a scale that combined items from the Rutter (Rutter, Tizard, & Whitmore, 1970) and Conners (Conners, 1969, 1970) child behaviour rating scales. Separate ratings were obtained from the child's parent and class teacher. Parent and teacher ratings were summed for each year and then averaged over the interval from 7–9 years to provide a robust measure of the child's tendencies to conduct problems. The reliability of the resulting scale, assessed using coefficient α, was .97.

Child educational achievement. At each assessment from age 11–13 years, the child's class teacher was asked to rate the child's performance in each of five areas of the curriculum (reading, handwriting, written expression, spelling, mathematics) using a 5-point scale ranging from very good to very poor. To provide a global measure of the child's educational achievement over the interval from 11–13 years, the teacher ratings were summed across years and curriculum areas and then averaged to provide a teacher rating grade point average for each child. The reliability of this measure was $\alpha = .96$.

Measures of child personality. (a) Child neuroticism was assessed at age 14 years using a short-form version of the neuroticism scale of the Eysenck Personality Inventory (Eysenck & Eysenck, 1964). The reliability of this scale was $\alpha = .80$. (b) Child self-esteem was assessed at age 15 years using the Coopersmith Self-Esteem Inventory (SEI) (Coopersmith, 1981). The reliability of this scale, assessed using coefficient α, was .87.

Measures of adolescent adjustment. (a) Early onset sexual intercourse: At age 18 sample members were questioned about their sexual behaviours, including the age of onset of intercourse. Young people who reported that they had first had sex before age 16 were classified as having early sexual onset. (b) Substance use (15 years): At age 15 sample members were questioned about their use of tobacco, alcohol and cannabis. Tobacco use was assessed on the basis of a 5-point scale reflecting the current frequency of cigarette smoking at age 15. This scale ranged from 'non-smoker' through to 'daily smoker'. The frequency of alcohol use in the past 12 months was assessed using a 6-point scale that ranged from 'never' through to 'almost every day'. In addition, a dichotomous measure of cannabis use was created based on the young person's report of cannabis use in the past 12 months. (c) Mental health problems (15 years): At age 15, young people were administered a mental health interview that combined components of the Diagnostic Interview Schedule for Children (DISC) (Costello et al., 1982) and other measures to assess a range of DSM-III-R disorders in the cohort over the previous 12 months. This information was used to construct DSM-III-R diagnoses of major depression and anxiety disorders, including overanxious disorder, generalised anxiety disorder, social phobia and simple phobia. In addition, sample members were also questioned about the frequency of suicidal thoughts in the previous 12 months.

Young adult lifestyle factors. At each assessment from age 18 onwards participants were questioned about aspects of their living arrangements since the previous assessment including: a) living with parents and age of leaving the family home; and b) entry into cohabiting relationships.

Statistical analysis

The associations between pregnancy/abortion status and mental health at ages 15–18, 18–21, and 21–25 years (Table 1) were tested for statistical significance by fitting random effects models to the repeated measures data. For dichotomous outcomes (depression,

Table 1 Rates of disorder (15–18, 18–21, 21–25 years) by cumulative history of pregnancy/abortion to age 18, 21, 25 years respectively

Measure	Not Pregnant	Pregnant No Abortion	Pregnant Abortion	*p*
Major depression (%)				
15–18 years	31.2	35.7	78.6	
18–21 years	27.5	34.5	45.1	
21–25 years	21.3	30.5	41.9	
Pooled risk ratio (95% CI)[1]	.35[a] (.20–.59)	.49[a] (.27–.91)	1[b]	<.001
Anxiety disorder (%)				
15–18 years	37.9	35.7	64.3	
18–21 years	15.2	25.0	25.5	
21–25 years	16.9	29.8	39.2	
Pooled risk ratio (95% CI)[1]	.35[a] (.19–.63)	.54[a, b] (.27–1.07)	1[b]	.001
Suicidal ideation (%)				
15–18 years	23.0	25.0	50.0	
18–21 years	12.5	17.9	25.5	
21–25 years	8.0	13.0	27.0	
Pooled risk ratio (95% CI)[1]	.25[a] (.13–.50)	.31[a] (.14–.69)	1[b]	<.001
Alcohol dependence (%)				
15–18 years	5.2	7.1	.0	
18–21 years	4.3	6.0	5.9	
21–25 years	2.7	3.1	6.8	
Pooled risk ratio (95% CI)[1]	.53[a] (.17–1.61)	.56[a] (.15–2.10)	1[a]	.53
Illicit drug dependence (%)				
15–18 years	4.0	3.6	.0	
18–21 years	1.3	7.1	17.7	
21–25 years	1.7	4.6	12.2	
Pooled risk ratio (95% CI)[1]	.10[a] (.03–.32)	.16[a] (.04–.65)	1[b]	<.001
Mean (SD) number of mental health problems				
15–18 years	1.01 (1.13)	1.07 (1.39)	1.93 (.73)	
18–21 years	.61 (.96)	.90 (1.14)	1.20 (1.20)	
21–25 years	.50 (.85)	.81 (1.05)	1.27 (1.30)	
Pooled risk ratio (95% CI)[1]	.57[a] (.45–.72)	.66[a] (.50–.87)	1[b]	<.001
Sample sizes				
15–18 years	478	28	14	
18–21 years	375	84	51	
21–25 years	301	131	74	

[1]The results of planned comparisons of the rate of each outcome across the three groups are indicated by the superscripts ([a, b]). Different superscripts indicate that the groups were significantly ($p < .05$) different on their rates of disorder. Similar superscripts indicate that groups were not significantly different in their rates of disorder.

anxiety, suicidal ideation, substance dependence) logistic regression models were fitted, whereas for the count of number of mental health problems Poisson regression was used. For each outcome (Y) the general model fitted was of the form:

$$G(Yit) = B0 + B1X1it + B2X2it + Ui$$

where G(Yit) was the log odds of Y for the i-th individual in the t-th time interval for dichotomous outcomes or the log of the rate of problems for the i-th individual in the t-th time interval for the count of the number of mental health problems; X1it and X2it were time dynamic design variates reflecting the pregnancy/abortion status of the i-th individual up to the t-th interval, with X1it representing the Never Pregnant group and X2it the Pregnant No Abortion group, respectively, relative to the Abortion group; and Ui was an individual specific random effect. For each outcome a test of the overall significance of the pooled association with pregnancy/abortion history was obtained from a Wald chi squared test of the joint null hypothesis $B1 = 0$, $B2 = 0$. Estimates of the pooled risk ratios of disorder (odds ratios for dichotomous outcomes, incidence rate ratio for the problem count) in the Never Pregnant and Pregnant No Abortion groups relative to the Abortion group were given by e^{B1}, e^{B2} respectively.

The associations between pregnancy/abortion history and covariates (Table 2) were tested for statistical significance using the chi squared test of independence. The adjusted associations between pregnancy/abortion history and mental health outcomes (Table 3) were examined by extending the random effects models described above to include the covariate factors in Table 2. Finally, the association between pregnancy/abortion history prior to age 21 years and subsequent mental health problems from 21–25 years (Table 4) was modelled using Poisson regression in which the rate mental health problems was modelled as a log-linear function of pregnancy/abortion history prior to age 21 and covariates.

Results

Associations between pregnancy/abortion history and mental health outcomes

Table 1 shows the associations between pregnancy/abortion history (classified as not pregnant; pregnant no abortion; pregnant abortion) by ages 18, 21 and 25 years and measures of mental health assessed at ages 15–18, 18–21 and 21–25 years respectively. The

Table 2 Profile of social, family and childhood characteristics (0–15 years) and young adult lifestyle factors by pregnancy/abortion status (15–25 years)

Measure	Not Pregnant (N = 301)	Pregnant No Abortion (N = 131)	Pregnant Abortion (N = 74)	p[1]
Socio-demographic background				
% Mother lacked formal educational qualifications	41.2	70.2	51.4	<.0001
% Family of semi-skilled, unskilled socio-economic status	15.0	34.4	31.1	<.0001
Family functioning				
% 3+ changes of parents (0–15 years)	10.6	34.4	28.4	<.0001
% Parental history of offending (15 years)	6.3	22.4	17.8	<.0001
% Childhood contact sexual abuse	11.3	31.8	25.7	<.0001
% Childhood physical abuse	7.0	26.9	32.4	<.0001
Childhood behaviour/educational achievement				
% In highest quartile of childhood conduct problems (7–9 years)	21.1	33.9	37.5	.002
% In lowest quartile on grade point average (11–13 years)	22.4	39.3	31.5	.002
Childhood personality				
% In highest quartile on neuroticism (14 years)	20.1	25.2	34.3	.038
% In lowest quartile on self-esteem (15 years)	19.2	32.8	38.0	<.001
Adolescent adjustment				
% Early onset sexual intercourse (<16 years)	13.0	42.3	35.6	<.0001
% Daily smoker (15 years)	3.3	19.0	14.1	<.0001
% Drinking alcohol at least monthly (15 years)	19.6	32.8	38.0	<.001
% Used cannabis (15 years)	4.4	16.4	15.5	<.0001
% Prior history of depression/anxiety disorder (15 years)	13.3	25.2	32.4	<.0001
% Prior history of suicidal ideation (15 years)	6.0	11.5	25.7	<.0001
Time dynamic lifestyle factors				
% Living with parents at				
18 years	88.0	55.7	55.4	<.0001
21 years	49.8	22.1	29.7	<.0001
25 years	21.3	16.8	12.2	.15
% Cohabiting with partner at				
18 years	2.0	18.3	14.9	<.0001
21 years	17.6	43.5	33.8	<.0001
25 years	44.9	66.4	59.5	<.0001
% Ever pregnant by age				
18 years	–	18.5	24.3	.32
21 years	–	60.3	73.0	.07

[1]Chi squared test of independence.

Table 3 Risk ratios[1] (95% CI) of disorder by pregnancy/abortion status after covariate adjustment

Measure	Not Pregnant	Pregnant No Abortion	Pregnant Abortion	p	Significant covariates[2]
Major depression	.48[a] (.27–.84)	.35[a] (.18–.67)	1[b]	.006	1–4, 6–9
Anxiety disorder	.52[a, b] (.27–1.02)	.44[a] (.21–.93)	1[b]	.082	2, 4, 8
Suicidal ideation	.42[a] (.21–.85)	.24[a] (.11–.56)	1[b]	.004	2, 3, 5, 6, 9–11
Illicit drug dependence	.20[a] (.06–.69)	.15[a] (.04–.63)	1[b]	.014	2, 10
Number of mental health problems	.66[a] (.52–.84)	.58[a] (.44–.76)	1[b]	<.001	2–5, 6, 8, 9

[1]The results of planned comparisons of the adjusted rate of each outcome across the three groups are indicated by the superscripts ([a, b]). Different superscripts indicate that the groups were significantly ($p < .05$) different in their adjusted rates of disorder. Similar superscripts indicate that groups were not significantly different in their adjusted rates of disorder.
[2]Significant covariates: 1 = maternal education; 2 = childhood sexual abuse; 3 = childhood physical abuse; 4 = child neuroticism (14 years); 5 = child self-esteem (15 years); 6 = grade point average (11–13 years); 7 = child smoking (15 years); 8 = prior history of depression/anxiety (15 years); 9 = prior history of suicidal ideation (15 years); 10 = living with parents; 11 = living with partner.

measures of mental health include DSM-IV major depression, anxiety disorder, alcohol and illicit drug dependence, suicidal ideation and total number of disorders. All comparisons were tested for overall statistical significance using a random effects model to estimate the association between pregnancy/abortion history and mental health (see Methods). Examination of the table shows:

Table 4 Covariate adjusted incidence rate ratios (95% CI) between number of mental health problems (21–25 years) and pregnancy/abortion history prior to age 21

	Not Pregnant	Pregnant No Abortion	Pregnant Abortion	*p*
Incidence rate ratio (95% CI)[1,2]	.60[a] (.44–.83)	.67[a] (.46–.97)	1[b]	.008

[1]The results of planned comparisons of the adjusted rate of each outcome across the three groups are indicated by the superscripts ([a, b]). Different superscripts indicate that the groups were significantly ($p < .05$) different in their adjusted rates of disorder. Similar superscripts indicate that groups were not significantly different in their adjusted rates of disorder.
[2]Significant covariates include: childhood sexual abuse; childhood physical abuse; self-esteem (15 years); grade point average (11–13 years).

1. For all outcomes, except alcohol dependence, there were significant ($p < .001$) associations between pregnancy history and rates of disorder. These associations reflected a tendency for rates of mental health problems to be highest amongst those having abortions and lowest amongst those who had not become pregnant, with those who became pregnant but did not have an abortion having rates that were intermediate between these extremes.
2. For all outcomes except alcohol dependence, the results of pairwise comparisons showed a generally similar pattern in which rates of disorder did not vary significantly ($p > .05$) between the never pregnant and pregnant no abortion groups. In all comparisons, those becoming pregnant and seeking abortions had significantly ($p < .05$) higher rates of disorder than the not pregnant group and, with the exception of anxiety disorder, significantly higher rates of disorder than the pregnant no abortion group.

Adjustment for confounding

A limitation of the analysis in Table 1 is that it does not take into account third or confounding factors that might explain the elevated rates of mental disorders amongst those having abortions. This issue is examined in Table 2, which shows the associations between pregnancy/abortion status by age 25 and a range of potential confounding factors. Examination of the table shows evidence of significant tendencies for those who became pregnant by age 25 to exhibit a profile characterised by greater childhood social and economic disadvantage, family dysfunction and individual adjustment problems. In addition, those who became pregnant were more likely to have left the family home at a young age and to have entered a cohabiting relationship.

To take into account the factors in Table 2 the associations between pregnancy/abortion history and mental health outcomes were adjusted by extending the random effects models to include covariate factors (see Methods). The results of this analysis are shown in Table 3, which reports the covariate adjusted risk ratios, the overall test of significance and the results of pairwise comparisons of the adjusted rates. For each analysis the table also reports the significant covariate factors. The table shows:

1. For four of the five outcomes (depression, suicidal ideation, illicit drug dependence, total mental health problems) the association with pregnancy/abortion history remained statistically significant ($p < .05$) after control for confounders. For the remaining outcome, anxiety disorder, the adjusted association was marginally significant ($p = .08$).
2. Pairwise comparisons showed that those who were not pregnant and those who were pregnant without abortion had adjusted rates of disorder that were not significantly different ($p > .05$). However, in all cases, the abortion group had significantly ($p < .05$) higher rates of disorder than the pregnant no abortion group, and with the exception of anxiety disorder, significantly ($p < .05$) higher rates than the not pregnant group.

A prospective analysis

A limitation of the analysis reported in Tables 1 and 3 is that the associations between pregnancy/abortion history and mental health involved the concurrent assessment of pregnancy status and mental health. This raises issues about the direction of any causal association since the results may be interpreted in two ways: (a) mental health problems lead to increased risks of abortion; or (b) abortion leads to increased risks of mental health problems. To address this issue, the analysis was extended to produce a prospective analysis in which pregnancy/abortion history prior to age 21 was used to predict mental health outcomes from 21–25 years. This analysis was limited to the overall number of disorders owing to the relatively sparse data for specific disorders over the interval 21–25 years and the smaller number of women who became pregnant by age 21.

The results of this analysis are summarised in Table 4 which shows estimates of the covariate adjusted incidence rate ratios for the number of mental health problems. The association between pregnancy/abortion history prior to 21 and number of mental health problems from 21–25 years remained statistically significant after covariate adjustment ($p = .008$). In addition, consistent with

the previous analysis, the results show a clear pattern in which, after covariate adjustment, those who were not pregnant and those who were pregnant but did not have an abortion had rates of disorder that were not significantly different ($p > .05$), whereas those having abortions had rates of disorder that were significantly ($p < .05$) higher than both of these groups.

Discussion

In this study we have used data gathered over a 25-year longitudinal study to examine linkages between mental health and exposure to abortion in adolescence and young adulthood. This study produced evidence consistent with the view that in young women, exposure to abortion was associated with a detectable increase in risks of concurrent and subsequent mental health problems. This conclusion is based on the following lines of evidence:

1. On the basis of concurrently assessed data (Table 1), young women reporting abortions had elevated rates of mental health problems when compared with those becoming pregnant without abortion and those not becoming pregnant.
2. These associations persisted after extensive control for a range of confounding factors, suggesting a possible causal linkage between exposure to abortion and mental health problems (Table 3).
3. To examine the direction of causation, a prospective analysis was conducted in which exposure to abortion by age 21 was used to predict subsequent mental health problems (Table 4). That analysis showed that even following control for confounding factors, exposure to abortion prior to age 21 was associated with increased risks of later mental health problems.

In general, these results are consistent with the view that exposure to abortion was associated with increased risks of mental health problems independently of confounding factors. The study estimates suggested that those who were not pregnant or those becoming pregnant but not having an abortion had overall rates of mental disorders that were between 58% and 67% of those becoming pregnant and having an abortion.

In comparison to previous research in this area, the present study has a number of clear strengths which include: a) the use of a longitudinal design in which pregnancy and mental health were assessed throughout adolescence into young adulthood; b) assessment of mental disorders using standardised diagnostic criteria; c) the availability of a range of concurrent and prospectively assessed covariate factors; d) adjusted contrasts between those having abortion and equivalent groups of those becoming pregnant and those not pregnant. To our knowledge, no previous study of this topic has combined all of these features to examine the linkages between abortion and mental health. However, whilst the present study has a number of strengths, there are some limitations that should not be overlooked. In particular, potential threats to study validity include:

1. *Omitted covariates*: Although the study findings show that young women exposed to abortion are at increased risks of mental health problems after adjustment for a range of confounding factors, the possibility that the association reflects sources of confounding that were not controlled should not be overlooked.
2. *Errors in the ascertainment of abortion*: Comparison of the rates of abortion reported by this cohort with a population estimate based on official record data suggested moderate accuracy in the reporting of abortion, with the reported rates for the cohort being 81% of the estimated population rate for women aged 15–25. These estimates suggested some underreporting of abortion in the cohort (see Methods). In turn, this raises the possibility that errors in the reporting of abortion may have distorted the results (Reardon & Cougle, 2002).
3. *The role of contextual factors*: An important threat to study validity comes from the lack of information on contextual factors associated with the decision to seek an abortion. It is clear that the decision to seek (or not seek) an abortion following pregnancy is likely to involve a complex process relating to: a) the extent to which the pregnancy is seen as wanted; b) the extent of family and partner support for seeking or not seeking an abortion; c) the woman's experiences in seeking and obtaining an abortion. It is possible, therefore, that the apparent associations between abortion and mental health found in this study may not reflect the traumatic effects of abortion *per se* but rather other factors which are associated with the process of seeking and obtaining an abortion. For example, it could be proposed that our results reflect the effects of unwanted pregnancy on mental health rather than the effects of abortion *per se* on mental health. The data available in this study was not sufficient to explore these options. However, it is our intention to study this cohort at age 30 and at that time it may be possible to gather further contextual information on the factors associated with decisions regarding abortion.

Notwithstanding the reservations and limitations above, the present research raises the possibility that for some young women, exposure to abortion is a traumatic life event which increases longer-term susceptibility to common mental disorders. These findings are inconsistent with the current consensus on the psychological effects of abortion. In particular, in its 2005 statement on abortion, the American

Psychological Association concluded that 'well-designed studies of psychological responses following abortion have consistently shown that risk of psychological harm is low ... the percentage of women who experience clinically relevant distress is small and appears to be no greater than in general samples of women of reproductive age' (American Psychological Association, 2005). This relatively strong conclusion about the absence of harm from abortion was based on a relatively small number of studies which had one or more of the following limitations: a) absence of comprehensive assessment of mental disorders; b) lack of comparison groups; and c) limited statistical controls. Furthermore, the statement appears to disregard the findings of a number of studies that had claimed to show negative effects for abortion (Cougle et al., 2003; Gissler et al., 1996; Reardon & Cougle, 2002).

On the basis of the current study, it is our view that the issue of whether or not abortion has harmful effects on mental health remains to be fully resolved. Certainly in this study, those young women who had abortions appeared to be at moderately increased risk of both concurrent and subsequent mental health problems when compared with equivalent groups of pregnant or non-pregnant peers. While it is possible to dismiss these findings as reflecting shortcomings in the assessment of exposure to abortion or control of confounders (see above), it is difficult to disregard the real possibility that abortion amongst young women is associated with increased risks of mental health problems. There is a clear need for further well-controlled studies to examine this issue before strong conclusions can be drawn about the extent to which exposure to abortion has harmful effects on the mental health of young women.

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TESTIMONY OF PETER N. KIRSANOW BEFORE THE SENATE JUDICIARY COMMITTEE ON THE NOMINATION OF JUDGE SAMUEL A. ALITO JR. TO THE UNITED STATES SUPREME COURT JANUARY 12, 2006

Mr. Chairman, members of the Committee, I am Peter N. Kirsanow, a member of the U.S. Commission on Civil Rights and a partner in the labor and employment practice group of the Cleveland, Ohio law firm of Benesch Friedlander Coplan & Aronoff. I am appearing in my personal capacity.

The Commission on Civil Rights was established by the Civil Rights Act of 1957 to, among other things, study and collect information relating to discrimination or denial of equal protection laws or the constitution because of color, race, religion, sex, age, disability or national origin; appraise the laws and policies of the federal government relating to discrimination or denials of equal protection and serve as a national clearinghouse of information relating to discrimination or denials of equal protection on the basis of protected classifications.

In furtherance of the clearinghouse function and with the help of my assistant I have examined the civil rights-related opinions of Judge Samuel Alito as well as his record as an advocate in the context of prevailing civil rights jurisprudence. This was done by reviewing the opinions in all of the civil rights-related cases in which Judge Alito participated while on the Third Circuit Court of Appeals and by examining every civil rights-related case in which Judge Alito was involved as an advocate before the Supreme Court.

Our examination reveals that Judge Alito's approach to civil rights issues is consistent with generally accepted textual interpretation of the relevant constitutional and statutory provisions as well as governing precedent. His opinions evince appreciable degrees of judicial precision, discipline, modesty and restraint and are consistent with a judicial philosophy that insists that judges properly confine themselves to the adjudication of the case before them and not legislate broadly or administer the law generally in deciding a case. In short Judge Alito's

record on civil rights-related issues is exemplary: precise, legally sound, intellectually honest and with an understanding and appreciation for the historical bases for civil rights laws.

Our examination also underscores that some aspects of Judge Alito's record on civil rights have been mischaracterized and many of the criticisms are misplaced. Three brief examples:

First, some have claimed that Judge Alito has a regressive view of affirmative action, one to the extreme right of Justice Sandra Day O'Connor. Perhaps the most frequently cited criticism of Judge Alito's analysis of affirmative action pertains to the three affirmative-action cases in which Judge Alito participated (on brief) during his tenure in the Reagan Administration's Solicitor-General's Office — *Wygant v. Jackson Board of Education*, *Sheet Metal Workers v. EEOC*, and *Firefighters v. Cleveland* (all involving expansive racial preferences as remedies for discrimination). Notwithstanding the fact that positions espoused as an advocate for a particular Administration are poor proxies for interpretive doctrine, there is scant evidence that as a Supreme Court Justice, Judge Alito would restrict affirmative action remedies currently available under *United Steelworkers v. Weber*, *Johnson v. Transportation Agency* or *Grutter v. Bollinger* more than would Justice O'Connor. In all three cases, Judge Alito essentially argued that rigid quotas are unlawful and that preferences based solely on race or ethnicity must, at a minimum, be based on the beneficiary's status as an actual victim of discrimination. Even if Judge Alito's advocacy positions in these three cases were somehow probative of his interpretive doctrine as a judge, it is interesting to note that his positions were not substantially dissimilar from those of Justice O'Connor.

For example, in *Wygant v. Jackson Board of Education*, the issue was whether the equal-protection clause of the Fourteenth Amendment permits a public entity to grant certain public

employees preferential protection against layoff solely on the basis of race or national origin where there is neither a finding nor evidence that the employees have been discriminated against by such entity. Judge Alito argued that such a layoff provision violates the equal-protection clause, failing to withstand strict scrutiny. Justice O'Connor agreed.

In *Sheet Metal Workers v. EEOC*, the issue was whether, in crafting remedies under Title VII, a court may award preferences based solely on race or ethnicity, rather than on the beneficiary's status as an actual victim of discrimination, and whether such remedies are unconstitutional. The case also contained myriad important sub-issues. In *Sheet Metal Workers*, Justice O'Connor did not hold in favor of Judge Alito's general advocacy interest, but was favorably disposed to Judge Alito's position regarding the issue of rigid, over-inclusive racial preferences as a remedy for non-victims under Title VII.

In *Firefighters v. The City of Cleveland*, the issue was whether a judgment entered with the consent of a defendant public employer in an action brought under Title VII may award racial preferences and promotions to persons who are not the actual victims of such employer's discriminatory conduct. Judge Alito argued in the negative. In that case, Justice O'Connor disagreed with Judge Alito's advocacy interest.

Again, even if Judge Alito's advocacy positions are predictive of his judicial decisions, the record described above fails to demonstrate extreme doctrinal differences with Justice O'Connor on affirmative action. Rejection of quotas and expansive racial preferences does not evince hostility toward affirmative action, let alone civil rights in general.

Judge Alito's measured and restrained approach to racial preferences and affirmative action is exhibited in his record on the Third Circuit. In Judge Alito's only affirmative-action case involving race, *Taxman v. Board of Education of the Township of Piscataway*, he joined

eight Third Circuit judges in holding that a school board violated Title VII when it used its affirmative action plan to grant a non-remedial workforce preference by laying off a teacher in order to promote racial diversity. (It should be noted that the Clinton Justice Department concurred with the majority position.)

Judge Alito's approach to affirmative action, as well as other civil-rights issues, is methodical and precise, producing closely circumscribed opinions respectful of the interests of civil-rights claimants without compromising precedent or the rule of law. Judge Alito opposed unlawful racial quotas or racial set-asides untethered to a showing of discrimination. He declined to promote personal policy preferences.

Second, it has been asserted that Judge Alito erects extraordinarily high standards for Title VII plaintiffs. Some critics have cited Judge Alito's dissent in *Bray v. Marriott* as evidence of his tendency to impose "almost impossible evidentiary burdens" upon plaintiffs in Title VII cases. But a review of *Bray* actually shows that Judge Alito's dissent steadfastly adheres to precedent and carefully applies the law to the facts, while the majority opinion departed from the well-established burden of proof required of a Title VII plaintiff.

The Title VII burden-of-proof framework set forth in *McDonnell Douglas v. Green* and its progeny is well-established:

A. To establish a *prima facie* case of unlawful discrimination, a plaintiff must establish that he or she

   1. is a member of a protected class;

   2. applied for and was qualified for the job opening in question;

   3. was rejected; and

4. after rejection, the job remained open and the employer continued to seek applicants to fill it.

B. Once a plaintiff establishes a *prime facie* case, the burden of *production* shifts to defendant to articulate a legitimate, non-discriminatory reason for plaintiff's rejection. It is important to note that the burden of production is not a burden of *proof*, i.e., defendant is not required to prove that its articulated reason was, in fact, the basis for plaintiff's rejection. Rather, the defendant is required to produce evidence that there was a nondiscriminatory reason for plaintiff's rejection. The burden of proving discrimination always remains with plaintiff.

C. If defendant proffers a legitimate, nondiscriminatory reason for plaintiff's rejection, then plaintiff must present evidence that either

1. casts sufficient doubt on defendant's proffered reason(s) so that a fact finder could reasonably conclude that each reason was a fabrication (i.e., plaintiff must produce evidence from which the fact finder could reasonably *disbelieve* the employer's articulated reason for rejection. It is not enough for plaintiff merely to show that an employer's reason was wrong, unwise or mistaken) [Pretext Prong One] or

2. allows the fact finder to infer that discrimination was more likely than not a motivating or determining reason for the rejection [Pretext Prong Two].

In *Bray*, plaintiff, a black female employee, brought a complaint against Marriott alleging Marriott discriminated against her in favor of a white female employee when it failed to promote Bray to the position of Director of Services.

Marriott's proffered nondiscriminatory reason for selecting the white female over Bray was that the former was better qualified: The white applicant had (1) a higher three-year performance rating (1, 2, and 1 versus 2, 2, and 2); (2) a higher job-grade level (45 versus 43); (3) a degree in restaurant and hotel management versus English and history; and (4) was twice named Manager of the Year, which Bray never was.

Bray attempted to cast doubt on Marriott's proffered reason by introducing evidence that (1) the white applicant's most recent performance rating was based on a semi-annual review rather than an annual one, (2) Marriott never told Bray that she was rejected before interviewing the white applicant, contrary to Marriott's internal guidelines, and (3) there were inaccuracies in a Marriott general manager's deposition testimony regarding the evaluation and selection process.

The district court was unpersuaded that Bray's evidence created a genuine issue of material fact and granted Marriott's motion for summary judgment. At the district-court level, Bray had maintained that she had satisfied both pretext prongs, but on appeal she only challenged the district court's Prong One determination. Bray contended that she had shown that she exceeded the white employee in every objective measure and that there was no reasonable explanation for her not getting the position other than race discrimination.

A majority of the Third Circuit three-judge panel agreed that Bray had presented enough evidence of inaccuracies and discrepancies in Marriott's proffered nondiscriminatory reason to allow a reasonable fact finder to infer that such reason was a pretext for discrimination.

Specifically, the majority cited Marriott's failure to comply with its internal guidelines by failing to notify plaintiff of her rejection before interviewing the white applicant; the general manager's inaccurate deposition testimony that he thought Bray was not capable of doing the job; the general manager's inaccurate deposition testimony that the white applicant was unanimously chosen by the three-member selection committee; and the fact that the white applicant's last evaluation was a semi-annual one as opposed to an annual one. The Third Circuit reversed.

Judge Alito dissented, noting that the Prong One standard requiring plaintiff to provide evidence that may cause a reasonable fact finder to *disbelieve* defendant's proffered reason is a higher standard than one that requires only that the fact finder *disagree* with the reason. Judge Alito noted that the purported inconsistencies and discrepancies in Marriott's proffered reason did not rise to the Prong One standard and, moreover, were qualified by other evidence: *viz* (1) Marriott's failure to comply with its internal guidelines regarding notifying plaintiff of her rejection before interviewing the white applicant was a de-minimus administrative error; (2) the general manager's inaccurate statement that Bray was not capable of doing the job was clarified by his very next deposition statement wherein he stated that he was looking for the "best qualified" candidate; (3) the general manager's inaccurate testimony that the white applicant was selected unanimously was, again, de-minimus (two members agreed with the selection, one abstained); and (4) the issue of the semi-annual review, even if somehow probative of discriminatory animus (presumably by suggesting that it was an effort to inflate the white applicant's record), was not raised by Bray on appeal and, accordingly, was waived.

While the majority's burden of proof analysis was not necessarily a radical departure from the standard in a pretext case, Judge Alito "respectfully suggest(ed) that what the majority here has done is to weaken the burden on plaintiff at the pretext stage of the *McDonnell Douglas*

framework to one where all the plaintiff needs to do is point to minor inconsistencies or discrepancies in terms of the employer's failure to follow its own internal procedures in order to get to trial."

Judge Alito's suggestion is a bit modest. In truth, the majority's approach effectively transforms defendant's burden of production into a burden of *proof*, thereby derogating plaintiff's burden of proof and incorporating, however subtlely, a presumption of discrimination into the *McDonnell Douglas* framework.

It is submitted that this is a prime example of Judge Alito's judicial approach and temperament that are the best protection against erosions to civil rights liberties: a precise, faithful and disciplined interpretation of the law.

A third contention unsupported by our examination of Judge Alito is that the civil rights votes and opinions are regressive or out of the mainstream. A review of the hundreds of cases upon which Judge Alito has sat in his 15 years on the Third Circuit produces 121 panels that decided cases that may be termed, in the traditional sense, "civil rights cases." That is, the issues in the cases involved matters pertaining to constitutional provisions such as the Fifth or Fourteenth Amendments or statutes such as the 1964 Civil Rights Act, the 1965 Voting Rights Act, or the Americans with Disabilities Act, etc.

If Judge Alito is a hard-right extremist and outside the judicial mainstream, then by definition one would expect that he would rarely side with his fellow judges on the Third Circuit Court of Appeals. In fact, one would expect that he would almost never agree with those judges appointed by Democrat presidents. Further, one would expect that Judge Alito would vote with his Republican colleagues against his Democrat ones by overwhelming margins.

But a review of Judge Alito's extensive civil rights record on the Third Circuit shows that if he is a far right, closed-minded ideologue, then so are all the other judges on the court, whether appointed by Democrats or Republicans.

Obviously that is not the case.

Judge Alito's co-panelists on civil rights cases agreed with his votes and written opinions 94% of the time, producing unanimous results 90% of the time. Moreover, Democrat-appointed judges actually agreed with Judge Alito's position at a slightly higher rates (96%) than Republican-appointed judges (92%).

Consider Judge Alito's record when sitting on panels with two Democrat-appointed judges (RDD Panels); then compare such record to the panels where Judge Alito sat with one Republican-appointed judge and one Democrat-appointed judge (RRD Panels); and finally compare such record to panels with two other Republican-appointed judges (RRR Panels):

RDD Panels. Judge Alito sat with two Democrat-appointed judges in 20 cases, and all 20 were unanimous. The results favored the civil rights plaintiff six times (30%) and were adverse 14 times (70%). Judge Alito wrote the majority opinion in five of the cases. Where Judge Alito wrote the opinion, the results favored the civil rights plaintiff 40% of the time and were adverse 60% of the time.

RRD Panels. Judge Alito sat with one Republican and one Democrat-appointed judge in 60 cases, where his Democrat-appointed colleague agreed with him 56 times (93%) and disagreed only four times (7%) – the same rate as his Republican-appointed colleagues. 54 of the 60 cases were unanimous (90%). The results in slightly over half of the cases were adverse to the interests of the civil rights claimant. Judge Alito wrote the opinion for a unanimous court in 14 cases, for a split court in three, concurred in two and dissented in two.

RRR Panels. Judge Alito sat with two other Republican-appointed colleagues in 41 cases with a 90% agreement rate. All but six were unanimous (85%). Judge Alito wrote 11 unanimous opinions, one for a split court, one concurrence and one dissent.

Interestingly, panels in which Alito participated with two other Democrat-appointed judges were more likely to render decisions adverse to civil rights plaintiffs than panels in which Judge Alito was joined by two other Republicans. Moreover, the RDD Panels were more likely to be unanimous (100%) than the RRR Panels (85%) – hardly evidence of a partisan ideologue.

Obviously, a thorough assessment of Judge Alito's judicial approach requires an analysis of the actual facts and applicable law of each case. Some disagreements may occur in cutting-edge cases. Nonetheless, it cannot be credibly claimed that Judge Alito is a judicial extremist or hostile to civil rights without leveling the same charges against every other judge on the court.

Judge Alito has issued at least forty-seven written civil rights opinions: thirty-five majority opinions, five concurring opinions, and seven dissenting opinions. Of Judge Alito's decisions on 3-Judge panels, he sat with forty-six federal judges from the Third Circuit, five other Circuit Courts of Appeals (5th, 8th, 9th, 11th & Fed. Cir) and nine lower federal courts. Judge Alito's co-panelists represent the appointments of 5 Republican and 3 Democratic Presidents. In the identified civil rights cases, they agreed with his votes and written opinions 94% of the time, producing a unanimous result 90% of the time.

3 Judge Panels: Agreement Rate with Judge Alito's Civil Rights Opinions, By Nominating-President				
Nominating President	**No. of Judges**	**Cases**	**Agree**	**3-0 Panel**
Johnson	3 Judges	9	**9 (100%)**	9 (100%)
Ford	1 Judge	6	**6 (100%)**	5 (83%)
Bush II	5 Judges	17	**17 (100%)**	17 (100%)

3 Judge Panels: Agreement Rate with Judge Alito's Civil Rights Opinions, By Nominating-President				
Nominating President	**No. of Judges**	**Cases**	**Agree**	**3-0 Panel**
Carter	7 Judges	24	**23 (96%)**	23 (96%)
Clinton	7 Judges	66	**63 (95%)**	61 (92%)
Reagan	13 Judges	78	**74 (94%)**	71 (91%)
Bush I	3 Judges	13	**12 (92%)**	12 (92%)
Nixon	7 Judges	29	**22.5 (77%)**	21 (72%)
Total	**46 Judges**	**242**	**227 (94%)**	**219 (90%)**
D-Total	**17 Judges**	**99**	**95 (96%)**	**93 (94%)**
R-Total	**29 Judges**	**143**	**131.5 (92%)**	**126 (88%)**

3-Judge Panels: Rate of Agreement with Judge Alito's Position in Civil Rights Cases & Rate of Panel Unanimity (*sorted by individual judge sitting with Alito on at least six occasions)							
Judge	***Party of Nominating President***	**No. of Cases**	**Agree**	**Dis-agree**	**Member of a Unanimous Panel**	**Agree %**	**Panel Unanimity %**
Fuentes, Julio M.	*D (Clinton)*	**18**	18		18	**100%**	100%
Ambro, Thomas L.	*D (Clinton)*	**11**	11		11	**100%**	100%
Greenberg, Morton Ira	*R (Reagan)*	**11**	11		10	**100%**	100%
Smith, D[avid] Brooks	*R (Bush II)*	**8**	8		8	**100%**	100%
Oberdorfer, Louis Falk	*D (Carter)*	**6**	6		6	**100%**	100%
Barry, Maryanne Trump	*D (Clinton)*	**6**	6		5	**100%**	83%
Schwarzer, William	*R (Ford)*	**6**	6		5	**100%**	83%
Cowen, Robert E.	*R (Reagan)*	**6**	6		5	**100%**	83%
Scirica, Anthony Joseph	*R (Reagan)*	**20**	19	1	19	**95%**	95%
Becker, Edward Roy	*R (Reagan)*	**16**	15	1	15	**94%**	94%
McKee, Theodore Alexander	*D (Clinton)*	**15**	14	1	14	**93%**	93%
Nygaard, Richard Lowell	*R (Reagan)*	**13**	12	1	11	**92%**	84%
Sloviter, Dolores Korman	*D (Carter)*	**10**	9	1	9	**90%**	90%
Rosenn, Max	*R (Nixon)*	**9**	8	1	8	**89%**	89%

3-Judge Panels: Rate of Agreement with Judge Alito's Position in Civil Rights Cases & Rate of Panel Unanimity (*sorted by individual judge sitting with Alito on at least six occasions)							
Judge	***Party of Nominating President***	**No. of Cases**	**Agree**	**Dis-agree**	**Member of a Unanimous Panel**	**Agree %**	**Panel Unanimity %**
Rendell, Marjorie O.	*D (Clinton)*	**12**	10	2	9	**83%**	75%
Roth, Jane Richards	*R (Bush I)*	**6**	5	1	5	**83%**	83%
Stapleton, Walter King	*R (Nixon)*	**9**	5.5	3.5	5	**61%**	55%
Totals	***7-Ds; 10-Rs***	***182***	***169.5***	***12.5***	***163***	***93%***	***90%***

Again, these statistics are merely descriptive and do not purport to be predictive of whether Democratic-appointed judges share Judge Alito's jurisprudence or approach in civil rights cases. However, the high agreement rate suggests that Judge Alito's judicial approach is not out of the mainstream of contemporary legal thought.

Judge Alito's 25-year record on matters pertaining to civil rights demonstrates an unwavering commitment to equal protection under the law and a precise and comprehensive understanding of our civil rights laws that would make him an outstanding addition to the Supreme Court.

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

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.



December 21, 2005

Honorable Arlen Specter, Chairman

Honorable Orrin G. Hatch
Honorable Charles E. Grassley
Honorable Jon Kyl
Honorable Mike DeWine
Honorable Jeff Sessions
Honorable Lindsey O. Graham
Honorable John Cornyn
Honorable Sam Brownback
Honorable Tom Coburn

Honorable Patrick Leahy
Honorable Edward M. Kennedy
Honorable Joseph R. Biden, Jr.
Honorable Herbert Kohl
Honorable Diane Feinstein
Honorable Russell D. Feingold
Honorable Charles E. Schumer
Honorable Richard J. Durbin

Re: **Lambda Legal's Opposition to the Nomination of Samuel Alito Jr. to the U.S. Supreme Court**

Dear Members of the United States Senate Committee on the Judiciary:

As a legal organization advocating for LGBT people and people with HIV, we know how important it is that every member of the judiciary be committed to the Constitution and its core principles of liberty, equality and justice for all. In examining Samuel Alito's nomination for a lifetime appointment to the Supreme Court, we bring to bear our more than 30 years of experience advocating in favor of these principles that are the bedrock of our legal system.

Unfortunately, what our analysis reveals is that Judge Alito has a political agenda different from that required of members of the judiciary. It is based on his personal political ideology and stands apart from any principle that can reasonably be located in the Constitution. We do not believe that Judge Alito has the necessary commitment to liberty and equality for *all* Americans. Judge Alito puts particular political ends above a fair reading of the Constitution, Bill of Rights and the laws passed by Congress. Put differently, his political agenda leads him to write judicial decisions to make the law conform to his politics. He then applies legal craftsmanship and precedent to justify the law he is making.

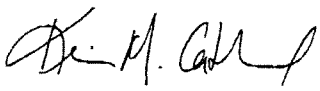
The job of a Supreme Court Justice is unique within the judiciary. Among other things, the constraints created by legal precedent are far less binding at the Supreme Court.

Putting politics ahead of the Constitution and laws of this country is dangerous at all levels of our judicial system. This practice is dangerous because it jeopardizes the system of checks and balances that the judiciary is meant to safeguard, making the concerns of groups of people lacking political power especially vulnerable.

For these reasons, Lambda Legal is compelled to oppose Samuel Alito's nomination.

With Chief Justice Roberts, Lambda Legal waited until after the confirmation hearings to decide our position because we did not feel that we had enough information about him. But Judge Alito is a different matter altogether. In this case, he has an extensive track record of court decisions and other materials that lend insight to his philosophy. Please read our analysis of Judge Alito's record, below.

Respectfully Submitted,



Kevin M. Cathcart
Lambda Legal
Executive Director

Attachment: Lambda Legal's Analysis of Samuel Alito.

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The Honorable Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

January 5, 2006

Dear Senators Specter and Leahy,

As law professors from across the United States, we write to express our opposition to the confirmation of Judge Samuel Alito to the United States Supreme Court.

Nominated by President Bush to replace moderately conservative Justice Sandra Day O'Connor, Judge Alito has a 15-year record of trying to push the law sharply to the right. According to the *National Law Journal*, Judge Alito "is described by lawyers as exceptionally bright, but much more of an ideologue than most of his colleagues."[1] Analyses show that in close cases – the kinds of cases the Supreme Court reviews – Judge Alito consistently takes positions that devalue individual rights and protections. And despite the president's pledge to nominate someone who embraces the principle of judicial restraint, Judge Alito often reaches his conclusions by overturning or weakening federal statutes, diminishing constitutional safeguards, and hollowing out precedent.

Invalidating Federal Statutory Protections

Judge Alito has sought to curb Congress' authority to tackle issues of national importance, voting to invalidate the federal prohibition on machine gun possession and part of the federal Family and Medical Leave Act. Republicans and Democrats alike have criticized both the Supreme Court and lower federal courts for voting to strike down federal protections without appropriately deferring to Congress as a co-equal branch of government. While several decisions in the past two years have slowed the trend, Judge Alito's record suggests that he would accelerate it once again.[2] There are several significant federalism cases already before the Court this term.

Machine Gun Ban. In *United States v. Rybar*,[3] Judge Alito argued in dissent that the federal ban on machine gun possession – which had been on the books in some form since 1934 – is unconstitutional Commerce Clause legislation. His colleagues accused him of disrespectfully requiring the "coordinate branches of government" to "play 'Show and Tell' with the federal courts at the peril of invalidation of a Congressional statute."[4] All of the other appeals courts that had considered the law in the wake of the Supreme Court's 1995 ruling in *United States v. Lopez*[5] agreed with Judge Alito's colleagues. Every court to have looked at the law since then has done the same, except one, and the Supreme Court

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[1] Joseph Slobodzian, *Third Circuit – Microcosm of Change*, NAT'L L. J., Dec. 7, 1992, at 1.
[2] As Jeffrey Rosen has noted, between 1995 and 2003 the Rehnquist court struck down thirty-three federal laws on constitutional grounds, doing so at a higher annual rate than any court in American history. Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, Apr. 17, 2005.
[3] 103 F.3d 273 (3d Cir. 1996), *cert. denied* 522 U.S. 807 (1997).
[4] *Id.* at 282.
[5] 514 U.S. 549 (1995).

summarily vacated that decision this year after issuing its decision in *Gonzales v. Raich*,[6] which rejected Judge Alito's cramped view of Congress' law-making authority.

Family and Medical Leave Act. In *Chittister v. Department of Community and Economic Development*,[7] Judge Alito held that Congress does not have the authority to give the country's nearly five million state employees the right to sue their employers for damages for violating the Family and Medical Leave Act's guarantee of personal unpaid sick leave. Facing a similar challenge in *Nevada Department of Human Resources v. Hibbs*,[8] the Supreme Court later found that a state employee can enforce his or her rights under the part of the law requiring employers to provide for family leave.

Weakening Federal Statutory Protections

Judge Alito has voted, often in dissent, to curb judicial enforcement of vital federal statutes, including the following.

Title VII of the Civil Rights Act of 1964. In several divided decisions, Judge Alito has also undermined Congressional intent by voting in dissent to make it harder to prove claims of job discrimination. In *Bray v. Marriott Hotels*,[9] Judge Alito unsuccessfully tried to keep a worker's claim of race discrimination from being heard by the jury. His colleagues in the majority asserted that anti-discrimination statutes "would be eviscerated if our analysis were to halt where [Alito's] dissent suggests."[10] In *Sheridan v. E.I. Dupont de Nemours & Co.*,[11] he was outvoted 10-1 by the *en banc* Third Circuit when he tried to get around precedent to throw out a jury verdict in favor of a worker claiming sex discrimination.

Clean Water Act. In *Public Interest Research Group, Inc. v. Magnesium Elektron, Inc.*,[12] Judge Alito voted to make it harder than Congress intended for citizens to establish standing to sue for toxic emissions that violate the Clean Water Act; in fact, he agreed that Congress lacked the authority to authorize certain citizen suits. Several years later, by a 7-2 vote in *Friends of the Earth v. Laidlaw*,[13] with only Justices Scalia and Thomas dissenting, the Supreme Court effectively rejected Judge Alito's position.

Sherman Antitrust Act. In *LePage's, Inc. v. 3M Corp.*,[14] Judge Alito voted in dissent to strike down a $68 million jury verdict against 3M Corporation for violating the Sherman Antitrust Act by monopolizing scotch tape sales at the expense of a smaller competitor with less diverse product lines.

Rehabilitation Act. In *Nathanson v. Medical College of Pennsylvania*,[15] Judge Alito tried to raise the bar for proving disability discrimination. He dissented from a ruling finding that a disabled medical student had produced sufficient evidence to take to a jury her claim that she had to drop out because the school failed to provide her a seating arrangement that accommodated her disability. The majority

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[6] 125 S. Ct. 2195 (2005).
[7] 226 F.3d 223 (3d Cir. 2000).
[8] 538 U.S. 721 (2003).
[9] 110 F.3d 986 (3d Cir. 1997).
[10] *Id.* at 993.
[11] 100 F. 3d 1061 (3d Cir. 1996) (*en banc*).
[12] 123 F.3d 111 (3d Cir. 1997).
[13] 528 U.S. 167 (2000).
[14] 324 F.3d 141 (3d Cir. 2003) (*en banc*).
[15] 926 F.2d 1368 (3d Cir. 1991).

accused Judge Alito of raising the student's burden of proof to the point where "few if any Rehabilitation Act cases could survive" a defendant's motion to have a case dismissed before trial.[16]

Immigrants' Statutory Rights. In *Dia v. Ashcroft*, a majority of the full court accepted a Guinean citizen's asylum claims and said that Judge Alito's dissent "not only guts the statutory standard, but ignores our precedent."[17] In *Lee v. Ashcroft*, the court majority agreed with a Korean immigrant's claim that a conviction for filing a false tax return did not make him deportable and said that Judge Alito's dissent engaged in "speculation" about what Congress intended, in violation of the "well-recognized rules of statutory construction."[18] In *Sandoval v. Reno*,[19] Judge Alito wrote in dissent that certain aliens in custody could not seek waivers of their deportation orders in court; the Supreme Court rejected his view in *INS v. St. Cyr*.[20]

Diminishing Constitutional Protections and Hollowing Out Precedent

Freedom from Illegal Search and Seizure. In a series of cases, Judge Alito pushed to narrow the Fourth Amendment's protection against unreasonable search and seizure.[21] In *Doe v. Groody*,[22] for instance, he wrote in dissent that police officers did not violate the Constitution when they strip-searched a mother and her 10 year-old daughter – who were not criminal suspects – while executing a warrant that only authorized the search of the target of their investigation. Homeland Security Secretary and long-time federal prosecutor Michael Chertoff, then Judge Alito's colleague on the Third Circuit, wrote the majority opinion, asserting that if the court were to accept Judge Alito's theory that the judge who issued the warrant intended to authorize everything the police sought, even though the warrant he signed did not, it would "transform the judicial officer into little more than the cliché 'rubber stamp.'"[23]

Women's Reproductive Freedoms. In *Planned Parenthood v. Casey*,[24] Judge Alito wrote in dissent that he would uphold a Pennsylvania law requiring a woman in certain circumstances to notify her husband before obtaining an abortion. The Supreme Court, including Justice O'Connor, rejected that view. It found that the restriction placed an undue burden on women's reproductive freedom, saying that "women do not lose their constitutionally protected liberty when they marry."[25] Commentators from across the political spectrum believe that Judge Alito's dissent in *Casey*, together with his terse, seemingly grudging concurrences in other abortion cases, demonstrate that he disagrees with *Roe v. Wade*[26] and would, at the very least, uphold significant restrictions on the right to choose.[27]

Right to Effective Counsel. In *Rompilla v. Horn*,[28] Judge Alito evaded recently decided Supreme Court precedent to hold that a death row inmate's defense attorneys were not constitutionally ineffective, even though they failed to investigate key files containing important evidence about their client's

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[16] *Id.* at 1387.
[17] *Dia v. Ashcroft*, 353 F.3d 228, 251 n.22 (3d Cir. 2003) (*en banc*).
[18] *Lee v. Ashcroft*, 368 F.3d 218, n.11 (3d Cir. 2004)
[19] 166 F.3d 225 (3d Cir. 1999).
[20] 533 U.S. 289 (2001).
[21] Robert Gordon, *If You're a Liberal, You'd Prefer Scalia*, SLATE, Nov. 1, 2005 *at* http://www.slate.com/id/2129107/.
[22] 361 F.3d 232 (3d Cir.) *cert. denied*, 125 S. Ct. 111 (2004).
[23] *Id.* at 243.
[24] 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).
[25] *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992).
[26] 410 U.S. 113 (1973).
[27] *See* Charles Lane, *Nominee's Reasoning Points to a Likely Vote Against* Roe v. Wade, WASH. POST, Nov. 2, 2005.
[28] 355 F.3d 233 (2004), *rev'd*, 125 S. Ct. 2456 (2005).

troubled childhood which may have persuaded a jury not to impose the death sentence. The dissent called the lawyers' performance "shocking," and Judge Alito's holding "inexplicable."[29] By a 5-4 margin, with Justice O'Connor casting the deciding vote, the Supreme Court rejected Judge Alito's conclusion. Justice O'Connor noted in a concurrence that the evidence the lawyers failed to investigate went to the "very heart" of the prosecution's case for the death penalty.[30]

Right to Race-Neutral Jury Selection. In *Riley v. Taylor*,[31] Judge Alito dissented from the full Third Circuit's grant of *habeas corpus* to a death row inmate who claimed that the prosecution violated the holding of *Batson v. Kentucky*[32] by using racially-motivated peremptory strikes to remove African Americans from the jury. Judge Alito said that inferring racial discrimination from the striking of every single potential black juror from all of Delaware's four first-degree murder trials during the year Riley was tried was no more reasonable than inferring an electoral preference for lefties from the hypothetical fact that five of the last six presidents happened to be left-handed. The majority condemned the analogy, writing that it ignored the underlying constitutional right and "minimize[d] the history of discrimination against prospective black jurors and black defendants … ."[33]

Church-State Separation. In *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*,[34] Judge Alito argued in dissent that a public school board could get around an earlier Supreme Court ruling, which barred school-approved, clergy-led prayers at graduation ceremonies, by allowing students to approve student-led prayers at graduation ceremonies. Effectively disagreeing with Judge Alito in *Santa Fe Independent School District v. Doe*,[35] decided several years later, a six-justice Supreme Court majority, including Justice O'Connor, held that a public school board policy of allowing student-approved, student-led prayers at public high school football games was unconstitutional.

The Supreme Court is the guardian of our rights and freedoms. For decades to come, Judge Alito's one vote could work significant changes in the law affecting these rights and freedoms. This is particularly true given that Judge Alito is nominated to replace Justice O'Connor, who has provided the swing vote in many important 5-4 decisions. Based on his fifteen-year record on the bench, we believe that Judge Alito would reshape the law in ways that make our country less equal and less free.

We urge you to reject the nomination of Judge Alito nomination to the Supreme Court.

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[29] *Id.* at 273-274 (Sloviter, J., dissenting).
[30] *Rompilla v. Beard*, 125 S. Ct. 2456, 2470 (2005) (O'Connor, J., concurring).
[31] 277 F.3d 261 (3d Cir. 2001) (*en banc*).
[32] 476 U.S. 79 (1986).
[33] *Riley*, 277 F.3d at 292.
[34] 84 F.3d 1471 (3d Cir. 1996) (*en banc*).
[35] 530 U.S. 290 (2000).

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*Institutional affiliations are included for identification purposes only.

January 10, 2006

The Honorable Arlen Specter
Chairman,
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member,
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Leahy,

We are law professors who strongly support the confirmation of Judge Alito to the Supreme Court of the United States. None of us is a registered Republican. Based on our personal experience with Judge Alito, however, we strongly support his elevation to the Supreme Court.

Each of us has worked with or known Judge Alito at different points in his professional life. Some of us attended law school with him. Others worked with him during his tenure at the Solicitor General's Office and the Office of Legal Counsel. Some clerked for him. Others have encountered him either as advocates or in other capacities during his tenure on the U.S. Court of Appeals for the Third Circuit.

Each of us has been impressed by Judge Alito's intellectual acumen and legal abilities. We admire not only his intellect but also his personality, including his sense of humor. We did not encounter a doctrinaire, result-oriented ideologue but rather a lawyer and judge open to argument and reason. In our experience—a collective experience that covers the course of his professional career—Judge Alito is not a person who shapes his decisions toward the pursuit of a political agenda. In particular, as a judge, we have found that he decides each case on its merits. While he is conservative by political affiliation—and is cautious by temperament—we do not believe that political ideology has driven his legal decision-making as a judge.

Confirming Samuel A. Alito, Jr., to the Supreme Court would allow an individual to be seated at the Court whose prior experience, intellectual abilities, and legal background make him extremely well qualified to sit on the highest Court in the land. The list of qualifications, in our view, includes his judicial temperament, his intellectual independence, and his deep allegiance to the rule of law. Based on our combined personal experience we heartily recommend his confirmation.

Sincerely,

Frank O. Bowman, III
Floyd R. Gibson Missouri Endowed Professor of Law,
University of Missouri – Columbia School of Law

Ronald K. Chen
Associate Dean for Academic Affairs and Professor of Law, Rutgers School of Law -- Newark

Nora V. Demleitner
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Professor of Law, William and Mary Marshall-Wythe School of Law
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LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
UNDER LAW

TESTIMONY OF

MARJORIE PRESS LINDBLOM AND ROBERT E. HARRINGTON

CO-CHAIRS OF

THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

REGARDING ITS BOARD MEMBERS'

OPPOSITION TO THE NOMINATION OF

JUDGE SAMUEL A. ALITO

AS AN

ASSOCIATE JUSTICE OF

THE SUPREME COURT OF THE UNITED STATES

We, the undersigned, are the Co-Chairs of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). We appreciate the opportunity to present this written testimony for the record in connection with the Senate Judiciary Committee's consideration of the nomination of Judge Samuel A. Alito to be an Associate Justice of the United States Supreme Court. For more than forty years, the Lawyers' Committee has been devoted to the recognition and enforcement of civil rights in the United States. Throughout its history, the Board Members of the Lawyers' Committee have opposed only two other nominations to the Supreme Court.

On January 5, 2005, we submitted a Statement on behalf of 114 Board Members of the Lawyers' Committee and members of the boards of local Lawyers' Committees in opposition to the proposed appointment of Judge Alito. Our Statement urged the Judiciary Committee to inquire about, and Judge Alito to address fully, important civil rights issues raised by his record. Regrettably, what has been added to the public record about Judge Alito does not reduce or mitigate the concerns that motivate our opposition to his confirmation.

Affirmative Action and Diversity Measures

Our Statement noted that Judge Alito had made it plain that he personally believes "very strongly" in positions he had advanced while he was a government lawyer in the 1980's seeking to sharply curtail the scope and effectiveness of affirmative action measures. His relevant judicial opinions and votes did not show that he has changed his position. To the contrary, his record indicates that he is likely to interpret the Constitution and federal civil rights laws in a way that undermines the efforts of educational institutions and others to promote diversity in many different contexts. In view of his prior statements in this area, his hearing testimony did not alter our conclusion that as a Justice of the Supreme Court he is likely to take positions that might prevent the adoption and implementation of constructive affirmative action policies.

Senator Russell Feingold pressed Judge Alito to address the importance of racial and ethnic diversity to our country, but Judge Alito refused to acknowledge that it is a compelling national interest. Senator Feingold asked:

> We talk about affirmative action. In her opinion in *Grutter v. Bollinger*, Justice O'Connor recognized the, quote, "real-world significance and impact of affirmative action programs and policies." And she noted that American businesses need skills obtained through exposure to widely diverse people and

> cultures. A racially diverse officer corps is essential to the military's ability to fulfill its mission to provide national security. And diversity in colleges and university leads to diversity in civil society, which is, quote, "essential if the dream of one nation indivisible is to be realized," unquote.
>
> Justice O'Connor expressly gave great weight to the views of military leaders who said a highly qualified, racially diverse military is essential.
>
> How much weight would you give to that view?

Judge Alito responded that "I have personal experience about how valuable having people with diverse backgrounds and viewpoints can be. And the Supreme Court has expressed the view that diversity is a compelling interest, having a diverse student body is a compelling interest. Justice Powell voiced that back in the *Bakke* case, and it's been reiterated in a number of cases, and, most prominently, most recently in the *Grutter* case."

But when Senator Feingold pressed the question "Do you think that increasing diversity in the classroom is a compelling state interest?," Judge Alito's response was disappointing and unresponsive. He said that "*Grutter* is a precedent that directly addressed this issue, and *Gratz*, in the context of education. And it's the Supreme Court's recent word on this issue." We acknowledge that this statement does not rule out the possibility that he will vote to uphold affirmative action programs similar to the law school's program reviewed in *Grutter*. However, we believe that it is significant that he carefully refused to agree that the goal of realizing and advancing diversity in education and other contexts is a compelling national interest. This reluctance to give any support to the majority's approach in that case, particularly in light of his prior statements on this issue, leaves us convinced that his confirmation would threaten, not advance, the achievement of this vital national goal.

Protections Against Employment Discrimination

Our Statement expressed concern about Judge Alito's apparent hostility to plaintiffs in employment discrimination cases. Nothing presented during the hearings diminishes our concerns about Judge Alito's appellate decisions in employment discrimination cases. Senators Kyl and DeWine, seeking to defend the nomination, framed an issue as to whether Judge Alito's record demonstrates a pattern of ruling against the "little guy," and referred to a list of cases in which they said Judge Alito had ruled in favor of black plaintiffs in employment discrimination cases. But of the race cases listed, only one was an opinion written in dissent by Judge Alito, and

although it was in favor of the plaintiff, the decision was limited to – a procedural matter - the issue of the statute of limitations; it did not address the merits of the claim. Consequently, the list of cases cited by the Senators provides little if any support for the argument that Judge Alito has been sensitive to the claims of minorities in civil rights cases. To the contrary, a much more telling observation is one that we noted in our earlier Statement: in employment discrimination cases where a key legal issue was still unresolved by the Supreme Court, Judge Alito consistently took a position that made it more difficult for the plaintiff to prevail. The statute of limitations case appears to be the only exception to that pattern. Moreover, it remains true that Judge Alito has never written an opinion in favor of an African-American plaintiff in an employment discrimination case on the merits. Nothing presented during the hearings diminishes our concerns about Judge Alito's appellate decisions in employment discrimination cases.

Concerned Alumni of Princeton

Despite the many questions to Judge Alito about the Concerned Alumni of Princeton, he never responded to the most serious cause for concern: Why did he consider it appropriate and advantageous, in his 1985 job application, to emphasize his affiliation with an organization that identified itself with opposition to allowing minority and women applicants greater access to a prestigious university? His disclaimer of recollection about being a member does not provide an adequate response to this concern.

Additional Threats to Civil Rights

Civil rights issues received too little attention in the questioning to explore fully all of our concerns about Judge Alito. These concerns extend to other topics, such as his sense of deference to the actions of the executive branch. While this area of the law is not directly related to civil rights, as we noted in our original Statement, minorities can be adversely affected if the executive branch operates without sufficient checks and balances. For example, there is invariably a temptation for a society to be less sensitive to the rights of ethnic minorities if they are, simply because of their race or ethnic groups, suspected to be sympathetic with a foreign enemy. Our experience during World War II in the inexcusable treatment of Japanese-Americans is one terrible example. More recently, the executive branch has detained many individuals of Middle Eastern origin based on suspicion of links to terrorism. While we make no judgment on the appropriateness of the executive branch's actions in this area, our society's understandable concern about foreign enemies still has the potential to create similar risks. Too much deference

to the executive branch based on national security or similar concerns can have a particularly adverse affect on minorities. We fear that if Judge Alito is confirmed, his addition to the Supreme Court will come to be regarded as a turning point, diminishing our nation's dedication to overcoming its tragic legacy of racial injustice.

We urge Senators who value the protection of civil rights, and effective measures for the full participation of people of all racial and ethnic backgrounds, to vote against cloture and to vote in opposition to the nomination of Judge Alito.

Marjorie Press Lindblom
Co-Chair

Robert E. Harrington
Co-Chair

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January 5, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
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Jonathan L. Greenblatt
Patricia A. Brannan

Dear Chairman Specter and Ranking Member Leahy:

As the Co-Chairs of the Lawyers' Committee for Civil Rights Under Law, we submit the enclosed "Statement of Board Members Opposing the Nomination of Judge Samuel A. Alito as an Associate Justice of the Supreme Court of the United States" on behalf of the 114 individual members of the Board of Directors and Trustees who subscribe to the Statement.[1]

These members of our Board oppose Judge Alito because the record demonstrates that his views are in direct conflict with the core civil rights principles to which the Lawyers' Committee is dedicated, and that as a member of the Supreme Court, Judge Alito would cast votes and write opinions that would set back the cause of civil rights in our country and impede our progress toward the goal of equal justice for all. It is worth noting that in the Lawyers' Committee's 42-year history, its Directors and Trustees have opposed a Supreme Court nominee on only two previous occasions.

We also enclose a Final Report that analyzes Judge Alito's legal philosophy pertaining to civil rights and constitutional interpretation. This in-depth Report serves as the basis for the conclusions contained in the Statement and provides extensive analysis of Judge Alito's background. If Judge Alito's testimony during confirmation hearings or other evidence justifies a change in the conclusions we have drawn, we will so inform you.

We hope the Statement and Report are of assistance to you and your staff. For the reasons noted in them, we strongly urge the Judiciary Committee to vote not to confirm this nominee.

Respectfully,

Marjorie Press Lindblom
Co-Chair

Robert E. Harrington
Co-Chair

Enclosures

cc: All Members of the U.S. Senate

[1] This Statement also list the names of a few board members from our affiliate local Lawyers' Committee offices.

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COMPLIANCE/ENFORCEMENT COMMITTEE CHAIRPERSON
Karen K. Narasaki
National Asian Pacific American Legal Consortium

EXECUTIVE DIRECTOR
Wade J. Henderson
(*Deceased)

January 6, 2006

The Honorable Arlen Specter, Chairman
The Honorable Patrick J. Leahy, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we write to express our opposition to the confirmation of Judge Samuel A. Alito, Jr. as Associate Justice of the Supreme Court of the United States.[1] The Supreme Court's jurisprudence over the past 50 years has often served to protect the fundamental constitutional rights of all Americans. Judge Alito's decisions, however, often stand in direct contrast to that jurisprudence and embrace a much more limited and narrow view of constitutional rights and civil rights guarantees. A careful examination of Judge Alito's record reveals a history of troubling decisions in the areas of civil rights, civil liberties, and fundamental freedoms, decisions that undermine the power of the Constitution and of Congress to protect the civil and human rights of all Americans. LCCR believes that Judge Alito's record does not demonstrate an adequate commitment to protecting fundamental rights and, therefore, urges the Senate to reject his nomination.

The Supreme Court is the final arbiter of our laws, and its rulings can drastically impact the lives, liberties, and rights of all Americans. As such, LCCR believes that no individual should be confirmed to the Supreme Court unless he or she has clearly shown a strong commitment to the protection of civil rights and liberties, human rights, privacy, and religious freedom. The evidence reviewed to date shows that Judge Alito's record in these areas is highly troubling. His overall record reveals a jurist whose views are clearly to the right of where most Americans stand on a number of issues, including the reach of civil rights laws, the constitutional safeguards afforded those within our criminal justice system, and the power of Congress to protect Americans in the workplace and elsewhere.

In addition, LCCR is very troubled by the statements Judge Alito made in his 1985 application to be the Reagan administration's Deputy Assistant Attorney General in the Office of Legal Counsel. In particular, Judge Alito cited his disagreement with key rulings by the Supreme Court on legislative reapportionment, criminal justice and religious liberties, and added that he was "particularly proud" of his work to restrict affirmative action and limit remedies in racial discrimination cases. Although he now claims that these were just mere words on an application, his record as a jurist reveals

[1] *Some organizations in the Leadership Conference on Civil Rights have not opposed Judge Samuel Alito's confirmation to the Supreme Court.*

something different. The ideological views taken in the application and during his time in the Reagan administration are exemplified throughout his judicial decision making, where he routinely favors a reading of statutory and constitutional law that limits the rights of individuals and the power of Congress to protect those individuals. The following is a summary of the reasons for LCCR's opposition:

Judge Alito's "Disagreement" with Supreme Court Rulings on Reapportionment

In an essay attached to a 1985 application for a position within the Department of Justice, Judge Alito wrote that he had been motivated by his opposition to, among other things, the Warren Court's rulings on legislative reapportionment.[2] Because those rulings first articulated the fundamental civil rights principle of "one person, one vote," and paved the way for major strides in the effort to secure equal voting rights for all Americans, his stated opposition to them is extremely troubling. It is vital to understand the context in which these cases were decided.

Prior to the 1960s, as urban areas throughout the country experienced rapid population growth, many state and federal legislative districts were not redrawn, often leaving rural voters with far more representation *per capita* – and thus far more political power – than urban residents. In Florida, for example, just 12 percent of the population could elect a majority of the state senate. While unequal districts affected all voters, their impact was especially harsh in the South, where, along with discriminatory requirements like poll taxes and literacy tests, malapportionment virtually guaranteed the exclusion of racial minorities from the democratic process. Until 1962, the federal courts generally refused to intervene, dismissing such matters as "political questions."

The Supreme Court's ruling in *Baker v. Carr*[3] broke new ground when the Court declared, for the first time, that the federal courts had a role to play in making sure that all Americans have a constitutional right to equal representation. In *Wesberry v. Sanders*,[4] the Court examined Congressional districts in the State of Georgia, which had drawn its legislative map so that 823,680 people in the Atlanta are were all represented by one Congressman, while a rural Congressman represented only 272,154 people. The Court held that these disparities violated the Equal Protection Clause of the 14th Amendment, and ordered that the districts be redrawn more evenly. In *Reynolds v. Sims*,[5] the Court applied the principle of "one person, one vote" to state legislatures, which, in many cases, had even more drastic malapportionment than Congressional districts. For example, the *Reynolds* case itself challenged Alabama's legislative districts, in which one county with more than 600,000 people had only one senator, while another county with only 15,417 people also had its own senator.

In articulating the concept of "one person, one vote," the so-called "Reapportionment Revolution" cases equalized political power between urban and rural voters, and ensured that every citizen would have an equal voice in the legislative process. Along with the passage of the Voting Rights Act of 1965 and its subsequent amendments, the decisions also paved the way to far greater representation of racial and ethnic minorities, at both the state and federal levels of government. They also helped open the door for legal challenges to the "at-large" and "multi-

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[2] Department of Justice Application of Samuel A. Alito, Jr. for the Position of Deputy Assistant Attorney General, Nov. 15, 1985.
[3] 369 U.S. 186 (1962).
[4] 376 U.S. 1 (1964).
[5] 377 U.S. 533 (1964).

member" districts that many Southern states established in an effort to circumvent the *Baker* rulings and continue excluding African-American voters from the political process.

The Warren Court decisions that established the constitutional principle of "one person, one vote" were a catalyst for tremendous progress in our nation's efforts to secure equal voting rights for all Americans, and quickly became so accepted as a matter of constitutional law that they could fairly be described as "superprecedent." Yet two decades later, long after most of the nation had come to embrace this progress, Judge Alito still boasted of his opposition to it. The fact that he would use his opposition as a "selling tactic" for a job in 1985 is disconcerting, and raises suspicions about his overall legal philosophy that deserve extensive scrutiny.

Judge Alito's Narrow Reading of Anti-Discrimination and Other Worker Protection Laws
Judge Alito's record also raises concerns about whether he would be a strong enforcer of our nation's civil rights and labor laws. His decisions thus far in such cases show a pattern of narrow interpretations of the laws, placing greater burdens on civil rights plaintiffs to prove discrimination and making it harder for the government to protect workers.

In a number of cases involving race, gender, disability, and age discrimination, Judge Alito was clearly to the right of his colleagues on the Third Circuit. In *Bray v. Mariott Hotels*,[6] for example, the Third Circuit ruled that an African-American plaintiff who had been denied a promotion had shown that racial discrimination might have been a factor, and that she was therefore entitled to take her case to trial. But Judge Alito dissented, writing an opinion that prompted the majority to charge that "Title VII would be eviscerated if our analysis were to halt where the dissent suggests."[7] In *Sheridan v. E.I DuPont de Nemours and Co.*[8], a gender discrimination plaintiff sued after being denied a promotion. A jury ruled in her favor, but the trial judge threw out the verdict. The Third Circuit found that she had presented enough evidence to persuade the jury that discrimination was a factor, but Judge Alito was the lone dissenter in the *en banc* decision. Judge Alito acknowledged that additional evidence of discrimination, beyond proof that an employer's explanation for an adverse decision was pretextual, should not usually be required for a plaintiff to get to a jury, but he maintained that summary judgment might still be appropriate in some cases. The result Judge Alito would have reached in the *Sheridan* case, however – reversing a jury finding of sex discrimination that every other judge on the Third Circuit would have upheld – undermines the neutral standard he articulated. To reach this result, Judge Alito not only gave the employer the benefit of the doubt but failed to consider some of the most important evidence brought by Sheridan. Finally, in *Nathanson v. Medical College of Pennsylvania*,[9] a prospective medical student filed suit under the Rehabilitation Act of 1973, claiming that the school failed to provide accommodations for a back injury. The trial court granted summary judgment in favor of the school, but a Third Circuit panel reversed on the Rehabilitation Act claim because there were different factual assertions that necessitated a jury trial. Judge Alito dissented, prompting his colleagues to write that under his standards, "few if any Rehabilitation Act cases would survive summary judgment."[10]

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[6] 110 F.3d 986 (3d Cir. 1997).
[7] *Bray*, 110 F.3d at 993.
[8] 100 F.3d 1061 (3d Circ. 1996).
[9] 926 F.2d 1368 (3d Cir. 1991).
[10] *Nathanson*, 926 F.2d at 1387.

Judge Alito's record on anti-discrimination cases becomes more troubling when considered in light of his record prior to serving on the Third Circuit. As Assistant to the Solicitor General during the Reagan administration, Judge Alito co-authored several *amicus curiae* briefs that sought to eliminate affirmative action policies that were put in place to remedy past discrimination,[11] discrimination which, in one case, persisted in contravention of at least three court orders over an eight-year period.[12] In his 1985 application for a promotion within the Justice Department, Judge Alito later mischaracterized these cases as involving nothing more than challenges to "racial and ethnic quotas." Judge Alito's involvement in the Reagan Justice Department's zealous campaign to undermine affirmative action remedies suggests that he adheres to an ideology that goes beyond mere conservatism on civil rights matters.

In cases involving other worker protections that deal with such matters as salary, pensions and job safety, Judge Alito has also demonstrated a clear and unmistakable tendency to rule narrowly and against working people. Given a choice between reading a statute broadly, consistent with Congress' intent to provide workers with basic protections, or reading a statute in the narrowest way possible, he again shows a disturbing tendency to come down against workers. In *Reich v. Gateway Press*,[13] for example, Judge Alito dissented from a ruling in which the Third Circuit found that employees of a group of related community newspapers were protected by the overtime rules of the Fair Labor Standards Act. The majority reasoned that while the law may not have covered each individual newspaper, which were small in size and circulation, the papers and all employment decisions were managed by one company and thus amounted to an "enterprise" that was subject to the overtime law. Judge Alito dissented, however, and would have denied this coverage, claiming that neither the statute nor the legislative history could support the majority's conclusion. In *Belcufine v. Aloe*,[14] on the other hand, Judge Alito took a more expansive reading of the law, but in this case it was in order to benefit corporate officers at the expense of workers. *Belcufine* involved a state law that held corporate officers personally liable for unpaid wages and benefits. Judge Alito ruled, in a split decision, that the law could no longer be applicable, as a matter of policy, once a corporation has filed a bankruptcy petition. The dissenting opinion pointed out that nothing in the statute in question "even remotely can be read to excuse the agents and officers" from liability once a company files for bankruptcy.[15]

Judge Alito's Willingness to Undercut Fundamental Privacy and Due Process Rights

In cases involving criminal justice matters such as the Fourth Amendment, *habeas corpus*, and the right to effective assistance of counsel, Judge Alito has shown an excessive tendency to defer to police and prosecutors. This deference frequently comes at the expense of the constitutional rights and civil liberties of individual Americans, and it raises concerns about whether Judge Alito would help enable governmental abuses of power.

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[11] *See*, Brief for the Equal Employment Opportunity Commission in *Local 28 v. EEOC*, No. 84-1656 (Dec. 9, 1985); Brief for the United States as *Amicus Curiae, Local 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland, et. al.*, No. 84-1999 (July 24, 1985); Brief for the United States as *Amicus Curiae, Wygant v. Jackson Board of Education*, No. 84-1340 (June 25, 1985).

[12] *See, Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC, 478 U.S. 421 (1986).*

[13] 13 F.3d 685 (3d Cir. 1994).

[14] 112 F.3d 633 (3d Cir. 1997)

[15] *Id.* at 643.

In *Doe v. Groody*,[16] Judge Alito argued in dissent that police officers who conducted strip searches without a warrant could still be entitled to qualified immunity. The majority concluded, in a decision authored by Judge Chertoff, that strip searches of the suspect's wife and ten-year-old daughter went well beyond the police's warrant to search the home of a suspected drug dealer, and that the officers were therefore not entitled to claim qualified immunity as a defense to a subsequent lawsuit. As Judge Chertoff noted, holding otherwise would "transform the judicial officer into little more than the cliché 'rubber stamp.'"[17] Judge Alito, in criticizing the majority for what he called a "technical and legalistic" ruling in favor of the plaintiffs,[18] would have granted authority to the police to decide who could be searched and therefore, would have given the officers immunity for invading the privacy rights of the wife and daughter. In *United States v. Lee*,[19] Judge Alito upheld the warrantless video surveillance by the FBI of a suspect's hotel suite. He justified his ruling on the ground that the FBI only turned on the surveillance equipment when an informant was present in the suite and could "consent" to the surveillance, but this ruling disregarded the fact that the equipment was capable of being used at any time and thus enabled the FBI to invade the suspect's privacy at any time. And in *Baker v. Monroe Township*,[20] a woman and her children were searched as they were entering premises that were the subject of a search warrant. The search warrant specified a location but there were no names included on the warrant, which led the majority to conclude that the warrant was deficient under the requirements of the Fourth Amendment. Judge Alito dissented, however, arguing that the lack of particularity in the warrant allowed the officers more leeway to search anyone on the premises.

Judge Alito's overly deferential attitude toward law enforcement at the expense of privacy rights was also evident before his appointment to the Third Circuit. In a 1984 memorandum, Judge Alito – then an attorney with the Justice Department – opined that the Attorney General and other government officials should have absolute immunity from civil liability for wiretapping the phones of Americans without a warrant.[21] He urged the administration not to pursue such an argument in a pending Supreme Court case, but only on purely strategic grounds. The Supreme Court, in *Mitchell v. Forsyth*,[22] went on to rule that absolute immunity did not apply in such situations, rejecting the broad, troubling view expressed in Judge Alito's memorandum.

Judge Alito's record is equally troubling in other areas of criminal justice, and shows the same excessive deference to law enforcement that can open the door to abuses. In another 1984 memorandum, Judge Alito argued in defense of a state law that had authorized Tennessee police to use deadly force against any fleeing felon suspect whom police have probable cause to believe had committed a violent crime or was armed or dangerous. In the case of *Tennessee v. Garner*,[23] that law was invoked after police shot and killed an unarmed, 15-year-old, 5'4" burglary suspect while he was climbing a fence. While Judge Alito did not recommend filing an *amicus curiae* brief in support of the police in the case, he still found the shooting to be constitutionally defensible. When given a choice between killing a possibly nonviolent suspect and allowing a

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[16] 361 F.3d 232 (3d Cir. 2004).
[17] *Doe*, 361 F.3d at 243.
[18] *Doe*, 361 F.3d at 247 (Alito, J., dissenting).
[19] 359 F.3d 194 (3d Cir. 2004), *cert. denied*, 2004 U.S. LEXIS 7112 (2004).
[20] 50 F.3d 1186 (3d Cir. 1995).
[21] Memorandum from Samuel A. Alito to Solicitor General, June 12, 1984.
[22] 472 U.S. 511 (1985).
[23] 471 U.S. 1 (1985).

possibly violent suspect to escape, Judge Alito argued that "[r]easonable people might choose differently in this situation."[24] The Supreme Court disagreed with Alito's farfetched analysis, finding the statute unconstitutional by a 6-3 margin.

Judge Alito's record also reveals a distressing tendency to deny the *habeas corpus* claims of those in the criminal justice system. In *Rompilla v. Horn*,[25] Judge Alito held that in the sentencing phase of a capital murder case, the failure of a defense attorney to investigate and present mitigating evidence, including the defendant's traumatic childhood, alcoholism, mental retardation, cognitive impairment and organic brain damage, did not amount to ineffective assistance of counsel in violation of the Sixth Amendment. His ruling was decried as "inexplicable" by the dissent[26] and was overturned by the Supreme Court,[27] which noted that some of the mitigating evidence was publicly available in the very courthouse in which the defendant was tried.[28] Justice O'Connor concurred in reversing Judge Alito's ruling, describing the defense attorney's performance as "unreasonable."[29] In another case, *Smith v. Horn*,[30] Judge Alito's dissent would have denied the *habeas* claims of a death row inmate. Judge Alito concluded that a jury instruction regarding the defendant's guilt, which the majority found the jury could have reasonable misunderstood, did not amount to a constitutional violation.

Finally, the case of *Riley v. Taylor*[31] shows Judge Alito's reluctance to question prosecutors even where racism is alleged in the jury selection process. In that case, Judge Alito did not find a constitutional violation in the prosecution's apparent use of peremptory challenges to exclude black jurors from a death penalty case involving an African-American defendant. His dissent in the case illustrated a disregard for the impact of racially motivated peremptory jury strikes on African-American defendants. The majority had relied, in part, on statistical data to conclude that black jurors had been excluded, but Judge Alito took issue with the use of statistics, questioning the exclusion of black jurors as a statistical oddity and comparing it to the fact that five of the last six U.S. Presidents had been left-handed. His comments drew a sharp rebuke from the majority, who said that "[t]o suggest any comparability to the striking of jurors based on their race is to minimize the history of discrimination against prospective black jurors and black defendants."[32]

Judge Alito's Troubling Record on Immigration Law

Judge Alito's record in appeals of asylum and deportation orders reveals an abnormally strong tendency to let adverse Board of Immigration Appeals (BIA) and lower court rulings stand. For example, an analysis by *The Washington Post* found that Judge Alito has sided with immigrants in only one out of every eight cases he has handled, which, according to the *Post*, sets him apart even from most Republican-appointed judges.[33] Judge Alito's record is more problematic in

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[24] Memorandum from Samuel A. Alito to Solicitor General, May 18, 1984.
[25] 355 F.3d 233 (3d Cir. 2004).
[26] *Rompilla*, 355 F.3d at 274 (Sloviter, J., dissenting).
[27] *Rompilla v. Beard*, 125 S. Ct. 2456 (2005).
[28] *Rompilla*, 125 S. Ct. at 2464.
[29] *Rompilla*, 125 S. Ct. at 2470 (O'Connor, J., concurring).
[30] 120 F.3d 400 (3d Cir. 1997).
[31] 277 F.3d 261 (3d Cir. 2001).
[32] *Riley*, 277 F.3d at 292.
[33] Amy Goldstein and Sarah Cohen, *Alito, In and Out of the Mainstream*, THE WASHINGTON POST, January 1, 2006, at A01.

light of the recently growing criticism, by many other federal judges from both parties, of asylum rulings by the BIA and administrative immigration judges.[34]

In asylum cases, Judge Alito has a strong tendency to rule against individuals who are seeking protection in the United States, even where evidence shows that they have been or would have been persecuted in their own countries. In *Chang v. INS*,[35] Judge Alito dissented from the court's grant of asylum for a Chinese engineer who claimed he would face persecution if returned to his own country. Judge Alito found no reason to reverse the INS denial of asylum despite the fact that Chang had presented evidence that his wife and son already faced persecution and he was threatened with jail if he returned to China. Similarly, in *Dia v. Ashcroft*,[36] Judge Alito dissented from a majority opinion granting asylum to an immigrant from the Republic of Guinea whose house had been burnt down and whose wife had been raped in retaliation for his opposition to the government. The majority noted that the immigration judge seemed to be searching for ways to deny asylum and find fault with the credibility of Dia. Judge Alito's dissent pushed for a higher standard.[37] The majority criticized Judge Alito's dissent, noting that his proposed standard would "gut the statutory standard" and "ignore our precedent."[38]

Judge Alito's excessive tendency to defer to the BIA is also evident from his record in deportation cases. In *Lee v. Ashcroft*[39], Judge Alito dissented when the court ruled that a false tax return is not an "aggravated felony,"[40] an immigration law term that triggers mandatory deportation and bars most forms of humanitarian waivers. The court reasoned that Congress only intended for tax evasion to trigger mandatory deportation, but Judge Alito disagreed and pushed for a more expansive reading of the law. The majority noted that ambiguity in the law should be resolved in favor of the immigrant and that Judge Alito's interpretation was grounded in "speculation."[41] In *Sandoval v. Reno*,[42] Judge Alito's dissent would have construed the Antiterrorism and Effective Death Penalty Act of 1996 to strip the federal courts of their ability to hear *habeas corpus* claims from aliens in custody challenging deportation orders. The Supreme Court ultimately rejected Judge Alito's reading of the law, in *INS v. St. Cyr*,[43] because such an interpretation would raise serious constitutional questions.

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[34] *See, e.g.* Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, THE NEW YORK TIMES, December 26, 2005, at A1 ("In one decision last month, Richard A. Posner, a prominent and relatively conservative federal appeals court judge in Chicago, concluded that 'the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice,'" *Id.*).

[35] 119 F.3d 1055 (3d Cir. 1997).

[36] 353 F.3d 228 (3d Cir. 2003).

[37] *Dia*, 353 F.3d at 262.

[38] *Id.* at 251 n.22.

[39] 368 F.3d 218 (3d Cir. 2004).

[40] *See* 8 U.S.C. 1101(a)(43). It should be noted that many "aggravated felonies" under the statute are neither "aggravated" nor "felonies" in the ordinary criminal context, often leading to harsh results. For example, one legal permanent resident was labeled an "aggravated felon" and ordered deported five years after a $14.99 shoplifting conviction. Elizabeth Kurylo, *Nigerian Woman Faces Deportation*, THE ATLANTA JOURNAL AND CONSTITUTION, June 12, 1998, at 01C.

[41] *Lee*, 368 F.3d at 225 n.11.

[42] 166 F.3d 225 (3d Cir. 1999).

[43] 533 U.S. 289, 310 (2001).

Also troubling is a 1986 letter Judge Alito wrote, in his capacity as Deputy Assistant Attorney General, to former FBI Director William Webster in which he suggested, *inter alia*, that "illegal aliens have no claim to nondiscrimination with respect to nonfundamental rights," and that the Constitution "grants only fundamental rights to illegal aliens within the United States."[44] Judge Alito uses a strained reading of the 1976 Supreme Court ruling in *Mathews v. Diaz*[45] to support this assertion, but oddly, he makes no mention of the 1982 ruling in *Plyler v. Doe*,[46] which squarely ruled that a state could not discriminate against undocumented children in public education, even though education is not considered a fundamental constitutional right. As such, Judge Alito's letter raises questions about whether he would be willing to adequately protect undocumented immigrants from unconstitutional forms of discrimination.

Judge Alito's Restrictive View of the Establishment Clause

Judge Alito's record shows that he takes an overly narrow view of the First Amendment's Establishment Clause, a view that sets him apart from Justice O'Connor and the majority of her colleagues to serve on the Supreme Court. His record – along with his acknowledged disagreement with the Supreme Court's most noteworthy rulings in this area[47] – raises concerns that he would not do enough to protect the religious liberties of an increasingly diverse America.

For example, in *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*,[48] Judge Alito voted – against an *en banc* majority of his colleagues on the Third Circuit – to uphold a public school policy that allowed high school seniors to vote on whether to include prayer during a graduation ceremony. By allowing a popular majority of public school students to waive the rights of a minority, Judge Alito's view – had it not also been subsequently rejected by the Supreme Court in a later case[49] – would have essentially defeated the purpose of the Establishment Clause.

Judge Alito's ruling in *ACLU of New Jersey v. Schundler* (*Schundler II*)[50] is equally troubling. In *Schundler*, the municipality of Jersey City, New Jersey had placed a crèche and menorah outside of City Hall. After a district court ruled that the display violated the Establishment Clause, the city added additional figures to the following year's display, including those of Santa Claus, Frosty the Snowman, a red sled, and Kwanzaa symbols. The district court eventually found that this modified display was also unconstitutional. Judge Alito reversed this decision, however, and upheld the modified display. In doing so, he minimized the fact that the display had only been modified in response to litigation and that the city had been attempting to promote religion through its holiday displays for decades – even though the Supreme Court considers such history to be highly relevant when determining whether a practice or policy violates the Establishment Clause.[51]

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[44] Letter from Samuel A. Alito, Jr. to Hon. William Webster, January 10, 1986.
[45] 426 U.S. 67 (1976).
[46] 457 U.S. 202 (1982).
[47] Department of Justice Application of Samuel A. Alito, *supra* at note 2 (stating that his interest in constitutional law had been "motivated in large part by disagreement with the Warren Court's decisions, particularly in the areas of . . . the Establishment Clause . . .").
[48] 84 F.3d 1471 (3d Cir. 1996) (en banc).
[49] *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).
[50] 168 F.3d 192 (3d Cir. 1999).
[51] *See, e.g. McCreary County, Kentucky v. ACLU of Kentucky*, 125 S.Ct. 2722, 2327 n.14 (2005) ("Just as Holmes' dog could tell the difference between being kicked and being stumbled over, it will matter to objective observers whether posting the [modified display] follows on the heels of displays motivated by sectarianism, or whether it

Judge Alito's Efforts to Limit Congressional Authority in Favor of "States' Rights"
Judge Alito's record demonstrates a troubling tendency to favor "states' rights" over the rights of ordinary Americans. During his tenure on the Third Circuit, he has engaged in an excessively narrow reading of the Commerce Clause and an excessively broad reading of state sovereign immunity under the 11th Amendment. In fact, his decisions show that he would go even further than the current Supreme Court in undercutting Congress' ability to protect Americans.

In *United States v. Rybar*,[52] the Third Circuit upheld the conviction of a firearms dealer for the sale of outlawed machine guns, joining six other circuits in finding the federal law banning the transfer or possession of machine guns[53] to be a valid exercise of Congressional authority under its power to regulate interstate commerce. But Judge Alito dissented, arguing that the Supreme Court's recent decision in *United States v. Lopez*[54], which invalidated Congress' gun-free school zone ban, made clear that Congress did not have such power. The majority distinguished *Lopez* because it dealt with a small geographic area – school zones - whereas the law at issue in *Rybar* applied nationwide. Judge Alito would have taken *Lopez* a step beyond to place further restrictions on Congress' power to use its Commerce Clause authority to protect Americans from machine gun violence. Judge Alito's extraordinarily narrow perspective of Congressional power expressed in his *Rybar* dissent raises serious concerns about whether he will uphold major and historically effective pieces of civil rights infrastructure such as the ban on discrimination in places of employment or public accommodation in the Civil Rights Act of 1964, and whether he will hold a restrictive view of Congress' power to move the country forward with additional civil rights laws such as hate crimes and non-discrimination legislation.

In *Chittister v. Department of Community and Economic Development*,[55] Judge Alito's majority opinion would have denied a state employee the benefits of the Family and Medical Leave Act of 1993 ("FMLA").[56] In this case, a state employee had sued after being fired for taking medical leave that had been approved pursuant to FMLA. A jury ruled in Chittister's favor, but the trial court reversed the verdict on the ground that the state was immune from suit under the 11th Amendment. On appeal, Judge Alito affirmed the ruling, claiming that Congress had not abrogated state sovereign immunity. The Supreme Court later reached an opposite conclusion from Judge Alito's holding in its 2003 decision in *Nevada Department of Human Resources v. Hibbs*.[57] The Court held that state employees could in fact sue their employers under the FMLA, a decision that has subsequently been read by some courts to validate the constitutionality of the entire law.

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lacks a history demonstrating that purpose"); *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 308 (2000) ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguish a sham secular purpose from a sincere one.'").

[52] 103 F.3d 273 (3d Cir. 1996), cert. denied, 522 U.S. 807 (1997).

[53] 18 U.S.C. § 922(o).

[54] 514 U.S. 549 (1995).

[55] 226 F.3d 223 (3d Cir. 2000).

[56] P.L. 103-3 (107 Stat. 6), approved February 5, 1993.

[57] 538 U.S. 721 (2003).

Judge Alito's Membership in "Concerned Alumni of Princeton"

In the same job application essay described above, Judge Alito also stated that he was "a member of the Concerned Alumni of Princeton University, a conservative alumni group"[58] ("CAP"). Throughout its existence, CAP was notorious for its outspoken, inflammatory rhetoric opposing Princeton's decision to enroll female students. Indeed, CAP reportedly advocated limiting the percentage of women admitted to the school.[59] CAP also derided Princeton's efforts to increase the number of minority students; the group argued that children of alumni were more deserving of admission. In the group's magazine, *Prospect*, one of the organization's founders fondly recalled that Princeton had once been "a body of men, relatively homogenous in interests and backgrounds," but that he now worried about the future of the University "with an undergraduate student of approximately 40% woman and minorities, such as the Administration has proposed."[60] In 1975, an alumni panel reviewed admission issues and condemned CAP's characterization of Princeton's policies. The panel, which included current Senate Majority leader Bill Frist, determined that CAP "presented a distorted, narrow and hostile view of the university that cannot help but have misinformed and even alarmed many alumni."[61] It is unclear when Judge Alito joined the group or what role he played in its activities. But his membership in the organization is troubling, given the group's outspoken hostility towards the inclusion of women and minorities at Princeton University, and it raises serious questions about the level of his commitment to gender and racial equality.

Also troubling is Judge Alito's current effort, following his nomination to the Supreme Court, to now deny he ever had any affiliation with the group. In a questionnaire he recently submitted to the Senate Committee on the Judiciary, Judge Alito stated that "[a] document I recently reviewed reflects that I was a member of the group [Concerned Alumni of Princeton] in the 1980s. Apart from that document, I have no recollection of being a member, of attending meetings, or otherwise participating in the activities of the group."[62] This supposed lack of any recollection of being a member of CAP seems difficult, at best, to reconcile with the statement he made in his 1985 job application essay – a statement in which he not only cited his membership in CAP, but deliberately used this claim of membership in an effort to bolster his conservative credentials.[63]

Conclusion

The stakes could not be higher. The Supreme Court is closely divided on cases involving many of our most basic rights and freedoms. Judge Alito has been nominated to fill the seat of retiring Justice Sandra Day O'Connor, who was the crucial deciding vote in so many of those cases. The American people want and deserve to know that any new Supreme Court justice will be committed to protecting individual rights, and will put our freedoms ahead of any political

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[58] Department of Justice Application of Samuel A. Alito, *supra* at note 2.

[59] Scott Shepard, *Critics Dust Off Old Files to Assail Court Nominee*, THE ATLANTA JOURNAL AND CONSTITUTION November 20, 2005, at 7C.

[60] Chanakya Sethi, *Alito '72 Joined Conservative Alumni Group*, DAILY PRINCETONIAN, November 18, 2005.

[61] David D. Kirkpatrick, *From Alito's Past, a Window on Conservatives at Princeton*, NEW YORK TIMES, November 27, 2005, at A1.

[62] U.S. Senate Committee on the Judiciary, Nominee for the Supreme Court of the United States, General (Public) questionnaire completed by Samuel A. Alito, Jr., at 7.

[63] Judge Alito's 1985 essay in which he cites his CAP membership begins by stating that "I am and always have been a conservative and an adherent to the same philosophical views that I believe are central to this Administration." In the paragraph citing his CAP membership, he also cites his membership with the Federalist Society and his submission of articles to the magazines *National Review* and *American Spectator*. Department of Justice Application of Samuel A. Alito, *supra* at note 2.

agenda. Unfortunately, Judge Alito's record not only fails to show such a commitment, but also raises serious doubts.

In addition, we also have doubts about whether Judge Alito will, at his confirmation hearings, address the above concerns in a fully open and candid manner. For instance, Judge Alito has given numerous shifting and conflicting reasons for why he did not, as he promised to Senators before being confirmed to the Third Circuit, recuse himself from cases involving the Vanguard companies, in which he had financial holdings. Furthermore, Judge Alito has also recently tried to dismiss a number of troubling statements in his 1985 job application, such as his disagreement with the Warren Court's reapportionment cases, by suggesting that his statements should not be taken seriously because he was simply applying for a job. Finally, as discussed above, Judge Alito has also attempted to deny any affiliation with the radical group Concerned Alumni of Princeton, even though he himself proudly claimed to be a member in 1985. These incidents raise doubts about whether Judge Alito's responses to tough questions about his record and his legal philosophy can be completely believed when his confirmation hearings begin next week.

For the above reasons, we must oppose his confirmation as Associate Justice. We appreciate your consideration of our views. If you have any questions, please feel free to contact LCCR Deputy Director Nancy Zirkin at (202) 263-2880 or LCCR Counsel Rob Randhava at (202) 466-6058. We look forward to working with you.

Sincerely,

Dr. Dorothy I. Height
Chairperson

Wade Henderson
Executive Director

League of United Latin American Citizens

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PRESS RELEASE

FOR IMMEDIATE RELEASE
January 10, 2006

Contact: Dr. Gabriela D. Lemus
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LULAC National Executive Board Unanimously Opposes Alito Nomination to the Supreme Court

Samuel Alito's Record is Deeply Disturbing

Washington, DC – The League of United Latin American Citizens announced today that it will oppose the nomination of Judge Samuel A. Alito, Jr. to the United States Supreme Court.

After long and careful deliberation, the National Executive Board of the League of United Latin American Citizens (LULAC) unanimously voted to oppose the nomination. The Executive Board felt that contrary to President George W. Bush's statements that Alito would be a fair and impartial judge on the Supreme Court, the judge's well-documented track-record during his tenure under both the Reagan and Bush administrations, when he was Assistant to the Solicitor General from 1981-1985, Deputy Assistant U.S. Attorney General from 1985-1987, and U.S. Attorney for New Jersey from 1987-1990, as well as during his tenure as a Judge on the Third Circuit suggest otherwise.

The National Executive Board was especially troubled with Sam Alito's contention during the Reagan administration that undocumented immigrants and nonresident aliens from other countries have limited or "no due process rights" under the Constitution. Alito advocated this view in a memo he wrote in 1986 regarding FBI activities. At a time when immigrants – both documented and undocumented – are under extreme duress and when Americans are concerned about federal eavesdropping and laws such as the Patriot Act which constantly raise the bar on the government's ability to intervene in people's individual rights, Alito's definitions suggest that there would be no constitutional constraints placed on U.S. officials in their treatment of not only immigrants, but of citizens as well.

"Americans in general and Latinos particularly, should be extremely concerned about this nominee to the Supreme Court," said LULAC National President Hector Flores. "Sam Alito's record demonstrates a predilection to support government action that abridges individual freedoms. When combined with recent actions taken by Congress to criminalize millions of immigrants, including lawful permanent residents and legal non-immigrants who accrue technical violation of immigration regulations, it is a roadmap for serious violations to be committed against citizens, the Latino community and immigrants, irrespective of their legal status."

President Bush has consistently passed up the opportunity to nominate a Latino to the Supreme Court. Instead, the President has chosen to place a judge that has all too often taken a hostile position toward fundamental civil liberties and civil rights who has no problem expressing views so extreme that they would deprive many immigrants and citizens of basic human rights. "Such views are alarming and legally wrong, and they run counter to our basic moral values as a nation," President Flores added.

The League of United Latin American Citizens is the oldest and largest Latino civil rights organization in the United States. LULAC advances the economic condition, educational attainment, political influence, health, and civil rights of Hispanic Americans through community-based programs operating at more than 700 LULAC councils nationwide.

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Statement
United States Senate Committee on the Judiciary
Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States
January 9, 2006

The Honorable Patrick Leahy
United States Senator , Vermont

OPENING STATEMENT OF SENATOR PATRICK LEAHY
HEARINGS BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
ON THE NOMINATION OF SAMUEL A. ALITO, JR.,
TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
JANUARY 9, 2006

The challenge for Judge Alito in the course of these hearings is to demonstrate that he will protect the rights and liberties of all Americans and serve as an effective check on Government overreaching. The President has not helped his cause by withdrawing his earlier nomination of Harriet Miers in the face of criticism from a narrow faction of his own party. Supreme Court nominations should not be conducted through a series of winks and nods designed to reassure Republican factions while leaving the American people in the dark. No President should be allowed to pack the courts, and especially the Supreme Court, with nominees selected to enshrine presidential claims of Government power. The checks and balances that should be provided by the courts, Congress and the Constitution are too important to be sacrificed to a narrow, partisan agenda.

This hearing is the opportunity for the American people to learn what Samuel Alito thinks about their fundamental constitutional rights and whether he will serve to protect their liberty, their privacy and their autonomy from Government intrusion. The Supreme Court belongs to all Americans, not just the person occupying the White House, and not just to a narrow faction of a political party.

The Supreme Court is the ultimate check and balance in our system. Independence of the courts and its members is crucial to our democracy and way of life. The Senate should never be allowed to become a rubber stamp, and neither should the Supreme Court. I will ask Judge Alito to demonstrate his independence from the interests of the President.

This is a nomination to a lifetime seat on the nation's highest court that has often represented the decisive vote on constitutional issues. The Senate needs to make an informed decision about this nomination. That means knowing more about Samuel Alito's work in the Government and knowing more about his views. I intend to ask about the disturbing memorandum he wrote to become a political appointee in the Meese Justice Department, in which he professes concern with the fundamental principle of "one person, one vote," a principle of the equality that is the bedrock of our laws.

This hearing is the only opportunity that the American people and their representatives have to consider the suitability of the nominee to serve as a final arbiter of the meaning of Constitution and the law. Has he demonstrated a commitment to the fundamental rights of all Americans? Will he allow the Government to intrude on Americans' personal privacy and freedoms? In a time when this Administration seems intent on accumulating unchecked power, Judge Alito's views on Executive power are especially important. It is important to know whether he would serve with judicial independence or as a surrogate for the President who nominated him.

The public conversation with Judge Alito in this hearing room over the next several days is important.

It is the people's Constitution and the people's rights that we are all charged with protecting and preserving. Through this hearing we embark on the constitutional process that was designed to protect those rights.

As we begin these hearings, I am reminded of a photograph that hangs in the National Constitution Center in Philadelphia, Pennsylvania, the home of our Chairman. It shows the first woman ever to serve on the Supreme Court of the United States taking the oath of office in 1981. Justice Sandra Day O'Connor serves as a model Supreme Court Justice.

She is widely recognized as a jurist with practical values and a sense of the consequences of the legal decisions being made by the Supreme Court. I regret that some on the extreme right have been so critical of Justice O'Connor and have adamantly opposed the naming of a successor who shares her judicial philosophy and qualities. Their criticism reflects poorly upon them. It does nothing to tarnish the record of the first woman to serve as an Associate Justice of the Supreme Court of the United States. She is a Justice whose graciousness and sense of duty fuels her continued service more than six months after she announced her intention to retire.

The Court that serves America should reflect America, but with this nomination the Court has lost a measure of diversity. There was no dearth of highly-qualified women, Hispanics, African Americans and other individuals who could well have served as unifying nominees while adding to the diversity of the Supreme Court. I look forward to the time when the membership of the Supreme Court is more reflective of the country it serves.
As the Senate begins its consideration of President Bush's current nomination, his third, of a successor to Justice O'Connor, we do so mindful of her critical role on the Supreme Court. Her legacy is one of fairness that I want to see preserved. Justice O'Connor has been a guardian of the protections the Constitution provides the American people.

Of fundamental importance, she has come to provide balance and a check on Government intrusion into our personal privacy and freedoms. In the Hamdi decision, she rejected the Bush Administration's claim that it could indefinitely detain a United States citizen. She upheld the fundamental principle of judicial review over the exercise of Government power and wrote that even war "is not a blank check for the President when it comes to the rights of the Nation's citizens." She held that even this President is not above the law.

Her judgment has also been critical in protecting our environmental rights. She joined in 5-4 majorities affirming reproductive freedom, religious freedom and the Voting Rights Act. Each of these cases makes clear how important a single Supreme Court Justice is. It is crucial that we determine what kind of Justice Samuel Alito would be, if confirmed, and if he would be an independent justice.

It is as the elected representatives of the American people, all the people, that we in the Senate are charged with the responsibility to examine whether to entrust their precious rights and liberties to this nominee. The Constitution is their document. It guarantees their rights from the heavy hand of Government intrusion and their individual liberties to freedom of speech and religion, to equal treatment, to due process and to privacy. This is their process.

The federal judiciary is unlike the other branches of Government. Once confirmed, federal judges serve for life. There is no court above the Supreme Court of the United States. The American people deserve a Supreme Court Justice who inspires confidence that he, or she, will not be beholden to the President but will be immune to pressures from the Government or from partisan interests.

Last October, the President succumbed to partisan pressure from the extreme right of his party by withdrawing his nomination of Harriet Miers. By withdrawing her nomination and substituting this one, the President has allowed his choice to be vetoed by an extreme faction within his party, before hearings or a vote. That eye-opening experience for the country demonstrated what a vocal faction of the Republican Party really wants: They do not want an independent federal judiciary. They demand judges who will guarantee the results that they want.

This nomination is being considered against the backdrop of another recent revelation -- that the President has, outside the law, been conducting secret and warrantless spying on Americans for more than four years. It comes as members of the Bush Administration and Republican congressional leadership face criminal investigations and indictments in corruption probes. This is a time when the protections of Americans' liberties are directly at risk, as are the checks and balances that have served to constrain abuses of power for more than 200 years. The Supreme Court is relied upon by all Americans to protect their fundamental rights.

I have yet to decide how I will vote on this nomination. I will base my determination on the whole record at the conclusion of these hearings -- just as I did in connection with the nomination of Chief Justice Roberts whose nomination I came to support.

The stakes for the American people could not be higher. At this critical moment, Senate Democrats serving on this Committee will perform our constitutional Advice and Consent responsibility with heightened vigilance. I urge all Senators, Republicans, Democrats and Independents, to join with us in a serious consideration of this pivotal nomination. The Supreme Court is the guarantor of the liberties of all Americans. The appointment of the next Supreme Court Justice must be made in the people's interest and in the Nation's interest, not to serve the special interests of a partisan faction.



Senator Arlen Specter
Chairman, Committee on the Judiciary
U.S. Senate

Senator Patrick Leahy
Ranking Member, Committee on the Judiciary
U.S. Senate

January 10, 2006

Chairman Specter and Senator Leahy:

Legal Momentum, the nation's oldest women's legal rights organization, opposes the confirmation of Judge Samuel Alito as Associate Justice to the Supreme Court of the United States. Throughout his career he has pursued legal approaches that raise questions about his ability to respect the balance of power between the three branches of government. Judge Alito defers to agency decisions in many settings, while showing skepticism toward individual litigants' claims, appears to support a narrow view of civil rights, prisoners' rights, and workers' rights, appears willing to uphold legislative restrictions on the right to privacy and is willing to limit congressional power while showing excessive deference to the executive branch. This agenda poses a danger to an inclusive society, and a representative democracy with constitutionally required checks and balances that serves the needs of the whole electorate. The legacy of conservative centrist, Justice Sandra Day O'Connor, deserves a replacement that does not rule based on political considerations, but can fairly and justly interpret the laws and Constitution of the United States.

Judge Alito's available record reveals a judicial philosophy that would undermine critical civil and privacy rights and protections. In his public statements, he speaks about the restrained role of judges. Put into practice, however, these views translate into higher burdens for plaintiffs seeking to vindicate their rights, deference to states or institutional defendants and employers, and limits on the ability of Congress to require certain conduct from states. For example, Judge Alito often favors a restrictive reading of the law, which results in the narrowest interpretation of civil rights. Thus, individuals may be unable to enjoy the full reach of these protections at crucial times. Stressing the need for judicial restraint and discouraging judges from legislating from the bench, he has used these themes as a means to limit access to the ability of individuals to have their day in court. And, he frequently argues to constrain the power of the courts and the power of Congress, with regard to binding states. The end result is that individuals, courts, and Congress have less ability to hold states accountable to ensure compliance with the law and remedy legal violations.

Judge Alito has taken a very restrictive approach in employment discrimination cases, resulting in few successes for plaintiffs. In *Bray v. Marriott*, he would have let stand an employer's decision not to promote an African American female employee even though there was considerable evidence of irregularities in the hiring and interview process. Judge Alito argued in dissent that the employer's failure to follow its own rules was not sufficient to prove discrimination against the plaintiff. For him, the employer's argument that the plaintiff was not the best qualified should have been accepted at face value. In contrast, the majority concluded there were enough questions about the employer's motives and conduct to allow the plaintiff her day in court. Moreover, the majority chided Judge Alito's analysis for effectively eviscerating the antidiscrimination purposes of the law, by accepting the employer's reasoning without adequate review to determine whether racial bias influenced the hiring decision. They stressed that what mattered was not whether the company was seeking the "best" candidate, but "whether a reasonable factfinder could conclude that Bray was not deemed the best because she is Black." In his fifteen years on the bench, Judge Alito has almost never ruled for African-American plaintiffs in employment discrimination cases. The Supreme Court deserves a Justice that is willing to consider the full circumstances of the case at hand, not deny plaintiffs their right to be heard.

While Congress has made efforts to protect workers who need time off work to care for a sick family member or to heal from a long term illness, Judge Alito would make it harder for workers to challenge state employers for violating the Family & Medical Leave Act. In *Chittister v. Department of Community and Economic Development*, Judge Alito wrote for a Third Circuit panel that the state of Pennsylvania was immune from lawsuits by state workers alleging

violations of the FMLA's medical leave provisions. The decision effectively insulated the state from FMLA claims, and undermined the ability of workers to access medical leave when needed. Meanwhile, Justice O'Connor, who Judge Alito would replace, voted to uphold a key provision of the Family and Medical Leave Act. If the Supreme Court adopted Judge Alito's views, millions of workers could lose their ability to vindicate their rights under the Family & Medical Leave Act.

Judge Alito's record strongly indicates that he would question the constitutional right to privacy and undermine existing Court precedent on the issue. In a 1985 job application, he touted his work on Reagan Administration-era cases which argued that the Constitution does not protect a right to an abortion – a position with which he indicated he personally agreed. In a memorandum discussing the strategy for the government's *amicus* brief in a pending case involving a Pennsylvania abortion regulation, he stressed the importance of finding a way to give states maximum latitude to adopt abortion restrictions to undermine, if not overrule, *Roe v. Wade.* After leaving the Administration and becoming a judge on the Third Circuit, he wrote a dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* arguing to uphold burdensome restrictions and hurdles aimed at women seeking an abortion. The Supreme Court ultimately rejected his position, but he once again underscored a desire to place new limits on a woman's ability to make her own reproductive health decisions.

Judge Samuel Alito's rulings on Americans' privacy rights extend even further his support for increased power for the executive branch. As a lawyer in the Solicitor General's Office in 1984, Alito wrote a memo supporting absolute immunity from civil liability for cabinet officials who authorized illegal wiretaps of Americans due to national security concerns. Later, he co-authored a brief to the Supreme Court in which the government argued for absolute immunity- an argument rejected by the Supreme Court. In contrast, Justice O'Connor, writing for an 8-1 majority in the case of American-born detainee Yaser Esam Hamdi *(Hamdi v. Rumsfeld),* in which the court ruled that an American citizen seized overseas as an "enemy combatant" must be allowed to challenge the factual basis of his or her detention, said the Court has "made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens."

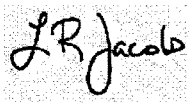
After becoming a judge, Alito wrote in several opinions that would have extended the reach of search warrants for the executive branch. In a dissenting opinion in *Doe v. Groody,* he argued that police officers did not violate the Constitution when they strip-searched a mother and her ten year-old daughter, despite the fact that neither was named in the search warrant. The majority opinion, written by now-Homeland Security Secretary Michael Chertoff, asserted that Judge Alito's position would effectively nullify the Fourth Amendment's warrant requirement and *"transform the judicial officer into little more than the cliché rubber stamp."* In another dissent, in *Baker v. Monroe Twp.,* Judge Alito voted to keep a jury from hearing whether a police supervisor unlawfully allowed his officers to handcuff, hold at gunpoint and search a woman and her teenage children who happened to stop by to visit the home of a relative in the midst of a search.

Alito's stance on executive branch powers is further revealed in a Feb. 5, 1986 draft memo where he argued that the White House should issue "interpretive signing statements" when signing a bill into a law, and that courts might be persuaded to consider this 'executive intent' equally with legislative intent. The balance of power between the three branches is imperiled when White House interpretation is accorded equal weight with congressional support.

In conclusion, Judge Alito has consistently articulated legal opinions that are outside the mainstream, that undermine legal protections against employment discrimination, that distorts the law in favor of extending power to the executive branch, and that resorts to judicial activism, blatantly ignoring the clear intention of the legislature to push his arch-conservative political agenda. Therefore, we urge you to oppose his nomination to the U.S. Supreme Court.

If you have any further questions, please contact Lisalyn Jacobs at Legal Momentum, (202) 326-0040.

Sincerely,



Lisalyn R. Jacobs
Vice President for Government Relations

CC: Committee on the Judiciary

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January 4, 2006

The Honorable Arlen Specter
Chairman,
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member,
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Leahy:

We write in support of the nomination of Judge Samuel A. Alito, Jr. to the United States Supreme Court. Each of us has devoted a significant portion of our legal practice or research to appellate matters. Although we reflect a broad range of political, policy and legal views, we all agree that Judge Alito should be confirmed by the Senate. Judge Alito has a well-deserved reputation as an outstanding jurist. He is, in every sense of the term, a "judge's judge." His opinions are fair, thoughtful and rigorous. Those of us who have appeared before Judge Alito appreciate his preparation for argument, his temperament on the bench and the quality and incisiveness of the questions he asks. Those of us who have worked with Judge Alito respect his legal skills, his integrity and his modesty. In short, Judge Alito has the attributes that we believe are essential to being an outstanding Supreme Court Justice and therefore should be confirmed. Thank you for considering our views.

Sincerely,

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James P. Young,	Sidley Austin LLP
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Todd J. Zywicki,	Professor of Law, George Mason University School of Law; Director, Office of Policy Planning, Federal Trade Commission 2003-04

Testimony of Professor Goodwin Liu
Boalt Hall School of Law, University of California, Berkeley

Before the United States Senate Committee on the Judiciary on the Nomination of Judge Samuel A. Alito, Jr. to the United States Supreme Court

Submitted January 10, 2006

Thank you, Mr. Chairman and Members of the Committee, for inviting me today. I am honored to have this opportunity to testify on the nomination of Judge Samuel Alito, Jr. to the United States Supreme Court.

My name is Goodwin Liu. I am Assistant Professor of Law at Boalt Hall School of Law at the University of California at Berkeley. My areas of expertise include constitutional law, civil rights, and the Supreme Court. Before joining the Boalt faculty, I practiced appellate litigation at O'Melveny & Myers in Washington, D.C. I clerked at the United States Supreme Court for Justice Ruth Bader Ginsburg in 2000-01 and at the United States Court of Appeals for the D.C. Circuit for Judge David Tatel in 1998-99.

I begin my testimony with a point on which everyone agrees: Judge Alito has an exceptionally talented legal mind. Over his fifteen-year tenure on the United States Court of Appeals for the Third Circuit, his opinions have demonstrated sharp analysis, lawyerly craft, and impressive mastery of complex issues. He clearly possesses the intellectual abilities required for appointment to the Nation's highest court.

Intellect, however, is a necessary but not sufficient credential. Equally important are the subtle qualities of judging that give the law its legitimacy, humanity, and semblance of justice. We care about the nominee's "judicial philosophy," a somewhat amorphous term that encompasses his perspective on the proper role of courts in a constitutional democracy. I would like to focus on one concern about Judge Alito's judicial philosophy that is especially troubling for the times in which we live.

That concern is Judge Alito's lack of skepticism toward government power that infringes on individual rights and liberties. Throughout his career, with few exceptions, Judge Alito has sided with the police, prosecutors, immigration officials, and other government agents, while taking a minimalist approach to recognizing official error and abuse. He is less concerned about government overreaching than federal appeals judges nationwide, less concerned than Republican-appointed appeals judges nationwide, and less concerned than his Republican-appointed colleagues on the Third Circuit (see Appendix A). In this area, Judge Alito's record is at the margin of the judicial spectrum, not the mainstream. His deferential instinct toward government is at odds with the Supreme Court's vital role in protecting privacy, freedom, and due process of law, and it deserves special concern in light of the questionable tactics being used to fight the War on Terror.

I. JUDICIAL REVIEW AND LIMITS ON GOVERNMENT ABUSE

Judicial review has always had an uneasy existence in our democracy. It is extraordinary that we allow nine unelected individuals with life tenure to examine and invalidate judgments that reflect the popular will. Accordingly, we expect judges to exhibit modesty and restraint. This is especially true in disputes over the allocation of power between Congress and the states. Because the democratic process itself has important safeguards against the undue concentration of power in either level of government, federal courts have a limited role in reviewing Congress's judgments in such cases.

But there are other cases where more robust judicial review is legitimate and necessary. The Bill of Rights, the Due Process Clause, and the Equal Protection Clause, among other provisions, limit government power in order to protect individual rights and liberties. It has long been the responsibility of federal courts, and the Supreme Court in particular, to enforce these guarantees precisely because they are insulated from ordinary politics. The Founding generation knew well the abuses of executive power and the need for an independent judiciary to keep government in check. In a 1789 speech proposing the Bill of Rights, James Madison envisioned that "independent tribunals of justice will consider themselves . . . the guardians of [individual] rights" and "will be naturally led to resist every encroachment" on these rights by the political branches.[1]

Much of the Supreme Court's authority and prestige is rooted in its faithful discharge of this role. Cases such as *Brown v. Board of Education*, *Gideon v. Wainwright*, and *Katz v. United States* validate the Court's role as ultimate protector of individual rights and our self-image as a Nation dedicated to the rule of law.[2] Conversely, the failure to resist government power in the name of individual rights has produced some of the Court's and the Nation's most shameful episodes.[3] Today, cases challenging government power comprise nearly half of the Supreme Court's docket. It is thus critical to examine how Judge Alito would approach these issues if confirmed.

II. PRIVACY, SECURITY, AND THE FOURTH AMENDMENT

Judge Alito has looked skeptically upon government power in some cases involving free speech and religious liberty.[4] But in his record as a whole, those decisions are

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1 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789).

2 *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (forbidding racial segregation); Gideon v. Wainwright, 372 U.S. 335 (1963) (guaranteeing counsel to every person accused of crime); Katz v. United States, 389 U.S. 347 (1967) (prohibiting government wiretapping without a warrant).

3 *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (upholding internment of over 120,000 persons of Japanese ancestry during World War II, the vast majority of whom were United States citizens).

4 *See* Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004); Swartzwelder v. McNeilly, 297 F.3d 228 (3d Cir. 2002); Saxe v. State College Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999); Mitchum v. Hurt, 73 F.3d 30 (3d Cir. 1995). *But see* Banks v. Beard, 399 F.3d 134, 148 (3d Cir. 2005) (Alito, J., dissenting) (defending indefinite denial of inmate access to family photographs and reading materials, despite no record evidence that such denial served a penological purpose).

exceptions to a disturbing pattern of deference toward the use of government power against individuals. Perhaps the most troubling aspect of this pattern is Judge Alito's cramped reading of the Fourth Amendment's prohibition on unreasonable searches and seizures, a vital safeguard that grew directly out of colonial resistance to abuses by the Crown. In his career, Judge Alito has never taken a position more receptive to individual privacy or security than the position taken by his colleagues on the same panel.[5]

A. POLICE USE OF EXCESSIVE FORCE

The Fourth Amendment right against unreasonable seizures prohibits police from using excessive force in an arrest, detention, or investigatory stop. Judge Alito has taken a very narrow view of what constitutes excessive force, beginning with the fifteen-page Justice Department memorandum he wrote in 1984 concluding that the use of deadly force against a fleeing unarmed suspect does not violate the Fourth Amendment.[6]

The memorandum examined a case in which Memphis police officers in 1974, responding to a burglary complaint, arrived at a house, heard a door slam, and saw someone running across the backyard. The suspect reached a fence, at which point an officer called out "police, halt." When the suspect began to climb the fence, the officer shot him in the back of the head, killing him. The suspect, Edward Garner, was an eighth-grader, fifteen years old, 5'4" tall, 100 to 110 pounds, and black.[7] Police found a purse and $10 taken from the house on his body. It was undisputed that the officer believed Garner was unarmed. The sole justification offered for the killing was to prevent escape. The Sixth Circuit found the shooting unconstitutional, holding that deadly force against a fleeing suspect is impermissible unless there is "probable cause . . . that the suspect poses a threat to the safety of the officers or a danger to the community if left at large."[8]

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[5] This fact is revealed by his votes in the 14 Fourth Amendment cases in his record that resulted in a divided panel: Johnson v. Knorr, 130 Fed. Appx. 552 (3d Cir. 2005); Feldman v. Community College of Allegheny, 85 Fed. Appx. 821 (3d Cir. 2004); Doe v. Groody, 361 F.3d 232 (3d Cir. 2004); United States v. Lee, 359 F.3d 194 (3d Cir. 2004); Grazier ex rel. White v. City of Philadelphia, 328 F.3d 120 (3d Cir. 2003); United States v. $92,422.57, 307 F.3d 137 (3d Cir. 2002); United States v. Nelson, 284 F.3d 472 (3d Cir. 2002); United States v. Zimmerman, 277 F.3d 426 (3d Cir. 2002); Pryer v. C.O. 3 Slavic, 251 F.3d 448 (3d Cir. 2001); Torres v. McLaughlin, 163 F.3d 169 (3d Cir. 1998); Mellott v. Heemer, 161 F.3d 117 (3d Cir. 1998); United States v. Brown, 159 F.3d 147 (3d Cir. 1998); United States v. Kithcart, 134 F.3d 529 (3d Cir. 1998); Baker v. Monroe Township, 50 F.3d 1186 (3d Cir. 1995). *See* Robert Gordon, *Alito or Scalito? If You're a Liberal, You'd Prefer Scalia*, SLATE, Nov. 1, 2005.

[6] Memorandum from Samuel A. Alito to the Solicitor General on *Memphis Police Department v. Garner*, Nos. 83-1035, 83-1070 (May 18, 1984), *available at* http://www.archives.gov/news/samuel-alito/-accession-060-89-216/MemphisPol-v-Garner-1984-box19-memoAlitotoSolicitorGeneral.pdf [hereinafter *Garner* Memorandum]. At the time, Judge Alito served as Assistant to the Solicitor General.

[7] At the time Judge Alito wrote his memorandum, it was well-established that the rate at which blacks were shot by the police was far higher than the comparable rate for whites, both nationally and specifically in Memphis. *See* James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707, 707-08, 718-20 (1982). Moreover, blacks in Memphis were shot more often than whites in circumstances posing no threat to the officer. *See id.* at 720 (reporting "a black death rate from police shootings while unarmed and nonassaultive . . . that is 18 times higher than the comparable white rate"). Despite the clear racial undertones of Garner's case, Judge Alito nowhere considered the issue.

[8] Garner v. Memphis Police Dep't, 710 F.2d 240, 246 (6th Cir. 1983).

In his memorandum, Judge Alito said the Sixth Circuit was "wrong."[9] He acknowledged that the officer "could see that his target was a youth who did not appear to be armed."[10] In addition, the officer "had no way of knowing precisely what the suspect had done."[11] Still, Judge Alito concluded: "I think the shooting can be justified as reasonable within the meaning of the Fourth Amendment."[12] In a chilling passage, he wrote:

> Any rule permitting the use of deadly force to stop a fleeing suspect must rest on the general principle that ***the state is justified in using whatever force is necessary to enforce its laws***. Assuming that a fleeing suspect is entirely rational . . . , what he is saying in effect is: "Kill me or alow [sic] me to escape, at least for now." If every suspect could evade arrest by putting the state to this choice, societal order would quickly break down.[13]

Judge Alito's dire prediction is difficult to square with his own observation three pages later that "federal law enforcement agencies . . . uniformly restrict the use of deadly force by their agents at least as strictly (and generally more strictly) then [sic] the court of appeals' rule."[14] Similarly, 87% of municipal and police department policies at that time explicitly prohibited the use of deadly force in cases like Garner's.[15] Judge Alito offered no evidence that these policies had caused "societal order" to "quickly break down."

In 1985, the Supreme Court, in an opinion by Justice White, rejected Judge Alito's position and affirmed the Sixth Circuit's rule, declaring: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."[16]

On the bench, Judge Alito has continued to take a constricted view of excessive force. In *Baker v. Monroe Township*, over a dozen local and federal narcotics agents raided the apartment of Clementh Griffin just as his mother, Inez Baker, and her three children, Corey, Tiffany, and Jacquine, were arriving for a family dinner.[17] Shouting "Get down," some police officers ran past the Baker family into the apartment, while others forced the Bakers down to the ground, pointed guns at them, handcuffed them, and searched Inez and Corey Baker. The family filed a civil rights suit claiming that the use of guns and handcuffs was excessive force. The Third Circuit, in an opinion by two Reagan appointees, held that the facts entitled the Bakers to a trial. According to the court, "the police used all of those intrusive methods without any reason to feel threat-

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9 *Garner* Memorandum at 3.

10 *Id.* at 2.

11 *Id.* at 12.

12 *Id.*

13 *Id.* at 10 (emphasis added).

14 *Id.* at 13.

15 *See* Tennessee v. Garner, 471 U.S. 1, 19 (1985) (citing K. MATULIA, A BALANCE OF FORCES: A REPORT OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE 161 (1982) (table)).

16 *Id.* at 11.

17 50 F.3d 1186 (3d Cir. 1995).

ened by the Bakers, or to fear the Bakers would escape. . . . [T]he appearances were those of a family paying a social visit, and . . . there is simply no evidence of anything that should have caused the officers to use the kind of force they are alleged to have used."[18] Judge Alito dissented, finding the events "terrifying" and "most unfortunate" for the Bakers but insufficient to warrant relief.[19]

Judge Alito also found no excessive force in *Mellott v. Heemer*, where seven state troopers and federal marshals carrying sawed-off shotguns and semiautomatic rifles evicted a family from their home on a dairy farm which had gone bankrupt.[20] Upon entering, the marshals "pumped" their guns to load them, pointed the guns "right in [the] face" of two persons in the home, "pushed" and "shoved" the residents, and ordered them to "sit still" and "shut the hell up."[21] Finding "virtually no evidence of resistance during the eviction," Judge Alito nevertheless upheld the use of force because the family had earlier refused to obey an eviction order and had made threats against any federal agent coming onto the property.[22] The dissent observed that "whatever fear the marshals had to cause them to descend on the Mellott farm with guns blazing was immediately dissipated when they encountered a pastoral scene of several people sitting peaceably in a parlor. . . . [T]he clearly passive conduct of those present should have caused them to adjust their response to the situation accordingly."[23]

B. WARRANTLESS ELECTRONIC SURVEILLANCE

Judge Alito has also taken a minimalist view of the Fourth Amendment right to privacy. In *United States v. Lee*, he upheld the FBI's installation of a video and audio surveillance device in a hotel room where the target of a bribery sting, Robert Lee, was staying and holding meetings with an associate, Douglas Beavers, who (unbeknownst to Lee) was cooperating with the FBI.[24] The FBI conducted the surveillance without a warrant, defending it on the ground that Lee had no expectation of privacy in his meetings with Beavers and that the monitoring device was turned on only when Beavers was in the room. Judge Alito accepted the FBI's argument and found no violation.[25]

However, the Supreme Court has said that an overnight guest in a hotel room enjoys the same strong expectation of privacy that applies in the home.[26] In *Lee*, the surveillance device remained in Lee's room even when Beavers was not there. As the dissent observed, the FBI had "the ability to manipulate a video camera to see and hear practically everything that Lee did in the privacy of his hotel suite throughout the day and

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18 *Id.* at 1193 (Gibson, J. (sitting by designation), joined by Becker, J.).

19 *Id.* at 1202-03 (Alito, J., dissenting).

20 161 F.3d 117 (3d Cir. 1998).

21 *Id.* at 120-21.

22 *See id.* at 122-23.

23 *Id.* at 126 (Rendell, J., dissenting).

24 359 F.3d 194 (3d Cir. 2004).

25 *See id.* at 203.

26 *See* Minnesota v. Olson, 495 U.S. 91, 99 (1990).

night."[27] This "Orwellian capability" was limited only by "the government's self-imposed restraint."[28] Judge Alito nowhere explained why such restraint—essentially a promise by the FBI to use the camera only when Beavers was in the room—should defeat the Fourth Amendment warrant requirement. That requirement "interpose[s] a magistrate between the citizen and the police" *precisely because* the right of privacy is "too precious to entrust to the discretion of [law enforcement]."[29]

Although *Lee* involved a domestic criminal investigation, Judge Alito's readiness to indulge government discretion without judicial safeguards raises concerns as to how he would approach issues like the National Security Agency's program of domestic eavesdropping—also conducted without a warrant and defended on the basis of executive discretion and self-restraint. As Justice Brandeis once said: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[30]

In *Lee*, Judge Alito also showed no hesitation to allow the use of increasingly sophisticated surveillance technology. While conceding that "video surveillance may involve a greater intrusion on privacy than audio surveillance," Judge Alito saw "no constitutionally relevant distinction" between the two,[31] even though the remote-controlled camera captured details of Lee's room beyond what Beavers could see at any given time.[32] A sharp contrast to Judge Alito's instincts is Justice Scalia's majority opinion in *Kyllo v. United States*.[33] In *Kyllo*, federal agents parked across the street from the defendant's home used a thermal-imaging device to detect heat lamps used to grow marijuana inside the home. The Supreme Court held that use of the device without a warrant violated the Fourth Amendment. "In the home," Justice Scalia said, "*all* details are intimate details, because the entire area is held safe from prying government eyes."[34] Privacy expectations in the home should not be left "at the mercy of advancing technology."[35]

C. DEFECTIVE WARRANTS

Where police have obtained a search warrant but exceeded its scope, Judge Alito (whom some have called a "strict constructionist"[36]) has creatively interpreted the war-

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27 *Id.* at 214 (McKee, J., dissenting).

28 *Id.*

29 *Id.* at 225.

30 Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

31 *Lee*, 359 F.3d at 202.

32 Although Lee had no legitimate expectation of privacy in what Beavers could see during their meetings, he retained an expectation of privacy in what Beavers could *not* see at any given time. *See Lee*, 359 F.3d at 217-18 (McKee, J., dissenting).

33 533 U.S. 27 (2001).

34 *Id.* at 37.

35 *Id.* at 35.

36 *See, e.g.*, Charles Babington & Michael A. Fletcher, *Alito Signals Reluctance to Overturn* Roe v. Wade, WASH. POST, Nov. 9, 2005, at A1 (quoting Senator Lindsey Graham); Robin Toner & Adam Liptak,

rant to patch the defect. Much has been said about *Doe v. Groody*, where Judge Alito dissented from an opinion by then-Judge Michael Chertoff invalidating the strip search of a ten-year-old girl in her father's home.[37] There, the warrant authorized the police to search only the father and his residence for illegal drugs. Judge Alito argued that the warrant should be read to incorporate the police affidavit seeking the warrant, which had requested authority to search "all occupants" of the home.[38] As Judge Chertoff noted, however, an affidavit cannot expand the warrant's scope unless the warrant *expressly* incorporates the affidavit, which the warrant at issue did not do.[39] This rule, which Judge Alito all but ignored, "goes to the heart of the constitutional requirement that judges, and not the police, authorize warrants."[40]

Judge Alito similarly tried to salvage a defective warrant in *Baker v. Monroe Township* discussed above.[41] The warrant had "x" marks indicating a search of "premises," "person[s]," and "vehicle[s]" for illegal drugs, but it described only the residence and not the persons or vehicles to be searched. In executing the warrant, the police conducted a full evidentiary search of Corey Baker, a boy who was visiting as a family dinner guest. The two Reagan appointees in the majority flatly held that the warrant did not authorize the search.[42] In dissent, Judge Alito construed the warrant to authorize the search of "any persons found on the premises"[43] despite no such language in the warrant.

Judge Alito also excused a defective warrant in *United States v. $92,422.57*, where Secret Service agents seized business records from a grocery company suspected of participating in food stamp fraud from 1994 to 1997.[44] The warrant authorized seizure of receipts, invoices, lists of business associates, delivery schedules, financial statements, computers, and software with no restrictions as to the time period, transactions, or crimes involved. In essence, the warrant allowed the agents to search through documents of any sort dating back to the company's opening in 1983, more than a decade before any alleged crime. Despite the Fourth Amendment's requirement that a warrant must "particularly describ[e] . . . the persons or things to be seized," Judge Alito excused the warrant's lack of particularity on the ground that "it was necessary to search for and seize all of the files in which a record of [legitimate] transactions would have been kept" in order to

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2 Camps, Playing Down Nuances, Stake Out Firm Stands, N.Y. TIMES, Nov. 1, 2005, at A25 (quoting Tony Perkins, president of the Family Research Council).

37 361 F.3d 232 (3d Cir. 2004).

38 *See id.* at 245-48 (Alito, J., dissenting).

39 *See id.* at 239 (citing Bartholomew v. Pennsylvania, 221 F.3d 425, 428 & n.4 (3d Cir. 2000), and Groh v. Ramirez, 540 U.S. 551, 557-58 (2004)).

40 *Id.* at 244. In any event, the affidavit stated no probable cause to search the girl, since the request to search "all occupants" of the home emphasized the possible concealment of drugs by "frequent visitors that purchase [drugs]" or by "persons who do not actually reside or own/rent the premises," *id.* at 236 (quoting affidavit), not by a ten-year-old girl living in the home. In finding probable cause for the search, Judge Alito ignored this language in the affidavit. *See id.* at 245 (Alito, J., dissenting).

41 50 F.3d 1186 (3d Cir. 1995).

42 *See id.* at 1194-95.

43 *Id.* at 1198 (Alito, J., dissenting).

44 307 F.3d 137 (3d Cir. 2002).

show that the company was not engaged in legitimate transactions.[45] As the dissent explained, this inverted logic—allowing the government "to seek evidence of legitimate, not illegitimate, conduct"—"essentially endorses a fishing expedition" with no limits.[46]

Even in *United States v. Kithcart*, a rare case in which Judge Alito found lack of probable cause to search and arrest the defendant, his opinion for the court was limited.[47] There, a police officer pulled over a black Nissan 300ZX driven by the defendant, a black male, after hearing reports of robberies in the area by two black males in a black sports car described as a Camaro Z-28. Judge Alito held that, based on the reports, the officer "could not justifiably arrest any African-American man who happened to drive by in any type of black sports car."[48] However, he left open the possibility on remand that the stop could be justified if the officer had "a reasonable suspicion that 'criminal activity may be afoot.' "[49] Dissenting from this portion of the opinion, Judge Theodore McKee observed that Judge Alito failed to "follow[] the obvious extension of [his] own logic. Just as the record fails to establish that Officer Nelson had probable cause to arrest any Black male who happened to drive by in a black sports car, it also fails to establish reasonable suspicion to justify stopping any and all such cars that happened to contain a Black male."[50]

III. CRIMINAL JUSTICE AND DUE PROCESS OF LAW

Judge Alito has shown as much deference to criminal prosecutions as he has to the police. At a time when America's commitment to due process of law is being closely scrutinized at home and abroad, his record raises serious concerns.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

The role of defense counsel "is critical to the ability of the adversarial system to produce just results."[51] Thus the Sixth Amendment guarantees "effective assistance of counsel."[52] This right is violated when counsel's performance falls "below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[53]

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45 *Id.* at 150.

46 *Id.* at 157 (Ambro, J., dissenting).

47 134 F.3d 529 (3d Cir. 1998).

48 *Id.* at 532. In this unanimous holding, Judge Alito was joined by Judge Timothy Lewis and Judge Theodore McKee.

49 *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)).

50 *Id.* at 533 (McKee, J., concurring in part and dissenting in part). Apart from *Kithcart*, I have found only one other case where Judge Alito detected a Fourth Amendment violation. In *Leveto v. Lapina*, 258 F.3d 156 (3d Cir. 2001), he wrote a unanimous opinion invalidating the search and detention of a doctor and his wife by IRS agents investigating tax evasion, but then denied relief on the ground that the defendants were entitled to qualified immunity.

51 Strickland v. Washington, 466 U.S. 668, 685 (1984).

52 *Id.* at 686.

53 *Id.* at 688, 694.

In 2004, Judge Alito ruled against a capital defendant, Ronald Rompilla, who claimed ineffective assistance of counsel because his lawyers did not present crucial evidence at his sentencing hearing that might have led the jury to spare his life.[54] Although his lawyers consulted family members and mental health experts, they failed to examine school, medical, and court records containing stark evidence of his troubled childhood and limited mental capacity. Those records showed that Rompilla's parents were severe alcoholics, that his father beat him and kept him locked in an excrement-filled dog pen, that his IQ was in the mentally retarded range, and that he suffered from organic brain damage likely caused by fetal alcohol syndrome.[55] Despite the neglected evidence, Judge Alito concluded that counsel's performance was reasonable. While a "good" or "prudent" lawyer might have examined the records, he argued, Rompilla's lawyers had done all that was "constitutionally compelled."[56]

The Supreme Court reversed, finding Judge Alito's position "objectively unreasonable" under "clearly established" law.[57] The Court cited defense counsel's failure to examine the court file on Rompilla's criminal history and explained: "There is an obvious reason that [this] failure . . . fell below the level of reasonable performance. Counsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. . . . [T]he prior conviction file was a public document, readily available for the asking at the very courthouse where Rompilla was to be tried."[58] Had the lawyers examined the file, "they would have found a range of mitigation leads that no other source had opened up."[59]

In reaching its holding, the Court relied on the description of defense counsel's obligations in the ABA Standards of Criminal Justice: "It is the duty of the lawyer . . . to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. *The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.*"[60] Remarkably, Judge Alito said he saw "nothing in the quoted portions of the ABA standards that dictates that records of the sort at issue here must always be sought."[61]

Judge Alito also voted to deny an ineffective assistance claim in *United States v. Kauffman*.[62] Kourtney Kauffman pled guilty to firearms charges on his lawyer's advice.

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54 Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004).

55 *See id.* at 243-44; *id.* at 279-80 (Sloviter, J., dissenting).

56 *Id.* at 258-59 (internal quotation marks and citations omitted).

57 *See* Rompilla v. Beard, 125 S. Ct. 2456, 2462 (2005). Justice O'Connor cast the swing vote.

58 *Id.* at 2464.

59 *Id.* at 2468. The Court noted that Pennsylvania "does not even contest" the prejudicial effect of the omission on Rompilla's sentencing. *Id.* at 2467.

60 *Id.* at 2466 (quoting ABA Standards of Criminal Justice 4-4.1 (2d ed. 1982 Supp.)) (emphasis added). The Court added that "[w]e have long referred [to these ABA Standards] as guides to determining what is reasonable." *Id.* (internal quotation marks and citations omitted).

61 *Rompilla*, 355 F.3d at 259 n.14.

62 109 F.3d 186 (3d Cir. 1997).

But his lawyer had failed to investigate an insanity defense despite receiving a letter from a psychiatrist who, upon examining Kauffman on the day of his crime and arrest, had concluded that he "was undoubtedly psychotic at that time."[63] In addition, Kauffman's attending physician, who examined him five days before the crime, said that Kauffman was bipolar and that his "mental status . . . was that of a person whose judgment was markedly compromised, with limited insight and poor reliability."[64] Further, a mental health counselor who saw Kauffman upon his arrest said he "was clearly psychotic at that time."[65] In an opinion by two judges appointed by the first President Bush, the Third Circuit ordered a new trial, finding "no reasonable professional calculation which would support [counsel's] failure to conduct *any* pre-trial investigation into the facts and law of an insanity defense."[66] Judge Alito dissented, crediting defense counsel's belief that "an insanity defense was not likely to be successful"[67] despite multiple expert opinions that Kauffman was psychotic when he committed the crime.

Although Judge Alito has upheld ineffective assistance claims in three instances,[68] *Rompilla* and *Kauffman* are the only two such cases in his record that resulted in a divided panel. In both cases, his position did not prevail.

B. ERRONEOUS JURY INSTRUCTIONS

A trial court's failure to accurately instruct the jury in a criminal case presents the risk of convicting the defendant without proof beyond a reasonable doubt of all elements of the crime or sentencing the defendant in violation of the law. In several cases, Judge Alito has excused serious errors in jury instructions.

In *Smith v. Horn*,[69] Clifford Smith and Roland Alston robbed a Pennsylvania pharmacy. During the robbery, one of them shot and killed a pharmacist. The state charged Smith with capital murder. But instead of showing he was the shooter, the state alleged that the two men were accomplices and, as such, each was liable for the acts of the other under state law. To convict Smith of murder on this theory, the state had to prove that he intended the killing to occur. However, the trial court's jury instructions failed to make this clear, instead suggesting that Smith could be found guilty of murder

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63 *Id.* at 187 (quoting Dr. Jacob Stacks, a psychiatrist at Harrisburg State Hospital).

64 *Id.* at 188 (testimony of Dr. Denis Milke, medical director of the Edgewater Psychiatric Center, where Kauffman was a patient five days before his arrest).

65 *Id.* at 189 (testimony of Patrick Gallagher, mental health counselor at York County Prison, where Kauffman was jailed after his arrest).

66 *Id.* at 190 (Lewis, J., joined by Roth, J.).

67 *Id.* at 192 (Alito, J., dissenting).

68 *See* Jansen v. United States, 369 F.3d 237 (3d Cir. 2004) (counsel failed to argue that drugs found in defendant's pants were for personal use and could not be considered in calculating drug quantity at sentencing); Carpenter v. Vaughn, 296 F.3d 138 (3d Cir. 2002) (counsel failed to object to trial court's misleading answer to capital sentencing jury's question about availability of parole if jury imposed a life sentence); Coss v. Lackawanna County Dist. Att'y, 204 F.3d 453 (3d Cir. 2000) (en banc) (counsel failed to subpoena any witnesses requested by defendant). Although there were two dissents in *Coss*, neither questioned the court's finding of ineffective assistance of counsel.

69 120 F.3d 400 (3d Cir. 1997).

even if he intended only the robbery and never intended the killing. The jury convicted Smith of murder and sentenced him to death.

In an opinion by two Reagan-appointed former prosecutors, the Third Circuit held that the faulty instructions denied Smith a fair trial because there was "a reasonable likelihood that the jury convicted Smith of first-degree murder without finding beyond a reasonable doubt that he intended that [the victim] be killed."[70] Judge Alito called this conclusion "shocking," "dangerous," and "an injustice."[71] He argued that the trial court had properly stated the intent requirement in an earlier part of the instructions defining accomplice liability.[72] Yet, as Judge Alito conceded, the term "accomplice" is "a complicated legal term," and the instructions as a whole were "ambiguous" and "inadvisable."[73]

Judge Alito further argued that the court should not have heard Smith's claim at all because his lawyers did not object to the jury instructions at trial or in prior appeals.[74] This argument was extraordinary because "the Commonwealth never raised . . . these issues at any time: not in the district court, not in its briefing before this Court, and not at oral argument."[75] In raising this argument on his own, Judge Alito apparently took upon himself the task of combing through the trial transcript and entire record of post-conviction proceedings in an effort "to protect state prerogatives."[76] Rejecting this argument, the court warned that it would "subtly transform our adversarial system into an inquisitorial one."[77] "[W]here the state has never raised the issue at all, in any court, raising the issue *sua sponte* puts us in the untenable position of ferreting out possible defenses upon which the state has never sought to rely. When we do so, we come dangerously close to acting as advocates for the state rather than as impartial magistrates."[78]

In another case involving erroneous jury instructions, *Virgin Islands v. Smith*, Judge Alito again dissented from an opinion by two Reagan appointees.[79] In *Virgin Islands*, a first-degree murder case in which the defendant argued self-defense, the district court failed to instruct the jury that under Virgin Islands law the prosecutor had to prove the absence of self-defense beyond a reasonable doubt. The majority held that this error "undermined the fundamental fairness of the trial, and constituted plain error."[80] In dissent, Judge Alito said that, while "it is *possible* that the jury might have been confused

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70 *Id.* at 411 (Cowen, J., joined by Mansmann, J.).

71 *Id.* at 424, 426 (Alito, J., dissenting).

72 *See id.* at 423-24.

73 *Id.* at 423, 424, 425.

74 *See id.* at 420-23.

75 *Id.* at 407.

76 *Id.* at 422 (Alito, J., dissenting). Although federal courts do have some discretion to raise procedural issues *sua sponte*, Smith's case presented none of the circumstances warranting such a move. *See id.* at 407-09 (discussing factors in *Granberry v. Greer*, 481 U.S. 129 (1987)).

77 *Id.* at 409.

78 *Id.*

79 949 F.2d 677 (3d Cir. 1991) (Scirica, J., joined by Becker, J.).

80 *Id.* at 686.

about the burden of proof regarding self-defense," "the likelihood that the defendant was prejudiced . . . is insufficient to establish the presence of plain error."[81]

Judge Alito also excused defective jury instructions in the cases of death-row inmates William Flamer and Billie Bailey.[82] Both cases involved a Delaware statute that directs juries, in deciding whether to recommend death, to weigh any aggravating circumstances of a capital offense against any mitigating circumstances. Although the statute lists certain aggravating factors, it does not require the jury to focus on the listed factors in making its decision. Yet the trial court in both cases required the jury to indicate on a written questionnaire "which statutory aggravating circumstance or circumstances were relied upon" if the jury chose the death penalty. In each case, the jury chose death and indicated that one of the statutory factors supporting its decision was that "[t]he murder was outrageously or wantonly vile, horrible, or inhuman."[83] Later, in a separate case, the Delaware Supreme Court found this statutory factor unconstitutionally vague, thereby calling into question Flamer's and Bailey's death sentences.

In the Third Circuit, there was little dispute that the questionnaire was flawed, since statutory aggravating factors are to play no role in guiding the jury's discretion under Delaware law. In a majority opinion, Judge Alito "strongly disapprove[d]" of the questionnaire, calling it "potentially misleading" and a source of "unnecessary confusion."[84] Still, he upheld the death sentences, finding no risk that the questionnaire had caused the juries to give inordinate weight to the invalid aggravating factor. Four dissenting judges said the questionnaire wrongly focused the jury's attention on the statutory factors. The invalid factor "may well have . . . tipped the scale in favor of death."[85]

C. RACIAL DISCRIMINATION IN JURY SELECTION

In 2001, Judge Alito sided with the state against a black man, James Riley, convicted of killing a white man by an all-white jury in Kent County, Delaware, whose population is 20 percent black.[86] Before trial, the prosecutor had struck all three prospective black jurors from the jury pool. Riley challenged this action as racially discriminatory under *Batson v. Kentucky*, which forbids prosecutors from removing potential jurors based on race.[87] To support his claim, Riley showed that the prosecution had struck black but not white jurors who had given the same testimony at voir dire. He also showed that the prosecution had struck every prospective black juror in the three other capital murder trials in Kent County within the prior year.

Judge Alito refused to infer racial discrimination from this pattern, stating that "a careful multiple-regression analysis" would be necessary to determine whether the strikes

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81 *Id.* at 689 (Alito, J., dissenting).

82 Flamer v. Delaware, 68 F.3d 736 (3d Cir. 1995) (en banc) (consolidated with *Bailey v. Snyder*).

83 *Id.* at 741, 744 (citing Del. Code Ann. tit. 11, § 4209(e)(1)(n)).

84 *Id.* at 754 n.20.

85 *Id.* at 771 (Lewis, J., dissenting); *see id.* at 776 (Sarokin, J., dissenting).

86 Riley v. Taylor, 277 F.3d 261 (3d Cir. 2001) (en banc).

87 476 U.S. 79 (1986).

were based on race or some other variable.[88] To support his point, he said: "Although only about 10% of the population is left-handed, left-handers have won five of the last six presidential elections. . . . But does it follow that the voters cast their ballots based on whether a candidate was right- or left-handed?"[89] The Third Circuit *en banc* disagreed with Judge Alito and upheld the *Batson* claim, criticizing his analogy for "minimiz[ing] the history of discrimination against prospective black jurors and black defendants."[90]

In contrast to Judge Alito's approach, the Supreme Court recently inferred racial discrimination in jury selection from a statistical pattern without requiring "careful multiple-regression analysis." In *Miller-El v. Dretke*, the Court reversed the conviction of a black defendant convicted of murder and sentenced to death by a jury seated after the prosecution had struck ten out of eleven black persons on the venire.[91] In an opinion joined by Justice O'Connor, the Court had no difficulty concluding that the racial pattern was "unlikely" the product of "[h]appenstance."[92]

Judge Alito has twice voted to uphold *Batson* claims; both cases involved strong evidence of *Batson* violations and produced unanimous decisions.[93] In the two *Batson* cases in his record that resulted in a divided panel, he rejected the claim each time.[94]

D. THE DEATH PENALTY

The issue of capital punishment deserves a brief word for two reasons. First, capital cases comprise a significant portion of the Supreme Court's docket. In this area, the Court often serves as a forum of last resort to correct errors in individual cases. Second, capital cases require judges to exercise utmost care in ensuring due process of law, an imperative underscored by findings of remarkably high error rates in capital proceedings[95] and by recent Supreme Court decisions, with Justice O'Connor's assent, granting

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88 *Id.* at 327 (Alito, J., dissenting).

89 *Id.*

90 *Id.* at 292. The court also found Riley's death sentence invalid because the prosecutor had misled the jury. *See id.* at 298. Judge Alito dissented from this holding too. *See id.* at 330 (Alito, J., dissenting).

91 125 S. Ct. 2317 (2005).

92 *Id.* at 2325 (internal quotation marks and citation omitted).

93 *See* Brinson v. Vaughn, 398 F.3d 225 (3d Cir. 2005) (prosecutor used thirteen out of fourteen strikes against black jurors and had appeared on a training videotape advocating the use of peremptory strikes against blacks); Jones v. Ryan, 987 F.2d 960 (1993) (prosecutor failed to provide specific, non-pretextual reasons for striking three out of four potential black jurors). In a separate case on the right to an impartial jury, Judge Alito wrote a unanimous opinion requiring the district court to consider evidence of racial bias on the part of one member of the jury. *See* Williams v. Price, 343 F.3d 223 (3d Cir. 2003).

94 In addition to *Riley*, Judge Alito voted to deny the *Batson* claim in *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992), even though the trial judge had used an expressly race-conscious method of jury selection. *See id.* at 1242 (Alito, J., concurring). Judge Alito dissented from the denial of rehearing *en banc* in another *Batson* case, *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995). In *Simmons*, three Reagan appointees unanimously ordered a new trial where the defendant had raised a colorable *Batson* claim whose resolution was prejudiced by a 13-year delay between his conviction and direct appeal.

95 *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000) (reporting 68% overall rate of prejudicial error in capital cases between 1973 and 1995).

relief to capital defendants because of flawed jury instructions, ineffective assistance of counsel, racial discrimination in jury selection, and prosecutorial misconduct.[96]

In the four capital cases in his record producing a divided panel, Judge Alito each time argued vigorously against granting relief.[97] In two instances (*Smith* and *Riley*), he failed to persuade his colleagues. In a third instance (*Rompilla*), he was reversed by the Supreme Court. Although Justice O'Connor's approach to capital punishment has been conservative, she has at times supplied a crucial vote in contentious cases in favor of greater care and fairness in the application of the death penalty. Yet it is precisely in the most contentious cases that Judge Alito has shown a uniform pattern of excusing errors and eroding norms of basic fairness.

IV. DEPORTATION, ASYLUM, AND DUE PROCESS OF LAW

Judge Richard Posner recently observed that adjudication of deportation and asylum cases by federal immigration judges and the Board of Immigration Appeals (BIA) "has fallen below the minimum standards of legal justice."[98] Noting "a staggering 40 percent" reversal rate of BIA decisions in the Seventh Circuit, Judge Posner said that "[o]ur criticisms of the Board and of the immigration judges have frequently been severe" and that "the problem is not of recent origin."[99] The Third Circuit, in unanimous decisions by bipartisan panels, has been similarly critical.[100] However, despite these concerns and the important life and liberty interests are at stake, Judge Alito has taken a narrow view of judicial safeguards against government error in immigration cases.

In *Sandoval v. Reno*, Judge Alito wrote a dissent arguing that the Antiterrorism and Effective Death Penalty Act of 1996 eliminated district court review of habeas claims filed by certain aliens held in custody pursuant to a deportation order.[101] Yet, as the panel majority explained, Judge Alito failed to read the statute in light of "[o]ver a century's worth of precedent and practice [that] unambiguously supports the conclusion that habeas jurisdiction is available to aliens in executive custody."[102] Adhering to the settled rule that "courts should not lightly presume that a congressional enactment containing general language effects a repeal of a jurisdictional statute,"[103] the court read the statute to preserve the availability of habeas relief in district court for aliens facing deportation. Judge

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96 *See* Rompilla v. Beard, 125 S. Ct. 2456 (2005); Miller-El v. Dretke, 125 S. Ct. 2317 (2005); Deck v. Missouri, 125 S. Ct. 2007 (2005); Smith v. Texas, 543 U.S. 37 (2004); Tennard v. Dretke, 542 U.S. 274 (2004); Banks v. Dretke, 540 U.S. 668 (2004); Wiggins v. Smith, 539 U.S. 510 (2003).

97 The four cases—*Rompilla*, *Smith v. Horn*, *Riley*, and *Flamer*—have been discussed above.

98 Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005).

99 *Id.* at 829, 830 (citing multiple examples).

100 *See, e.g.*, Wang v. Attorney General, 423 F.3d 260 (3d Cir. 2005); Fiadjoe v. Attorney General, 411 F.3d 135 (3d Cir. 2005); Korytnyuk v. Ashcroft, 396 F.3d 272 (3d Cir. 2005).

101 166 F.3d 225, 242-43 (3d Cir. 1999) (Alito, J., concurring in part and dissenting in part).

102 *Id.* at 237.

103 *Id.* at 232 (citing Ex parte McCardle, 74 U.S. 506 (1868), Ex parte Yerger, 75 U.S. 85 (1868), and Felker v. Turpin, 518 U.S. 651 (1996)).

Alito's view in *Sandoval* was rejected by nine other federal courts of appeals and by the Supreme Court.[104] In construing AEDPA, the vast majority of judges, but not Judge Alito, have sought to preserve judicial safeguards against erroneous deportation.

On the merits of individual asylum and deportation cases, Judge Alito has voted to grant relief on several occasions,[105] but never in a case with a divided panel. In such cases (there are six, including *Sandoval*), he has uniformly sided with the government, almost always in dissent. In *Tipu v. INS*, Judge Alito dissented from an opinion by two Republican-appointed colleagues remanding a deportation order for proper consideration of evidence in the petitioner's favor.[106] In *Chang v. INS*, Judge Alito again dissented from an opinion by two Republican appointees reversing the BIA's denial of eligibility for discretionary asylum based on political persecution.[107] In *Dia v. Ashcroft*, he dissented from an *en banc* majority holding that the BIA lacked substantial evidence for its determination that the asylum applicant was not credible.[108] In *Lee v. Ashcroft*, he dissented from the court's holding that filing a false tax return is not an aggravated felony rendering an alien deportable.[109] Finally, in *Singh-Kaur v. Ashcroft*, Judge Alito voted to affirm a deportation order based on a questionable BIA finding that the petitioner had provided "material support" for terrorist activities, despite a vigorous dissent by Judge Michael Fisher who, like Judge Alito, was appointed by the first President Bush.[110]

V. AT THE MARGIN, NOT THE MAINSTREAM

On the whole, Judge Alito is more deferential toward government than his Third Circuit colleagues, whether appointed by a Democrat or Republican; more deferential than federal appeals judges nationwide; and more deferential than Republican-appointed appeals judges nationwide. From 1990 to 1996, in criminal cases with divided panels, federal appeals judges agreed with the government 54% of the time, and Republican appointees agreed with the government 65% of the time. By contrast, Judge Alito has

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104 *See* INS v. St. Cyr, 533 U.S. 289, 310 (2001); *id.* at 310 n.33 ("the overwhelming majority of Courts of Appeals concluded that district courts retained habeas jurisdiction under § 2241 after AEDPA").

105 *See* Oyebanji v. Gonzales, 418 F.3d 260 (3d Cir. 2005); Partyka v. Attorney General, 417 F.3d 408 (3d Cir. 2005); Farah v. Gonzales, 140 Fed. Appx. 405 (3d Cir. 2005); Dodaj v. Attorney General, 128 Fed. Appx. 289 (3d Cir. 2005); Zhang v. Gonzales, 405 F.3d 150 (3d Cir. 2005); Liu v. Ashcroft, 372 F.3d 529 (3d Cir. 2004).

106 20 F.3d 580 (3d Cir. 1994) (Roth, J., joined by Becker, J.); *see id.* at 587 (Alito, J., dissenting). The petitioner had a brother undergoing dialysis who was dependent on him for emotional and financial support. Further, the petitioner had played only a minor role in the deportable offense, had shown complete rehabilitation, and worked as a cab driver.

107 119 F.3d 1055 (3d Cir. 1997) (Roth, J., joined by Lewis, J.); *see id.* at 1068 (Alito, J., dissenting).

108 353 F.3d 228 (3d Cir. 2003) (en banc); *see id.* at 266 (Alito, J., dissenting).

109 368 F.3d 218 (3d Cir. 2004); *see id.* at 225 (Alito, J., dissenting).

110 385 F.3d 293 (3d Cir. 2004); *see id.* at 301 (Fisher, J., dissenting). The petitioner, a native of India, had provided food and set up tents for meetings of a Sikh group opposed to the Indian government. Judge Alito held that the Sikh group was engaged in terrorist activity and that petitioner's provision of food and tents constituted "material support." But the undisputed evidence showed that the petitioner disclaimed any connection to violence and that the meetings he assisted were for religious purposes. *See id.* at 308-10.

agreed with the government 90% of the time in such cases. In disputed immigration cases, federal appeals judges agreed with the government 33% of the time, and Republican appointees agreed with the government 40% of the time. Judge Alito has agreed with the government 100% of the time.[111]

Almost every judge, including Judge Alito, aims to be impartial and fair. But every judge comes to the law with a set of values, a philosophy, a central tendency. In cases pitting individual rights against government power, Judge Alito's instincts are clear. He is at the margin of the judicial spectrum, not the mainstream.

On occasion, individual rights are depicted as obstacles that impede law enforcement and allow criminals to go free. But as Justice Frankfurter once said, "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[112] The Constitution protects the good man and the bad, the rich as well as the poor. The Constitution protects us all, and the rights and liberties we enjoy are only as secure as those enjoyed by others. That is the meaning of the motto inscribed on the front of the Supreme Court: "equal justice under law."

Judge Alito's record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won't turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man, absent a multiple regression analysis showing discrimination; and where police may search what a warrant permits, and then some. Mr. Chairman, I humbly submit that this is not the America we know. Nor is it the America we aspire to be.

Thank you, Mr. Chairman. I would be happy to answer any questions the Committee might have.

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[111] The data are from *Which Side Was He On?*, WASH. POST, Jan. 1, 2006, *available at* http://-www.washingtonpost.com/wp-dyn/content/custom/2005/12/30/CU2005123001137.html. Although the *Post* counts *Johnson v. Knorr*, 130 Fed. Appx. 552 (3d Cir. 2005), and *United States v. Kithcart*, 134 F.3d 529 (3d Cir. 1998), as divided panels where Judge Alito voted for the defendant, the pro-defendant holdings he supported in those cases were unanimous. Meanwhile, *United States v. Igbonwa*, 120 F.3d 437 (3d Cir. 1997), which the *Post* counts as an immigration case, was actually a criminal case in which Judge Alito dissented in favor of the defendant. *Partyka v. Attorney General*, 417 F.3d 408 (3d Cir. 2005), which the *Post* counts as a divided panel, was unanimous in granting the alien's petition for review; it was divided only insofar as Judge Alito voted to remand for further proceedings instead of vacating the removal order. With these adjustments, Judge Alito's record contains 29 votes for the government in 32 criminal cases with divided panels, and six votes for the government in six immigration cases with divided panels.

[112] United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

APPENDIX A

In many cases pitting individual rights against government power, Judge Alito has taken positions more deferential to government power than his Republican-appointed colleagues on the Third Circuit.

- *Banks v. Beard*, 399 F.3d 134 (3d Cir. 2005). Judge Alito dissented from an opinion by Judge Fuentes (Clinton) joined by Judge Rosenn (Nixon) finding prison restrictions on inmates' reading material in violation of the First Amendment.
- *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004): Judge Alito dissented from an opinion by Judge Chertoff (Bush II) joined by Judge Ambro (Clinton) invalidating the strip search of a ten-year-old girl and her mother.
- *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999): Judge Alito dissented from an opinion by Judge Sloviter (Carter) joined by Judge Scirica (Reagan) construing the Antiterrorism and Effective Death Penalty Act of 1996 to preserve the availability of habeas relief in district court for aliens facing deportation.
- *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997): Judge Alito dissented from an opinion by Judge Cowen (Reagan) joined by Judge Mansmann (Reagan) finding jury instructions to be unconstitutionally defective.
- *Chang v. INS*, 119 F.3d 1055 (3d Cir. 1997): Judge Alito dissented from an opinion by Judge Roth (Bush I) joined by Judge Lewis (Bush I) reversing the Board of Immigration Appeals' denial of eligibility for discretionary asylum.
- *United States v. Kauffman*, 109 F.3d 186 (3d Cir. 1997). Judge Alito dissented from an opinion by Judge Lewis (Bush I) joined by Judge Roth (Bush I) finding ineffective assistance of counsel.
- *Baker v. Monroe Township*, 50 F.3d 1186 (3d Cir. 1995). Judge Alito dissented from an opinion by Judge Gibson (Reagan) joined by Judge Becker (Reagan) finding unconstitutional the search and seizure of an innocent family during a drug raid.
- *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995). Judge Alito dissented from the denial of rehearing *en banc* of an opinion by Judge Nygaard (Reagan) joined by Judge Hutchinson (Reagan) and Judge Cowen (Reagan) granting defendant a new trial upon finding a colorable *Batson* claim that was prejudiced by a thirteen-year delay between conviction and direct appeal.
- *Tipu v. INS*, 20 F.3d 580 (3d Cir. 1994): Judge Alito dissented from an opinion by Judge Roth (Bush I) joined by Judge Becker (Reagan) remanding a deportation order for proper consideration of evidence in the petitioner's favor.
- *Burkett v. Fulcomer*, 951 F.2d 1431 (3d Cir. 1991). Judge Alito dissented from an opinion by Judge Mansmann (Reagan) joined by Judge Nealon (Kennedy) finding prejudicial denial of defendant's right to a speedy trial.
- *Virgin Islands v. Smith*, 949 F.2d 677 (3d Cir. 1991): Judge Alito dissented from an opinion by Judge Scirica (Reagan) joined by Judge Becker (Reagan) invalidating an erroneous jury instruction on the issue of self-defense.



Mabel Wadsworth Women's Health Center

December 28, 2005

Senator Patrick J. Leahy
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

We write you on behalf of Mabel Wadsworth Women's Health Center in Bangor, Maine. At this time, we strongly oppose the nomination of Judge Samuel Alito to the United States Supreme Court. We urge you to subject his nomination to the most demanding scrutiny.

Mabel Wadsworth Center provides comprehensive women's reproductive health care to thousands of women from across the state, regardless of their economic status. We are often the only link our clients have to the health care system; we are one of the most largest providers of prenatal care to low income women in the Bangor region; and we meet the need for cancer screening, contraception, abortion care, childbirth classes, breast care, lesbian health care, adoption referrals, pap smears and much more. We receive no government grants. For 21 years, we have operated successfully as both a clinic and an advocate for women's well-being.

Our stance today is closely related to an insight shared at a January 2004 meeting with our own Senators: That the dangers to Roe v. Wade and its protections of women's most private rights lie more immediately in its being further weakened through attrition than in its being overruled.

We now know that Judge Alito is an architect of that attrition strategy. His underlying reasoning places us on high alert.

As you are aware, in a May 30, 1985 Memorandum to the Solicitor General concerning Thornburgh v. American College of Obstetricians

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and Gynecologists ("Memorandum")[1], Judge Alito set forth in detail a plan to weaken Roe and facilitate overruling it:[2]

> Accordingly, and in view of the lessons of Akron, I make the following recommendation. We should file a brief as amicus curiae supporting appellants in both cases. In the course of the brief, we should make clear that we disagree with Roe v. Wade and would welcome the opportunity to brief the issue of whether, and if so to what extent, that decision should be overruled. Then, without great formal discussion of levels of scrutiny or degrees of state interest, we should demonstrate that many of the provisions struck down by the Third and [Seventh] Circuits are eminently reasonable and legitimate and would be upheld without a moment's hesitation in other contexts. If the Court can be convinced to sustain these regulations, it may have to adjust its standard of review. This is essentially the opposite of the Akron approach; it is an argument from the specific to the general, rather than vice versa.[3]

Judge Alito[4] knew that convincing the Supreme Court to accept "eminently reasonable" – rather than compelling – state regulations on abortion would logically lead to lowering the legal standard of review for a woman's right to choose; and that this would result in a downward spiral of fading constitutional importance for that right – and potential disappearance of the right.

Judge Alito specifically advocated for upholding a wide range of state regulations – some of which reached beyond abortion to contraception. He supported "an entirely legitimate state regulation"[5] requiring doctors to inform women that certain methods of birth control are "abortifacients"[6] and "do not prevent fertilization but terminate the development of the fetus after conception."[7] Despite his claim that such a regulation would fall "within the confines of Roe,"[8] Judge Alito's position conflated the jurisprudence of abortion and contraception; was at odds with the Supreme Court's silence on when life begins; and undermined Roe's deference to women's ability to make their own moral decisions, particularly in their first trimester of pregnancy.

Further, Judge Alito characterized a requirement that women contemplating abortion be informed, for example, that "aid may be available to pay for prenatal and neonatal care and delivery" and that "the father is financially liable for child support"[9] as "relevant,

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[1] Found at The National Archives online at http://www.archives.gov/news/samuel-alito/accession-060-89-216/Thornburgh-v-ACOG-1985-box20-memoAlitotoSolicitorGeneral-May30.pdf.

[2] "Thus, by taking these cases, the Court may be signaling an inclination to cut back [on Roe]. What can be made of this opportunity to advance the goals of bringing about the eventual overruling of Roe v. Wade and, in the meantime, of mitigatingg [*sic*] its effects?" Memorandum at 8.

[3] *Id.* at 9.

[4] Judge Alito was not a judge at the time he wrote the Memorandum. We use his current title as a matter of convenience.

[5] Memorandum at 9.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 10.

accurate, factual, and non-inflammatory."[10] On the contrary, such advice is inaccurate and misleading. The financial and personal costs of supporting a child last long after prenatal and neonatal care are over; and actually collecting child support payments from a reluctant man is notoriously difficult. We do not believe, as Judge Alito apparently did, that the above regulations are "eminently reasonable." They conflict with the realities of women's lives and constitute moralizing in disguise.

Indeed, elsewhere in his Memorandum, Judge Alito engages specifically in moralizing:

> While an abortion involves essentially the same medical choice as other surgery, it involves an additional moral choice, because the woman contemplating a first trimester abortion is given absolute and nonreviewable authority over the future of the fetus. Should not then the woman be given relevant and objective information bearing on this choice? Roe took from state lawmakers the authority to make this choice and gave it to the pregnant woman. Does it not follow that the woman contemplating abortion have at her disposal at least some of the same sort of information that we would want lawmakers to consider?
>
> Doctors may voluntarily provide this information. But they may also fail to do so in a large number of cases. A benevolent doctor may have a narrow idea about his patient's well-being. He may wish to spare his patient from having to confront an uncomfortable moral choice. Furthermore, many physicians, including those operating high-volume abortion clinics, have a financial interest in encouraging women to have abortions. Must the state entrust to them the sole responsibility to provide a woman with the relevant information bearing on her choice?[11]

We ask you to note several objectionable strands in this passage: (1) Women are obliged to act like legislators when they are making the most private possible decisions; (2) doctors should force abortion patients to confront selected moral choices (must one legally force a reluctant organ donor to do the same when a family member's life is at stake?); and (3) doctors in general, and those who perform abortions in particular, are financially driven and less than ethical. We do not wish to see a jurisprudence built on these false premises.

Among the most inapposite passages in Judge Alito's Memorandum is the following:

> [A] "'description of the stage of development of the unborn child'" [citations omitted] . . . is very relevant to the extra-medical dimension of the abortion choice. Second, [Judge Coffin] argued [citation omitted] that the information would cause "emotional distress, anxiety, guilt, and in some cases increased physical pain." These results, however, are part of the responsibility of moral choice. Any one confronting such a choice – a legislator voting on abortion legislation, a judge or juror pronouncing a sentence of death or imprisonment, a

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[10] *Id.*

[11] *Id.* at 11.

> military officer commanding a mission that he knows will cost lives – may experience similar effects.[12]

Please note the failed analogies: (1) A legislator assumes the burden of making public policy; a woman seeking an abortion is entitled to act as a private person. (2) A judge or juror pronouncing a sentence of death or imprisonment does so after an adjudication of guilt; a woman seeking an abortion has not been convicted of a crime. (3) A military officer commanding a mission is acting in the context of war; a woman seeking an abortion is not. The sentiments in this passage fall outside the mainstream of legal thought.

Finally, Judge Alito rejected the notion that requiring a physician to report abortion information, including the marital status of the woman, would have a "chilling effect" on physicians:

> As for the "chilling effect" on physicians, it is hard to take this argument very seriously. Doctors are subject to a host of recordkeeping and reporting laws. In truth, what probably chills them is not the thought of filling out abortion reports or the wildly unlikely prospect of criminal prosecution for an abortion-related offense but the thought of a visit from an IRS agent investigating tax shelters.[13]

One is struck by Judge Alito's intemperate speculation about physicians in this passage and elsewhere. This attitude is inconsistent with appropriate judicial restraint. As ethical health care providers, and on behalf of our physician colleagues, we object to it.

We ask you to note, moreover, that there are virtually no legal citations in the above-quoted Memorandum passages. They go beyond law-based advocacy from a government lawyer supporting an administration policy. They bear the earmarks of personal arguments.

Obviously, the Memorandum we have discussed is twenty years old. Were it an anomaly in Judge Alito's career, our objections would be muted. But despite his current verbal assurances that his personal opinions would not interfere with his honoring precedent and that his prior stance on abortion was mere advocacy, Judge Alito's later dissent on the Third Circuit in 1991 echoes that earlier stance.

There is no question that, where Supreme Court decisions clearly covered all salient aspects of a reproductive rights case he faced on the appellate bench, Judge Alito adhered to Supreme Court precedent.[14] However, his well-known dissent in Planned Parenthood v. Casey[15] – in which Judge Alito maintained that requiring women to notify spouses of intent to abort does not create an "undue burden" – revives the disconnect with women's

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[12] *Id.* at 12.
[13] *Id.* at 15.
[14] *See, e.g.*, Planned Parenthood v. Farmer, (3d Cir. 2000); Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997).
[15] 942 F.2d 683 (3d Cir. 1991).

realities reflected in his 1985 Memorandum. In Casey, Judge Alito skillfully tracked the "undue burden" standard and associated levels of scrutiny; but then accepted the state spousal notification regulation's harm to women where the numbers of injured women were small in his opinion. The Supreme Court unambiguously rejected his view.[16] Moreover, Judge Alito's Casey dissent adeptly used procedural arguments to gloss over violent harms not covered by the exceptions in the spousal notification statute – such as the possibility that the husband of a woman seeking an abortion would harm their children, rather than the woman, in retaliation.

Judge Alito reasoned differently in certain other contexts. In Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,[17] he elegantly parsed the discrimination inherent in forbidding Muslim police to retain their beards by hypothesizing on-the-street scenarios involving bearded police officers. He did not require evidence that such scenarios occurred; he accepted that, in the natural course of events, they were possible. In Casey on the other hand, Judge Alito refused to entertain common-sense scenarios of harm to women who might need to inform a violent spouse of their decision to abort. Instead, he declined to consider such harms by asserting that plaintiffs had offered no evidence that such injuries had in fact occurred as the result of the statute in question.[18] The difference in Judge Alito's approaches in these two cases is striking. His understanding of religious freedom in Fraternal Order is palpable. On the other hand, his apparent lack of insight into domestic violence and the real-life consequences for women[19] in Casey is disconcerting; and if imported into Supreme Court decisions, could prove lethal for many of our clients.

We are compelled to ask what path Judge Alito would take on the Supreme Court when facing a matter in the reproductive rights arena on which he is not technically bound by *stare decisis.* He may be a decent man and he is surely an accomplished professional; but the answer to this question bodes ill for women.

If you believe there is anything we can do to help you come to a decision – or to help you oppose this nominee, as we do – please do not hesitate to contact us.

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[16] Planned Parenthood v. Casey, 505 U.S. 833, 894 (1992)("The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. [Citation omitted.] The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.") Found at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=505&invol=833. Indeed, the role of courts is widely thought to encompass the protection of the rights of minorities in a wide range of contexts.

[17] 170 F.3d 359, 366 (3d Cir. 1999).

[18] Casey at 723 n. 6.

[19] This is an important issue. There are many legal doctrines – rejection of the "separate but equal" standard, the battered woman defense, the "reasonable person" (as contrasted to "reasonable man") standard applied to statutes of limitation in tort law that required an understanding of the parties' daily realities.

In the meantime, we hope you will pose the following questions to Judge Alito during the upcoming hearings:

I. *Under what circumstances is the examination of hypothetical harms acceptable in judicial reasoning? Under what circumstances must evidence of harm be adduced? Under what circumstances are sociological data acceptable?*

II. *Under what circumstances should physicians be required to dispense moral advice? Who should determine the content of such advice?*

III. *What are the circumstances under which a Supreme Court precedent should be overruled?*

Thank you for your attention in this extremely important matter.

Sincerely,

Ruth Lockhart	Sharon Barker	Stephanie Cotsirilos
Executive Director	President	Past President
	Board of Directors	Board of Directors



MALDEF
Mexican American Legal Defense and Educational Fund

Statement of Ms. Ann Marie Tallman, President and General Counsel, Regarding MALDEF's Opposition to the Confirmation of Judge Samuel A. Alito as Associate Justice of the United States Supreme Court

Good morning. I am Ann Marie Tallman, President and General Counsel of MALDEF, the Mexican American Legal Defense and Educational Fund.

MALDEF's thorough review of Judge Alito's legal record has revealed a disturbing pattern of insensitivity towards Latinos' lives and a pattern of legal opinions that would, if he is confirmed, dismantle fundamental constitutional protections currently enjoyed by the Latino community and all Americans. I will highlight today three areas of Alito's record that are particularly troubling to MALDEF: access to justice, employment discrimination, and immigrants' rights.

First, in the 1994 case of *Pemberthy v. Beyer*, Judge Alito issued a decision as a member of the Third Circuit Court of Appeals that has had the effect of barring many Latinos from serving on juries in cases in which Spanish evidence is at issue. In *Pemberthy*, the prosecution's case featured testimony in Spanish that was translated by the police and used in translation by prosecutors in presenting their case. In selecting jurors, prosecutors exercised peremptory challenges to strike five jurors who understood Spanish. The prosecutors said that they barred these jurors because jurors who speak Spanish might not credit the official, State-provided translations of the evidence and may use their special knowledge to glean additional information from the evidence.

After being convicted in New Jersey state court, the defendants petitioned the federal district court for review. The district court in New Jersey overturned the convictions, holding in part that dismissing Latino jurors because they can understand Spanish is tantamount to dismissing them based on race and is therefore unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

The State of New Jersey appealed to the Third Circuit, where Judge Alito heard the case and wrote the majority opinion, which reinstated the convictions. Alito held that the Constitution does not prohibit a trial attorney from dismissing jurors because of their proficiency in Spanish when translations of evidence are at issue.

Clearly, not all Americans who are proficient in Spanish are Latinos, and not every potential juror dismissed on this basis will be Latino. But a clear majority of Spanish-speakers in America are Latino, and a substantial segment of the Latino community in this country is Spanish-speaking. The rule of law applied in *Pemberthy*, therefore, clearly acts to prevent Latino litigants from enjoying equal access to justice in America by being

heard by a jury of their peers. Further, this rule of law denies the reality of the Latino of being subject to discrimination on the basis of language ability.

Next, I will highlight Judge Alito's work in employment discrimination, which has also contributed to MALDEF's decision to oppose his confirmation. In the case of *Bray v. Marriott* in 1997, Judge Alito wrote a dissent that would have, as the majority wrote in rejecting his views, "eviscerated" protections against racial discrimination in the workplace.

In addition, as an attorney in the Reagan Administration, Judge Alito wrote legal briefs and developed legal strategies to overturn affirmative action workplace programs that favored groups historically subject to discrimination. The positions espoused by Alito in these cases represent significant rollbacks of Latino progress in the drive towards fair employment practices. Disturbingly, Judge Alito also wrote in an application for promotion during this period that he felt particular pride in having participated in the Reagan Administration's efforts to invalidate affirmative action programs designed to remedy employment discrimination.

I would also like to note at this point that in this same 1985 application for promotion, Alito wrote that he "developed a deep interested in constitutional law" in part because he disagreed with Warren Court decisions in voting rights. Latinos have been politically empowered by the constitutional precedents that Judge Alito so readily dismisses here, and MALDEF is properly concerned about the prospect of elevating to the Court a man who wrote that his legal awakening was as an opponent of these fundamental precedents, including the principle of "one person, one vote." MALDEF is, I will note here, attorney of record for Latino plaintiffs in the Texas redistricting case that the Supreme Court agreed to hear this week. As such, we are concerned that the nominee wishes to roll back voting rights to their pre-Warren Court status.

The final area that I will highlight here today is Alito's legal record regarding immigrants' rights. As an attorney in the Reagan Administration, Alito drafted a legal opinion for FBI Director William Webster that MALDEF finds very troubling. Alito's opinion, which goes beyond the scope of the question that the FBI Director submitted to the Department of Justice, provides an overly narrow interpretation of the constitutional protections available to undocumented immigrants in the United States. Alito wrote that caselaw "suggests" that undocumented immigrants have no claim to nondiscrimination with respect to nonfundamental Constitutional rights.

Significantly, Judge Alito's legal opinion in his communication to the FBI Director omits mention of *Plyler v. Doe*, a case which MALDEF brought and won in 1982 on behalf of undocumented immigrant students who were barred from Texas schools in violation of their equal protection rights. The *Plyler* Court expressly held that education is not a fundamental right but that undocumented immigrants have equal protection rights in this context despite the right being "nonfundamental." *Plyler* was decided four years prior to Alito's letter to the FBI Director, but he ignores it entirely and chooses to cite older cases

that were not directly relevant to the legal question presented but which suggested limited readings of the availability of constitutional protections for undocumented immigrants.

MALDEF is very concerned that Alito's misstatement of the law regarding the constitutional rights of non-citizens may not be merely an omission or a simple mistake by a junior attorney, but may reflect a tendency on his part to disfavor constitutional protections for undocumented immigrants, many of whom are Latino.

In addition to the three areas of law that I have described here today, MALDEF has also uncovered disturbing tendencies on the part of Alito in the areas of federalism, criminal procedure, and the right to privacy.

In conclusion, MALDEF's thorough review of Judge Alito's record has revealed a jurist who has spent a career attempting to roll back the clock on the civil rights protections available to Latinos. As an attorney in the Reagan Administration, Alito advanced radical legal opinions which opposed civil rights protections for immigrants and minorities. As a judge, he has chipped away at fundamental constitutional protections which should properly be afforded to Latinos and all Americans. We strongly urge senators to vote "no" on the confirmation of Judge Alito.

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.

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.

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November 3, 2005

Honorable Arlen Specter, Chair
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

Recent press accounts suggest that some believe it was improper for Judge Samuel Alito to have participated in a case called *Monga v. Ottenberg*, decided by a panel of the Third Circuit in 2002. In my opinion, there is no basis for suggesting his action was in any way improper.

To briefly suggest my background to draw such a conclusion, I have taught and written in the field of legal and judicial ethics for over thirty years. The law school text that I co-author has long been the most widely used in the country, and it covers judicial ethics in considerable detail.

Judge Alito's required annual financial disclosure forms list among his holding several Vanguard mutual funds that offer diverse kinds of investment products. Some of the funds are shown as valued in the range $15,000 to $50,000; others are in range $50,000 to $100,000.

Based on the relatively sketchy reports we have available, the *Monga v. Ottenberg* case arose after Mr. Monga's business failed. A Massachusetts court appointed Mr. Ottenberg as receiver. Mr. Ottenberg claimed that certain Individual Retirement Accounts (IRAs) had been created by fraudulent transfers and thus that their assets should be available to pay creditors. The Massachusetts court agreed with him and so ordered. The IRAs were invested in several mutual funds, including some managed by Vanguard.

Even prior to that adverse ruling, Mr. Monga had filed collateral proceedings in federal court in Philadelphia seeking to enjoin the mutual fund companies from paying the accounts over to Mr. Ottenberg. That case had been dismissed in 1996, shortly before Mr. Monga's death. Later, in 1998, the Massachusetts state court had enjoined Mr. Monga's widow, Ms. Maharaj, from filing any other such action in any state or federal court.

The case on which Judge Alito sat was an appeal from the decision of Federal District Judge Hutton granting the motions of Vanguard and Founders Funds to dismiss yet another collateral federal action and to allow the companies to comply with the Massachusetts order. It

should not be surprising, given the repeated factual findings in favor of Mr. Ottenberg, that the Third Circuit panel consisting of Judges Alito, Fuentes and Roth unanimously affirmed Judge Hutton without published opinion. The Supreme Court denied certiorari.

As apparently a last ditch effort to keep her case alive, Ms. Maharaj then sought to reopen the case by suggesting that because Judge Alito had owned Vanguard mutual funds at the time of the Third Circuit decision, the result was somehow tainted. Thus, a different panel of the Third Circuit reheard the case and unanimously reached the same result, again in an unpublished opinion. The Supreme Court again denied certiorari.

The relevant statutory provision, 28 U.S.C. § 455, requires a federal judge such as Judge Alito to disqualify himself (a) "in any proceeding in which his impartiality might reasonably be questioned," or (b) if he "has a financial interest in * * * a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

Part (d) of § 455 then defines "financial interest" to mean "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that: (i) Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund."

The best technical argument that Judge Alito did something wrong seems to be that he had a "financial interest" in "a party to the proceeding," because Vanguard was technically one of the defendants in the collateral proceeding for injunction that was on review. The argument collapses, however, in view of the clear statement in § 455(d) that ownership of a mutual fund is expressly *not* a financial interest "unless the judge participates in the management of the fund."

I have seen it suggested that Vanguard apparently regards its mutual fund purchasers as "owners" in the same way that mutual insurance companies call their policyholders "owners." In both situations, investors or policyholders may "own" the company in some theoretical sense, but that fact no more makes Judge Alito part of the "management of the [Vanguard] fund" than a policyholder could be said to "manage" his or her insurance company. There is, in short, simply no way that Judge Alito fits within the prohibition of 28 U.S.C. § 455.

Further, and going more to the real issue in any ethics charge, it is absolutely clear that there is no way Judge Alito stood to profit from deciding the *Monga* case one way rather than another. Putting aside the infinitesimal share of the Vanguard funds that Judge Alito owned, Vanguard had no material stake in the outcome of the *Monga* case. Vanguard presumably wanted the case to be over; that is likely why it moved to dismiss the federal proceeding. But Vanguard held money that belonged either to Mr. Monga, or to the receiver Mr. Ottenberg.

Nothing that Judge Alito did or could do would change the fact that the money did not belong to Vanguard or Vanguard's theoretical "owners" such as Judge Alito.

There is thus no actual or technical substance to the suggestion that Judge Alito did something wrong in hearing the *Monga* case. One may say that judges must avoid even "the appearance of impropriety," but no reasonable person could believe that Judge Alito violated even that standard. It should not "appear" improper to decide a case which the judge has no incentive to decide other than in accordance with the law.

Finally, I have seen it said in the media that Judge Alito promised your Committee at the time of his confirmation in 1990 that he would recuse himself from "any cases involving the Vanguard companies." I have not seen the context of that "promise," but I greatly doubt that your Committee understood it to require more than the law governing disqualification requires.

In any event, even if Judge Alito had undertaken special responsibilities involving disqualification in cases in which Vanguard appeared in any form, I do not see his failure to recuse himself in the *Monga* case as other than one of the inadvertent failures to disqualify that occur from time to time because of the volume of cases and press of business in the federal courts. In 1997, for example, press reports said that Justice Ginsburg had participated in some twenty-one Supreme Court cases involving companies in which her husband held stock. The mistakes were clearly inadvertent, did not affect any result, and no one saw the incidents as suggesting anything other than oversights to be avoided in the future.

The name of the *Monga* case was *Monga v. Ottenberg*. The names of Vanguard and the other mutual funds appeared later in the case title to be sure, but it was obvious to everyone that they were not the real parties in interest. The decision in question ultimately turned on the finality of Massachusetts state court rulings in a dispute between two individuals, Monga and Ottenberg. It is thus utterly unjustified to call Judge Alito's participation in that case a conflict of interest or a breach of faith with this Committee.

In my opinion, Judge Alito's participation in the *Monga* case was in no way improper, nor does it give any reason to doubt that he would fully comply with his ethical responsibilities if he is confirmed as an Associate Justice of the United States Supreme Court.

Respectfully,

Thomas D. Morgan
George Washington University Law School

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January 9, 2006

Members
United States Senate
Committee on the Judiciary
Washington, DC 20515

RE: NAACP URGES THOROUGH REVIEW OF JUDGE SAMUEL ALITO'S TROUBLING RECORD ON CIVIL RIGHTS & CIVIL LIBERTIES DURING JUDICIARY COMMITTEE HEARING

DEAR SENATOR:

As you are aware from earlier correspondence, the NAACP is opposed to the nomination of Judge Samuel Alito to the United States Supreme Court based on our thorough review of his dismal record on upholding civil rights and civil liberties protections. As such, we would urge you, as a member of the Senate Judiciary Committee, to use your position and your Constitutionally-mandated responsibility to thoroughly review Judge Alito's record on civil rights and civil liberties and to try to determine the extent to which Judge Altio is likely to preserve the civil rights of Americans if he is confirmed to our Nation's highest court.

The Supreme Court is, in many cases, the last opportunity for many Americans to assert their rights and ensure the protection of their liberties. Many of the civil rights gains that have been made over the past 50 years are a result of Supreme Court rulings. Thus, the NAACP feels that it is of the utmost importance that any nominee to the Court is clear about his or her intentions to protect the civil rights gains that have been made over the past 5 decades and have always been promised to us by the US Constitution.

Of specific concern to us from Judge Alito's past history is:

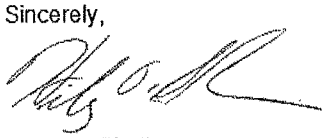
- In a 1985 job application for a position with the Reagan Administration, Judge Alito disagreed in writing with the Warren Court's reapportionment decisions now known as "one man, one vote", which are among the Court's most widely accepted decisions on civil rights and equal representation. The "one man, one vote" theory is also one of the basic tenets of Voting Rights that the NAACP has fought for;
- In the 1993 case *Grant v. Shalala* Judge Alito ruled against a class action alleging racial and other bias by an Administrative Law Judge when determining Social Security benefits, arguing that the Court of Appeals lacked the authority to conduct a trial and make independent findings on actions taken by an Administrative Law Judge for the Social Security Agency. In a strongly worded dissent to the Alito ruling, Judge Leon Higginbotham said that the decisions is "...effectively have courts take a back seat to bureaucratic agencies in protecting constitutional liberties. This...is a radical and unwise redefinition of the relationship between federal courts and federal agencies."

- In the 1997 case *Bray v. Marriot* Hotels, Judge Alito strongly dissented from a Third Circuit ruling and made it clear that he supports impossibly high barriers for victims of discrimination to have their cases heard;
- In a separate 1997 case, *Riley v. Taylor*, Judge Alito held that a prosecutor was not motivated by race in striking all African Americans from the jury of a death-penalty case involving an African American defendant. When the defendant produced statistical evidence showing the prosecution repeatedly African Americans from juries, Judge Alito contended that this was irrelevant and likened it to a study showing that a disproportionate number of recent Presidents have been left-handed
- In a 2004 case, *Doe v. Grody*, Judge Alito dissented from a ruling against police officers who had strip-searched a woman and her 10-year-old daughter while executing a search warrant authorizing the search of her husband and their home.

In short, during the course of the NAACP's investigation into Judge Alito's past we became convinced that he is unfit to sit on the United States Supreme Court because race and gender are still a real problem in the United States; a fact he appears to neither recognize nor appreciate.

Accordingly, as I said earlier, I hope you will ask tough questions, and demand thorough answers, during the hearings that begin today on Judge Alito to try to determine even further the extent to which he is, or is not, committed to upholding and protecting the civil rights and civil liberties of all Americans. On behalf of the NAACP, I would also like to further express our strong opposition to the nomination and our hope that you urge your Senate colleagues to oppose and defeat Judge Samuel Alito's nomination. Please contact me, or my Bureau Counsel, Crispian Kirk, at (202) 463-2940 soon to let me know your position on this matter, and to let me know what I can do to work with you to ensure that President Bush nominates, and the Senate confirms, moderate, not extremist, judicial candidates to the federal bench.

Sincerely,



Hilary O. Shelton
Director

TESTIMONY OF

THEODORE M. SHAW

DIRECTOR-COUNSEL AND PRESIDENT

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

ON THE NOMINATION OF

JUDGE SAMUEL ALITO

TO THE UNITED STATES SUPREME COURT



NAACP LEGAL DEFENSE

AND EDUCATIONAL FUND, INC.

January 12, 2006

Testimony of Theodore M. Shaw, Director-Counsel and President of the NAACP Legal Defense & Educational Fund, Inc., on the Nomination of Judge Samuel Alito to the United States Supreme Court

Good afternoon, my name is Theodore M. Shaw, the Director-Counsel and President of the NAACP Legal Defense & Educational Fund, Inc. ("the Legal Defense Fund").

The Legal Defense Fund, whose first Director-Counsel was Thurgood Marshall, and which is no longer a part of the N.A.A.C.P., is the nation's oldest civil rights law firm and has served as legal counsel for African-American civil rights claimants in most of the major racial discrimination cases decided by the United States Supreme Court.

Through every step of the African American experience in this nation, the Supreme Court has – in ways both positive and otherwise – shaped the lives and opportunities of black Americans. *Dred Scott, Plessy v. Ferguson, Brown v. Board of Education, Grutter v. Bollinger*: these cases describe not only where we have stood as a nation, but in so many ways have circumscribed and defined the lives of African-American people. The Supreme Court is just as important today as it was in 1857 when *Dred Scott* was decided, or in 1954, when the late Justice Thurgood Marshall argued before the Court in *Brown*. From voting to education, criminal justice to employment, civil rights issues continue to affect the lives of African Americans every day. Who is on the Court – who decides – is thus a decision which merits the highest consideration.

As a lawyer, as a member of the Bar of the Supreme Court of the United States, as the head of an organization, the primary responsibility of which is to provide legal representation in cases involving racial discrimination, including in cases before the Supreme Court, and as a representative of the civil and human rights community that places so much trust and hope in our judiciary, I take no pleasure in the task that brings me here today. I am acutely aware that some people will dismiss all opposition to the nomination of Judge Alito to the Supreme Court as knee-jerk liberalism. For us, however, this is not about liberal or conservative, right or left. We do not oppose nominees merely because they are conservative. Our concern is that judges are open minded, and that they decide cases based on the facts and the law.

Justice O Connor's judicial philosophy has been conservative. In fact, in many race discrimination cases coming before the Supreme Court, the claimants did not win her vote. But, importantly, her vote was always in play. For a quarter of a century, the Supreme Court has decided most race discrimination cases by razor thin 5-4 margins. Justice O Connor's vote was widely perceived to be the swing vote; the Court could go either way.

Unfortunately, Judge Alito's record does not reveal any of the pragmatism for which Justice O'Connor is well known. The overwhelming majority of African-American litigants whose claims Judge Alito have adjudicated has lost his vote. Judge Alito's confirmation to the Supreme Court will cause a substantial shift in the Court's civil rights jurisprudence in a manner that will make it significantly more difficult for civil rights plaintiffs to prevail. As a result, we and a number of other civil rights organizations oppose the nomination of Judge Samuel Alito to the United States Supreme Court as an Associate Justice.

We have prepared a detailed report discussing Judge Alito's record on various civil rights subject areas and detailing the reasons for our opposition, and I ask that the report be entered into the record. In my limited time today, I will highlight only a few issues.

First, for minority workers, women and others who depend on the nation's fair employment laws, Judge Alito's record is deeply troubling. In his fifteen years on the bench, Alito has almost never voted in favor of African-American plaintiffs in employment discrimination cases. Of the dozens of employment discrimination cases involving race in which Judge Alito has participated, he ruled for African Americans on the merits in only two instances. Further, he has never authored a majority opinion favoring African Americans in such cases. Moreover, in key cases, he has dissented from rulings of his colleagues for African-American plaintiffs and sought to impose upon plaintiffs claiming racial discrimination a higher burden of proof than Congress intended.

Judge Alito's comments regarding the Warren Court's decisions on "reapportionment" also are deeply troubling. Among other things, the Warren Court's reapportionment decisions are lauded for their role in barring state legislative schemes that dilute the voting strength of racial minorities by perpetuating inequitably drawn voting districts - districts in which the votes of citizens in one part of a state would be afforded, in some cases two times, five times or even ten times more weight than the votes of citizens in another part of a state. The Court established the principle that

every citizen has the right to an equally effective vote. In doing so, the Court set into motion a process that led to the dismantling of a political system infected both by prejudice and other forms of patent electoral manipulation. These decisions have resulted in more effective political participation in the political process for all voters. Nevertheless, Judge Alito has criticized them. Just as importantly, in his only voting rights decision on the bench, he voted to uphold at-large electoral districts, thereby tolerating the types of electoral abuses that the principle of one person, one vote as well as the Voting Rights Act of 1965 were intended to end.

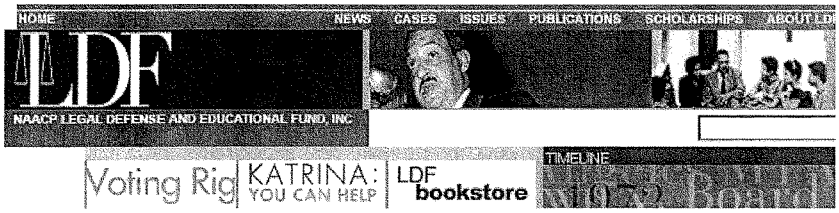
In the area of criminal justice, Judge Alito twice has written separately to express troubling views on a defendant's right to have a jury selected free of racial discrimination. In one case, he trivialized the serious matter of race discrimination in the selection of jurors by comparing it to whether someone is left-handed or right-handed. In another, Judge Alito suggested that a standard different from that announced by the U.S. Supreme Court should prevail.

Finally, we are deeply troubled by Judge Alito's record on affirmative action. In a brief attacking affirmative action, Samuel Alito used the following analogy: "Henry Aaron would not be regarded as the all-time home run king, and he would not be a model for youth, if the fences had been moved in whenever he came to the plate." This statement reveals a fundamental misconception of what affirmative action is about. Civil rights and affirmative action advocates are not asking for fences to be moved in; they are seeking opportunities to take the field, to stand at the plate. Hank Aaron, like Jackie Robinson, would never have had the opportunity to play in the Major Leagues, if Branch Rickey of the Brooklyn Dodgers and others had not "affirmatively acted" to desegregate baseball.

Our review of Judge Alito's record reveals that he has been remarkably consistent over the years. His views expressed as an advocate do not differ from his jurisprudence during fifteen years as an appellate judge. He has demonstrated a strong deference to government actors and employers in race discrimination cases, a narrow and cramped interpretation of civil rights laws, and a skewed skepticism of the claims of minority, female and other civil rights plaintiffs. Simply put, the question before us is whether African-American and other civil rights claimants would be better off before or after Judge Alito's confirmation to the Supreme Court. The clear answer is that civil rights claimants would be harmed by this confirmation.

While we would like to believe that Judge Alito would approach civil rights cases with an entirely open mind if he were confirmed to the Supreme Court, his

record as an appellate judge contradicts any such view. We therefore respectfully but vigorously oppose his confirmation as Associate Justice of the United States Supreme Court.



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December 19, 2005

NAACP Legal Defense Fund Opposes Alito Nomination

Report details hostility to civil rights and warns of tipped balance on High Court

On December 15, 2005, the NAACP Legal Defense and Educational Fund, Inc. (LDF) announced opposition to the nomination of Samuel Alito, Jr. to the U. S. Supreme Court, citing his hostility to strong enforcement of civil rights laws. LDF warned that confirmation of Judge Alito would threaten to shift significantly the Supreme Court's jurisprudence relating to affirmative action, voting rights, employment and criminal justice issues.

At a press conference in Washington, D.C., LDF released a 70-page report detailing what it called an "extreme" judicial approach by Judge Alito that would demonstrably impact important future decisions of the High Court. The LDF report cites cases in which Alito has attacked congressional legislative authority in a manner that his colleagues viewed as extreme. As a Justice Department lawyer, he argued to uphold police use of deadly force and undermine the rights of criminal defendants. In the area of affirmative action, LDF highlighted "troubling signals" that Alito would tip the delicate Court balance to unravel policies "at the epicenter of the modern struggle for racial equality."

"We can predict with substantial certainty that Judge Alito will very likely vote in a manner that, given the current composition of the Court, will cause a substantial shift in the Court's civil rights jurisprudence with devastating effects," the LDF report cautioned.

Judge Alito is scheduled to appear before the Senate Judiciary Committee in early January for confirmation hearings.

LDF Director-Counsel and President Theodore M. Shaw stressed that the organization does not relish opposing a

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nomination to the Supreme Court and does so only when the nominee's record is contrary to the goals of equal justice that are the hallmark of LDF's work.

With the announcement of Justice Sandra Day O'Connor's retirement last summer, LDF called upon President Bush to nominate a successor who is not ideologically rigid and predictable, but who is fair and open-minded, and committed to protecting advances in civil rights. LDF emphasized that Justice O'Connor's successor should not be a mission-driven ideologue but, even if a conservative, should maintain the balance on the Court with respect to civil rights issues.

To analyze Alito's record, LDF reviewed published and unpublished opinions in cases decided by Judge Alito as well as documents released by the White House and the National Archives. Appointed by President George H.W. Bush to the U.S. Court of Appeals for the Third Circuit in 1990, Alito spent his entire legal career at the Department of Justice.

LDF's report also reveals:

- Unquestionably, Justice O'Connor cast pivotal votes in civil rights cases coming before the Supreme Court. While Justice O'Connor did rule against civil rights litigants, at least her vote on important issues such as affirmative action was "always in play." In contrast, a review of Samuel Alito's tenure at the Justice Department reveals that he was directly involved in the Reagan Administration's frontal attacks on affirmative action, arguing against affirmative action in three significant cases before the Court. In his 15 years on the bench, he has ruled against African Americans on this issue.

- Judge Alito's record should be extremely troubling to minority workers, women and others who depend on equal opportunity protections in the workplace. Although he has heard dozens of cases, Judge Alito has almost never ruled in favor of an African-American plaintiff in an employment discrimination case; he has never authored even one opinion favoring an African-American plaintiff on the merits in such a case.

- Judge Alito's criticism of the Warren Court's reapportionment decisions is extremely troubling. These cases "set into motion a process that led to the dismantling of a political system infected both by prejudice and other forms of patent electoral manipulation." In his only opportunity on the bench to interpret the Voting Rights Act, Alito voted to uphold an at-large system of electing members to a Delaware school district, perpetuating an electoral system that diluted the voting strength of racial minorities.

- In the criminal justice area, Judge Alito has repeatedly parted ways with his colleagues and failed to heed Supreme Court precedent in important cases regarding race discrimination in jury selection, the right to effective assistance of counsel, and search and seizure issues.

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NARAL
Pro-Choice America

In Opposition to the Supreme Court Nomination of Samuel Alito

Testimony Presented by

Nancy Keenan
President
NARAL Pro-Choice America

U.S. Senate
Committee on the Judiciary

January 18, 2006

On behalf of NARAL Pro-Choice America and the pro-choice American majority we represent, I am honored to submit this testimony to the committee. I appreciate the efforts of the committee and the Senate in trying to ascertain the legal philosophy endorsed by Samuel Alito. I also appreciate your efforts in reviewing his record as an attorney and judge, and your efforts to understand what is at stake with this nomination for American law, and for the American people.

By every objective measure, the American public remains solidly pro-choice and overwhelmingly supports the landmark *Roe v. Wade* decision, which recognized the right to choose as a fundamental constitutional freedom. But Americans' views on this point speak not just to the question of legal abortion; rather, they represent a very basic and fundamental belief about the role of government in our personal lives. Americans believe in freedom and personal responsibility – and this is reflected in their stalwart support of the *Roe* decision. Unfortunately, Samuel Alito does not share their – our – view about the Constitution and the protections it grants. It is for this reason that NARAL Pro-Choice America opposes his nomination and urges you to do likewise.

As you know, as early as 1985, Samuel Alito voiced his opposition to a woman's right to choose and strategized about the best way to erode and ultimately take away this basic freedom. He stated starkly that it was his legal opinion that the Constitution does not protect a woman's right to choose. And he acted on that legal philosophy: As a high-

level lawyer and political appointee in the Reagan Department of Justice, Alito crafted a plan to dismantle *Roe* piece by piece, until such time as the Supreme Court could overturn it altogether. Far from being a mere bureaucrat carrying out the wishes of his superiors, he apparently sought this assignment and later boasted of his pride in having crafted the strategy. Later, when Alito had the opportunity as a judge, he continued to act on that legal philosophy, interpreting legal protections for the right to choose so narrowly as to endanger the most vulnerable women.

Alito had the opportunity during his testimony before this committee to refute these legal beliefs, to expand on his legal views, or explain how they had evolved – in short, to give senators and the American public confidence that their cherished rights were safe in his hands, in spite of his record. Unfortunately, he did none of the above. Instead, Alito affirmed that, in 1985, he was sincere in stating his legal judgment that a woman's right to choose finds no constitutional support. Much more troubling, Alito refused to disavow those statements as being unreflective of his current views. Though given every opportunity to recant his anti-*Roe* legal philosophy, Alito could go no further than to say he has an "open mind," without offering any instances of an issue where he had fundamentally changed his views on a matter of comparable philosophic import as the question of a woman's right to choose. Then, chillingly, he left the door open to voting against *Roe* by agreeing that precedent does not trump every other legal consideration.

At no point in his testimony did Alito agree that a woman's right to choose is protected by the Fourteenth Amendment or any other provision of the Constitution. Indeed, Alito could not even agree that *Roe* and *Casey* are "settled law." In this regard, his answers were strikingly more evasive and disturbing than John Roberts'. Roberts stated that *Roe* and *Casey* were "settled law on at least five occasions;" Alito demurred on this point. His explanation for why he refused to answer is unconvincing: He said that cases concerning reproductive freedom are currently pending before the Court and likely to arise again. Note the contrast, though, with his ability and willingness to endorse as "settled" other areas of the law: For example, although four cases are pending before the Supreme Court concerning redistricting, Alito could state unequivocally that "one man, one vote" was settled law.

Also, notably, Alito misstated and downplayed the legal basis for *Planned Parenthood of Southeastern Pennsylvania v. Casey*. He claimed, contrary to fact, that *Casey* "began and ended" with *stare decisis*. While *Casey* certainly discussed at great length respecting *Roe* for its precedential value, *Casey* also was – in itself – an articulate endorsement of constitutional protection for a woman's right to choose. To quote from the case:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education. [citation omitted] Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [citation omitted] Our precedents "have respected the private realm of family

> life which the state cannot enter." [citation omitted] These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 505 U.S. 833, 851.

How a Supreme Court Justice reads and understands *Casey* matters. Alito discounted *Casey* by saying it relied only on *stare decisis,* rather than a reaffirmation of the central principle of *Roe – that the Constitution protects a woman's right to choose.* If, as Alito contends, the Supreme Court should interpret *Casey* as simply a begrudging reaffirmation of an invalid ruling, *Casey* would become a far weaker precedent than it really is – a persuasive reaffirmation of *Roe's* core principle.

The committee has also heard testimony from scholars and representatives of organizations who analyzed Alito's opinions and speeches concerning the Fourth Amendment and executive branch powers. They determined that he systematically favors an expansion of governmental authority and rules in favor of the government when challenged by an individual nearly every time. Thus Alito's opinions on a woman's right to choose are consistent with his apparent legal philosophy that governmental power trumps individual rights. But if the courts don't set limits on such power, who will? One need not be a supporter of a woman's right to choose to be chilled by the thought of untrammeled governmental authority.

One final point: Overturning *Roe* has long been the goal of a powerful strategic movement – but the Court need not reverse *Roe* outright in order to end legal abortion or make access so difficult, expensive, and dangerous that abortion's legality is practically meaningless. Indeed, overturning *Roe* outright is not the most likely avenue for the Court and anti-choice legislatures to take in the near term. Access to abortion services is already perilously close to nonexistent in many parts of the country. Women, too, are subject to so many restrictions that in many cases traversing the legal gauntlet is, as a practical matter, already impossible.

In other words, rights can be taken away systematically, state by state, law by law, group by group, decision by decision. Alito's 1985 strategy memo to the top officials at the Department of Justice urged that the prudent course at that time would be to end the era of reproductive freedom gradually, by allowing the state more and more latitude to intervene, by redefining abortion to include common forms of birth control, by changing the legal standard of review. Then, Samuel Alito did not think a frontal assault on *Roe* was likely to prevail. But if confirmed, we risk the real possibility that Alito could endorse every tactic, every strategy, and every consequence of the movement to deprive women of their reproductive freedom, perhaps even including the overturn of *Roe* itself. Either way, the end result is that the right to choose could soon be taken away from millions of American women. This steady drumbeat has been intensifying for years.

Senators, the American majority continues to believe that choices about such intimate matters as when and whether to become a parent should be left to the individual – without interference from government and politicians. Decisions that involve so many personal considerations, decisions that go to the heart of one's ethical and moral self, one's personhood, are best left to the person most involved – the woman. Samuel Alito does not share this basic, fundamental view of government, of law, of individual rights. For this reason, I urge the Senate to oppose this nomination.

Thank you for your consideration.



January 11, 2006

United States Senate
Washington, D.C. 20510

Dear Senator:

On behalf of NARAL Pro-Choice America, I am writing to express our opposition to the confirmation of Samuel Alito to the U. S. Supreme Court. During his career, Alito has consistently demonstrated hostility toward fundamental reproductive rights. If he is confirmed as an Associate Justice on the Supreme Court, women will likely lose critical protections that *Roe v. Wade* established.

At the Department of Justice in the 1980s, Alito actively worked to limit and ultimately overturn *Roe v. Wade*. As an assistant to the Solicitor General, he wrote a lengthy, detailed strategy memorandum in which he recommended that the Reagan administration intervene in a significant abortion-related case before the Supreme Court in order to advance the administration's anti-choice agenda. In the memo, Alito detailed his legal strategy to dismantle the protections of *Roe v. Wade*, while pushing toward the ultimate goal of overturning the landmark decision altogether. He supported even the most intrusive and unreasonable restrictions on reproductive freedom. Perhaps most disturbingly, he saw nothing wrong with the government forcing doctors to tell patients that their use of birth control may cause abortion – an utterly inaccurate statement that defies scientific definitions endorsed by the medical community and the federal government.

Far from claims to the contrary, Alito's work at the Department of Justice was hardly that of a government functionary. According to a then-colleague in the Solicitor General's office, Alito sought out the opportunity to work on the administration's friend-of-the-court brief in the case, the colleague has explained that Alito was instrumental in crafting the brief, providing "the research, the thinking, as well as the legal research and analysis." In application for another job in the Department of Justice, Alito later boasted that he was "particularly proud" of his contribution in the case "in which the government has argued in the Supreme Court that ... the Constitution does not protect a right to an abortion." He emphasized that this was a "legal position" in which he personally believed "very strongly."

It was my hope that, during his Senate hearings, Alito would explain further these writings and share with senators and the American public whether he still holds these legal opinions about a woman's right to choose. Unfortunately, thus far, he has failed to

do so. Alito admitted that his 1985 statement accurately reflects his views at the time, but then flatly, repeatedly, refused to answer whether he continues to believe that "the Constitution does not protect the right to an abortion." Especially given his willingness to state his legal views in other areas, we have no choice but to conclude that he in fact continues to hold this extremely troubling view of women's fundamental freedom, and that he will vote to dismantle and ultimately overturn *Roe v. Wade* should he be confirmed.

Again, turning back to Alito's career: After his appointment to U.S. Court of Appeals for the Third Circuit, Alito tried, in the single case before him affording an opportunity to shape the contours of reproductive-rights law, to allow states the greatest latitude for restricting women's right to choose. As a member of the three-judge panel that heard *Planned Parenthood of Southeastern Pennsylvania v. Casey* before the case went to the Supreme Court, he wrote a dissent in which he voted to uphold every restriction on the right to choose at issue in the case. He argued in favor of a statute that would have forced married women to notify their husbands before seeking abortion care, even though the statute would endanger and coerce women who may fear abuse if forced to notify their husbands. Just a year later, Justice Sandra Day O'Connor cast the decisive vote to strike down the law. Justice O'Connor, along with her coauthors, wrote, "Women do not lose their constitutionally protected liberty when they marry."

Alito and his defenders sometimes cite other abortion-related decisions he has issued as claimed evidence that his legal philosophy does not predispose him against a woman's right to choose. But the claim is baseless. *Planned Parenthood of Central New Jersey v. Farmer* was squarely controlled by a Supreme Court case that dealt with a virtually identical statute. *Elizabeth Blackwell Health Center for Women v. Knoll* was decided on administrative law grounds and tells us nothing about how Alito will rule on a woman's constitutional right to privacy and choice. Regrettably, pro-choice Americans can take no comfort in these decisions. At every meaningful opportunity, Alito has sought to restrict our constitutional freedom of choice.

Because Samuel Alito's record is rife with hostility toward women's reproductive freedom, NARAL Pro-Choice America must oppose his confirmation to the Supreme Court. I urge you to vote "no" on this nomination.

Thank you for your consideration.

My best,

Nancy Keenan

Nancy Keenan
President

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Statement of the National Abortion Federation
Nomination of Samuel A. Alito to be Associate Justice of the Supreme Court
January 18, 2006

The National Abortion Federation welcomes the opportunity to submit testimony on the nomination of Judge Samuel Alito to become an Associate Justice of the United States Supreme Court. NAF strongly opposes his nomination. If confirmed, we believe Alito would be a vote to overturn or considerably weaken the longstanding precedent of *Roe v. Wade,*[1] thereby jeopardizing the health and lives of American women.

The National Abortion Federation (NAF) is the professional association of abortion providers in North America. NAF's mission is to ensure that abortion remains safe, legal, and accessible. NAF's members include physicians, advanced practice clinicians, nurses, counselors, administrators, and other medical professionals at more than 400 facilities in the United States and Canada. NAF members are recognized experts in abortion care, and include non-profit and private clinics, women's health centers, Planned Parenthood facilities, hospitals, and private physicians' offices, as well as nationally and internationally recognized researchers, clinicians, and educators at major universities and teaching hospitals. Together, they care for more than half the women who choose abortion each year in the United States.

In the last Supreme Court case on abortion in June 2000, *Stenberg v. Carhart,*[2] only five justices, including Justice Sandra Day O'Connor, supported *Roe* and a woman's right to choose. With the retirement of Justice O'Connor, President Bush now has the ability with the nomination of Samuel Alito to destroy this fragile five to four balance that currently protects women's access to safe and legal abortion in the United States.
Alito has made no secret of his opposition to abortion and a woman's constitutional right to privacy. For example, in his 1985 application for deputy assistant attorney general, Alito stated:

> "I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that...the Constitution does not protect a right to an abortion."[3]

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[1] 410 U.S. 113 (1973).
[2] 530 U.S. 914 (2000).
[3] Application for Deputy Assistant Attorney General November 18, 1985. PPO Non-Career Appointment form. Presidential Office of Personnel, Office of Records, Reagan Library.

Shortly after Alito went to work in the Department of Justice, he worked on the case that he referred to in his application. The Reagan administration filed an amicus brief in the case, *Thornburgh v. American College of Obstetricians and Gynecologists*,[4] which specifically argued that *Roe v. Wade* should be overturned.[5] The *Thornburgh* case was not assigned to Alito but that did not stop him from actively offering to contribute to drafting the brief. Alito's research memo outlined a specific and detailed strategy for eviscerating *Roe*. Alito called the brief an opportunity to "advance the goals of bringing about the eventual overruling of *Roe v. Wade*..."[6]Alito concluded his memo by stating that a back-door assault on *Roe* was preferable to a "frontal assault" on *Roe* because:

> "It has most of the advantages of a brief devoted to the overruling of *Roe v. Wade*: it makes our position clear, does not even tacitly concede *Roe*'s legitimacy, and signals that we regard the question as live and open. At the same time, it is free of many of the disadvantages that would accompany a major effort to overturn *Roe*."[7]

Only six years after his stint as deputy assistant attorney general, while serving on the Philadelphia-based U.S. Court of Appeals for the Third Circuit, Judge Alito supported restricting access to abortion and limiting the right to privacy. In the 1991 case *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[8] Alito would have upheld a provision requiring women to notify their husbands prior to having an abortion. Justice Sandra Day O'Connor, whose seat he is nominated to fill, joined the plurality opinion striking down that requirement. The plurality wrote: "Women do not lose their constitutionally protected liberty when they marry."[9]

Alito's hostility toward abortion continued in the 2000 case *Planned Parenthood of Central New Jersey v. Farmer*,[10] where he did not join the majority opinion in striking down a ban on abortion that lacked an exception to protect women's health. While supporters have argued that this case shows that he has a mixed record on abortion cases, Alito wrote his own opinion making clear he joined the decision only because he was required to follow the Supreme Court precedent of *Stenberg v. Carhart*, a case he no longer will be required to follow as a Supreme Court justice. Alito himself held out a decision he joined in *Elizabeth Blackwell Health Center v. Knoll*[11] as an

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[4] 476 U.S. 747 (1986).
[5] Brief for the Unites States as Amicus Curiae in Support of Appellants, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379).
[6] Samuel A. Alito. Memo to the Solicitor General, re: *Thornburgh v. American College of Obstetricians and Gynecologists*. Reproduced from the holdings of the National Archives and Records Administration, Record Group 60, Department of Justice, Files of the Deputy Assistant Attorney General, Charles Cooper, 1981-1985, Accession #060-89-216, Box 20.
[7] Id.
[8] 947 F.2d 682 (3d Cir. 1991).
[9] 505 U.S. 833 at 898 (1992).
[10] 220 F.3d 127 (3d Cir. 2000).
[11] 61 F.3d 120 (3d Cir. 1995).

example of impartiality. However, that case concerned the applications of administrative law and Medicaid requirements, not the constitutionality of safe and legal abortion.

Despite being presented with many opportunities during his testimony before the Senate Judiciary Committee, Alito did nothing to distance himself from his long public record as a lawyer and as a judge. His record on choice is very clear. As a lawyer, he said that the Constitution does not protect the right to an abortion. In the Reagan Administration, he outlined a strategy to chip away at, and eventually overturn *Roe v. Wade.* On the Third Circuit, Alito voted to restrict a woman's right to choose, going further than the U.S. Supreme Court and Justice O'Connor, whose seat he is nominated to fill.
We have every reason to believe that given the opportunity to weaken and/or overrule *Roe*, he would vote to do so, thereby jeopardizing the lives and health of American women for generations to come. A retreat to the days of unsafe, back-alley abortion is unacceptable. Several NAF members have first-hand experience with the devastating health consequences of illegal, unsafe abortion. Our members were there when *Roe* was decided, and they have been on the front lines ever since, protecting women's health and saving women's lives despite the harassment, threats, and violence they face on a regular basis.

Dr. Curtis Boyd of Albuquerque, New Mexico remembers desperate women pleading with him, "But, Doctor, can't *you* do something?" Dr. Boyd risked his medical license, his career, and his own freedom because "I could no longer live with the knowledge that I could do something and I was choosing not to." Dr. Boyd provided abortions because he knew "women's lives could be ruined when they could not abort a pregnancy."[12]

Dr. Eugene Glick of San Francisco, California vividly remembers "a 31-year-old Mexican-American woman who died of endotoxic shock with her husband and four or five children around. And that scene is in my mind and has been in my mind coming back all the time. I see the bed, I see the kids crying and I see the husband crying."[13]

Dr. Mildred Hanson of Minneapolis, Minnesota served as the head of a hospital committee on abortion and sterilization in the 1960's. She coached women through an elaborate system to prove that an unwanted pregnancy threatened their life or mental health. But one day she received a frantic call from a young woman seeking her help, and without a name or number all she could do was familiarize her with the process and ask her to call back. She never called back. "I later learned that she committed suicide by jumping out of a 17th-story window," said Dr. Hanson, now 82, her voice breaking. "To this day, I feel responsible for her death."[14] Dr. Hanson also recalls an earlier incident in 1935 when a woman died from a septic abortion, orphaning six children. That memory is still engrained in her head to this day.

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[12] Dr. Curtis Boyd. Sermon Given to the Universalist Unitarian Church of Peoria, Illinois. Sunday, September 20, 1992, page, 4
[13] Felicia R. Lee, "Think Tank; Doctors who Performed Abortions Before *Roe v. Wade*," *The New York Times*, October 4, 2003, Section B, Page 9.
[14] Id.

It is estimated that if *Roe v. Wade* is overturned and the issue returns to the states, as many as twenty states would ban abortion immediately and as many as ten more could follow. Only about twenty states would keep abortion safe and legal. But the bans would not end abortion in those states. Instead, they would mean that women may once again have to risk their lives, health and fertility in order to terminate an unwanted pregnancy.

Currently, abortion is one of the safest medical procedures provided in the United States and an essential part of the continuum of women's reproductive health care. But that has not always been the case. Between the 1880s and 1973, abortion was illegal in all or most states, and countless women died or experienced serious medical problems as a result. Women often made desperate and dangerous attempts to induce their own abortions or resorted to untrained practitioners who performed back-alley abortions with primitive instruments or in unsanitary conditions. Women streamed into emergency rooms with serious complications -- perforations of the uterus, retained placentas, severe bleeding, cervical wounds, rampant infections, poisoning, shock, and gangrene that resulted in sterility or even death in many cases.

Unfortunately at the same time the Supreme Court has consistently upheld the principal holding of *Roe*, it has also contributed to *Roe's* erosion by allowing states to impose restrictions that limit access to abortion. It is critical to the lives and health of millions of women that the protections of *Roe* be upheld and not weakened further. The majority of Americans believe that *Roe* should be upheld and remain the law of the land. They believe that abortion is a personal decision that should be made by a woman and her health care provider without government interference. A nominee such as Samuel Alito who is on record against *Roe* is clearly out of step with the majority of Americans.

Alito's statement that he will have an open mind is hardly an assurance given that we heard the same thing from Justice Clarence Thomas, who in his first term voted to overturn *Roe*. During his hearing, Alito confirmed that his statement that the Constitution does not protect the right to an abortion was an accurate representation of his legal philosophy rather than his personal opinion, and refused to share whether that was his legal opinion today. He also would not acknowledge that an abortion restriction which does not protect a woman's health is unconstitutional, even though that has been the standard since *Roe v. Wade*. Retreating to the days before *Roe* when women did not have that constitutional protection is unacceptable

On behalf of the members of the National Abortion Federation and the women they care for, I appreciate this opportunity to submit testimony on the nomination of Judge Samuel Alito to the Supreme Court, and I urge Senators to vote against his confirmation.

NATIONAL ABORTION FEDERATION

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January 9, 2006

Senator Arlen Specter
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Patrick Leahy
Ranking Minority Member
Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter and Senator Leahy,

On behalf of the National Abortion Federation and our members, I am writing to express our opposition to the nomination of Judge Samuel A. Alito to the United States Supreme Court. If confirmed, Alito would shift the Court to the right and would be a vote to overturn *Roe v. Wade*, thereby jeopardizing women's lives and health.

Alito has made no secret of his opposition to abortion and a woman's constitutional right to privacy. Alito has argued that the "Constitution does not protect abortion," and has touted his work to overturn *Roe v. Wade* as an early highlight of his career. Although some have tried to downplay these statements as evidence only of an advocate applying for a job, Alito was not merely expressing his personal views or advocating for a client. Instead, Alito was offering his own legal philosophy and legal opinion that the Constitution does not protect the right to choose.

Additionally, Alito has actively volunteered to work on cases arguing for a reversal of *Roe v. Wade*. For example, Alito volunteered to draft the legal strategy and framework for the government's brief in *Thornburgh v. American College of Obstetricians and Gynecologists*. In that case, the government's brief sought to mitigate the effects of *Roe* in the short term while launching a "back-door assault" on *Roe* for the long term. Alito's work on the brief was deemed "instrumental" by one of his colleagues and central to the drafting of the brief.

Judge Alito's hostility to *Roe v. Wade* is not only evident from his tenure as a government lawyer, but also from his work as a judge on the U.S. Court of Appeals for the Third Circuit. While serving on that court, Judge Alito supported restricting access to abortion and limiting the right to privacy in *Planned Parenthood v. Casey*. His opinion on spousal notification was ultimately rejected by the Supreme Court. In the 2000 case, *Planned Parenthood of Central New Jersey v. Farmer*, Alito refused to join the majority opinion in striking down a ban on abortion because it lacked an exception to protect women's health. Instead, he wrote his own opinion making clear he joined the decision only because he

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was required to follow the Supreme Court precedent of *Stenberg v. Carhart*, a case he no longer would be required to follow as a Supreme Court justice.

Rather than nominating a moderate, consensus candidate to the Supreme Court, President Bush chose to bow to the pressures and demands of his far-right base and nominate Samuel Alito, a jurist whose judicial philosophy is clearly out of the mainstream. The fact that the President chose such an extreme candidate to replace Justice O'Connor, who cast the swing vote in many reproductive rights cases, is unacceptable. For these reasons, the National Abortion Federation calls on the United States Senate to defeat the nomination of Samuel Alito to the United States Supreme Court.

Sincerely,

Vicki A. Saporta

President and CEO

NASW
National Association of Social Workers
...the power of social work

November 18, 2005

The Honorable Arlen Specter
Chair, Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Chairman Specter:

The National Association of Social Workers, Inc. ("NASW") submits its position statement regarding the nomination of Judge Samuel A. Alito, Jr., to the United States Supreme Court. NASW calls for a thorough and deliberative confirmation process where Judge Alito can demonstrate his commitment to constitutional protections for women's health and reproductive rights and to the significant progress that has been made in civil rights and liberties over the past half-century.

NASW, a nonprofit professional association with over 153,000 members, is the largest membership association of social workers in the world. The attached Statement articulates in more detail NASW's position supporting the nomination of qualified judges who reflect the demographic diversity of the United States and the recognition and protection of an individual's unimpeded access to family planning and reproductive health services, including abortion services, as a fundamental human right. In addition, NASW is concerned about losing the gains in civil liberties and social justice obtained through the courts during the last four decades.

Based on these concerns and the information that exists regarding his professional record, NASW opposes the nomination of Judge Samuel A. Alito, Jr., to the Supreme Court of the United States. Please see the attached document for NASW's complete recommendations concerning the confirmation of Judge Alito.

Sincerely,

Elizabeth J. Clark

Elizabeth J. Clark, PhD, ACSW, MPH
Executive Director

cc: Judiciary Committee Members

Enclosure: Position Statement

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January 9, 2006

Re: Evaluation by the National Association of Women Lawyers (NAWL) of Judge Samuel A. Alito, Jr.

To: Members of the Senate Judiciary Committee

Dear Members:

Attached for your information is a copy of the evaluation of Judge Samuel A. Alito, Jr., conducted by the National Association of Women Lawyers.

Sincerely,

Stephanie A. Scharf
Chair, Committee for the Evaluation of Supreme Court Nominees

NEWS RELEASE

Contact: Lorraine K. Koc, President, National Association of Women Lawyers, 215-676-6000x217; lkoc@dcbshops.com.

Stephanie A. Scharf, Chair, Committee for the Evaluation of Supreme Court Nominees, 312-222-9350; sscharf@jenner.com.

JANUARY 8, 2006—FOR IMMEDIATE RELEASE BY THE NATIONAL ASSOCIATION OF WOMEN LAWYERS®

NATIONAL ASSOCIATION OF WOMEN LAWYERS ("NAWL") ISSUES EVALUATION OF JUDGE SAMUEL A. ALITO FOR THE POSITION OF ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

The National Association of Women Lawyers ("NAWL"), Committee for the Evaluation of Supreme Court Nominees, has evaluated Judge Samuel Alito for the position of Associate Justice of the Supreme Court of the United States. The Committee has determined that Judge Alito is not qualified to serve on the Court from the perspective of laws and decisions regarding women's rights or that have a special impact on women.

NAWL's rating of not qualified from a women's rights perspective is the result of its evaluation of Judge Alito's writings, including his judicial record. On those women's rights issues that he has addressed, Judge Alito has shown a disinclination to protect or advance women's rights. Our concern also recognizes that Judge Alito will be replacing Justice Sandra Day O'Connor, who has been a decisive vote in a number of cases involving the rights of women and laws that have a special impact on women. Judge Alito's jurisprudence in the area of women's rights has not been restrained, as some have characterized his general judicial approach; rather, he has too often engaged in strained legal reasoning to effect a narrowing of women's rights beyond the intent of statutes and precedent.

Of primary concern to NAWL is Judge Alito's stance on women's reproductive rights. Judge Alito's dissent in *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991), is a pointed attack on the abortion right. Judge Alito argued that married women should be compelled by law to notify their husbands of their abortions. This conclusion—that women lack medical autonomy—was at odds with the opinion of the Supreme Court in an earlier case, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), which affirmed *Roe*, condemning indirect constraints on a woman's right to choose. Judge Alito was willing to require that Planned Parenthood take on the impossible burden of proving the number of women who informed their husbands of their intent to obtain abortions. In addition, he was willing to ignore directly applicable Supreme Court precedent.

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), Judge Alito's endorsement of spousal notification was explicitly struck down in an opinion by Justice Sandra Day

O'Connor, the Justice he is seeking to replace. NAWL believes that Judge Alito's reasoning in the 1991 *Planned Parenthood* decision stems from a bias against the abortion right and is more results-oriented than precedent supports. This is consistent with the approach advocated by Judge Alito in May 1985, when, working in the Solicitor General's office, he wrote a memo to the Solicitor General expressing the belief that *Roe v. Wade* was wrongly decided and urged an incremental attack on it by means of decisions that would empower the states to regulate abortions and undermine the authority of medical professionals.

In his opinions, Judge Alito has disparaged substantive due process, a critical underpinning of women's reproductive rights. In a zoning case, *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir.1997), Judge Alito concurred with the majority but dissented in part, expressly to attack the validity of a substantive due process argument offered by the plaintiff. His hostility toward the Fourteenth Amendment jurisprudence, upon which *Roe v. Wade* rests, is another basis for NAWL's concerns.

Although Judge Alito's former law clerks and professional associates interviewed by NAWL generally reported that he has had positive and supportive working relationships with women and has appropriately hired women and promoted them to senior positions, Judge Alito's interpretation of statutes affecting women and their families further reflects a narrow reading of the requirements of those statutes to the detriment of women's rights. In this area, he takes a highly technical approach to statutory interpretation that arguably is inconsistent with the intent of the statutes in question. *See, e.g., D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3d. Cir. 1992); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996)(Alito, J., sole dissenter to *en banc* opinion); *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Chittester v. Department of Community and Econ. Development*, 226 F.3d 223 (3d Cir. 2000).

The National Association of Women Lawyers is the leading national voluntary organization devoted to the interests of women lawyers and women's rights. Founded over 100 years ago, NAWL has members in all 50 states and engages in a variety of programs and activities to advance its mission. The Committee for the Evaluation of Supreme Court Nominees reviews and evaluates the qualifications of each Presidential nominee to the United States Supreme Court with an emphasis on laws and decisions regarding women's rights or that have a special impact on women. Members of the Committee are appointed by the President of NAWL and include a distinguished array of law professors, appellate practitioners and lawyers concentrating in litigation, with diverse backgrounds from around the country and who work in a variety of professional settings. A copy of the Committee's Mission and Procedures may be found at www.nawl.org <http://www.nawl.org/>.

National Cancer Institute
U.S. National Institutes of Health | www.cancer.gov

Posted: 03/04/2003 **Updated:** 03/25/2003

Summary Report: Early Reproductive Events and Breast Cancer Workshop

Introduction

The Early Reproductive Events and Breast Cancer Workshop convened February 24-26, 2003, and the outcomes of the meeting were reviewed and discussed at the joint meeting of the NCI Board of Scientific Advisors (BSA) and Board of Scientific Counselors (BSC) held March 3, 2003.

The Workshop was established to provide an integrated scientific assessment of the association between reproductive events and the risk of breast cancer. Participants represented a diversity of breast cancer expertise, including epidemiologists, clinicians, basic scientists and breast cancer advocates. The Workshop evaluated the current strength of evidence of the characteristics of pregnancy related to cancer (epidemiologic studies), the biologic changes resulting from pregnancy that may be involved in modifying breast cancer risk (clinical studies), and the biologic mechanisms identified (animal studies).

This report summarizes the epidemiologic, clinical and animal studies findings related to early reproductive events and breast cancer risk, and each finding is given a Strength of Evidence Rating*. Gaps in research knowledge for each scientific area are identified, and recommendations for future research directions are provided.

Epidemiologic Findings

- Early age at first term birth is related to lifetime decrease in breast cancer risk. (1)
- Increasing parity is associated with a long-term risk reduction, even when controlling for age at first birth. (1)
- The additional long-term protective effect of young age at subsequent term pregnancies is not as strong as for the first term pregnancy. (1)
- A nulliparous woman has approximately the same risk as a woman with a first term birth around age 30. (1)
- Breast cancer risk is transiently increased after a term pregnancy. (1)
- Induced abortion is not associated with an increase in breast cancer risk. (1)
- Recognized spontaneous abortion is not associated with an increase in breast cancer risk. (1)
- Long duration of lactation provides a small additional reduction in breast cancer risk after consideration of age at and number of term pregnancies. (1)
- Pregnancy-induced hypertension is associated with decreased breast cancer risk. (2)
- Maternal DES exposure is associated with an increase in breast cancer risk. (3)

Epidemiologic Gaps

- By what mechanism does pregnancy at an early age protect against breast cancer?
- Do pregnancy and age at pregnancy modify radiation-induced breast cancer risk?
- What are the effects of age at pregnancy on subgroups of women (e.g., those with BRCA-1 and BRCA-2 mutations)?
- What is the mechanism by which lactation affects breast cancer risk?
- What is the temporal pattern of breast cancer risk following lactation?
- What is the effect of lactation on women with BRCA-1 and BRCA-2 mutations?
- Does gender of offspring have an effect?
- Does birth weight of offspring have an effect?
- What is the impact of multiple births in the same pregnancy, with and without assisted reproductive technology?
- What are the breast cancer risk implications of abnormal pregnancies (e.g., spina bifida, late fetal death, fertility treatment-induced pregnancy, preterm delivery, small for gestational age offspring)?
- What is the mechanism by which pre-eclampsia reduces breast cancer risk?
- Is there a distinction between hypertension and pre-eclampsia with respect to breast cancer risk?
- Is gestational diabetes associated with breast cancer risk?

Clinical Findings

- There are long-lasting decreases in mammographic density following pregnancy. (2)
- There may be changes in breast histology that can be correlated with risk in premenopausal women. (3)
- Prolactin, estradiol, and IGF-1 are decreased after pregnancy. (3)

Clinical Gaps

- What are the levels, determinants, and interactions of pregnancy-related mammotrophic factors, ligands, and receptors?
- What is the time course of pregnancy-related hormonal changes?
- Are pregnancy-related hormonal changes influenced by genetic polymorphisms?
- What is the precise nature of pregnancy-related changes in breast histology?
- How is the epithelial/stromal relationship altered in pregnancy?
- Can pregnancy-related changes in breast histology be correlated with ductal lavage findings?
- Can noninvasive procedures for assessing breast composition (e.g., MRI and other imaging techniques, particularly functional imaging) substitute for histology?
- What are the molecular changes in the breast during and after pregnancy?
- What are the histologic and molecular characteristics of breast tumors during and after pregnancy?
- Are there immune system changes that may be relevant to breast cancer risk following pregnancy?
- Are there pregnancy-related, non-hormonal metabolic changes relevant to breast cancer risk?

Animal Model Findings

- Pregnancy protects against subsequent chemical carcinogen-induced breast cancer in rats and mice. (1)
- Estrogen and progesterone combinations and hCG protect against carcinogen-induced cancer in rodents by mimicking pregnancy. (1)
- Short-term estrogen exposure, at levels of estrogen mimicking pregnancy, is protective for carcinogen-induced cancer in rats. (1)

Animal Model Gaps

- What are the mechanisms of hormone action when they are given before or after chemical carcinogen exposure?
- What is the relationship between pregnancy and risk of preneoplastic lesions?
- What are the levels, determinants, and interactions of pregnancy-related mammotrophic factors, ligands, and receptors?

Future Research Directions

- Develop additional animal and treatment models, including further examination of existing models.
- Examine the molecular mechanisms of hormone-induced protection, including epithelial/stromal interactions.
- Integrate the methodology of genomics and proteomics into the study of pregnancy in relation to risk of breast cancer.
- Pursue descriptive studies about human breast development in order to formulate new hypotheses.
- Pursue international studies to develop hypotheses for observed international differences in breast cancer risk.
- Develop surrogate markers to identify risk of breast cancer following pregnancy.
- Translate knowledge about protective effects of pregnancy into intervention trials with human populations.
- Promote interactions among epidemiologists, clinicians, and basic scientists.
- Consider a funding mechanism aimed at interdisciplinary research concerning pregnancy and breast cancer.
- Develop high-throughput technology for hormone measurement.
- Support the collecting, archiving, and sharing of relevant biospecimens.

Boards' Response

The NCI Board of Scientific Advisors and Board of Scientific Counselors reviewed and discussed the results of the Early Reproductive Events and Breast Cancer Workshop, and unanimously approved the Workshop findings. One additional gap in our clinical understanding of breast cancer was identified: Do breast cancers diagnosed during pregnancy have different morphologic or molecular characteristics than those diagnosed at other times? It is hoped that the outcomes of this Workshop will help guide the Institute's future research agenda and public communication materials.

*Strength of Evidence Ratings Key

Strength of Evidence Ratings: Epidemiology

1
= Well established
2
= Weight of evidence favors
3
= Suggested from human population studies, but speculative
4
= Suggested from laboratory or theoretical considerations but essentially unevaluated in human populations

Strength of Evidence Ratings: Biologic Changes

1
= Well established
2
= Weight of evidence favors
3
= Suggested by human evidence, but speculative
4
= Suggested from laboratory findings or theoretical considerations but essentially unevaluated in humans

Strength of Evidence Ratings: Biological Mechanisms from Laboratory Studies

1
= Well established
2
= Weight of evidence favors
3
= Suggested by experimental evidence, but speculative
4
= Not supported by experimental evidence

Minority Dissenting Comment

Participant comment [1] regarding the outcome of the workshop.

Table of Links

[1] http://cancer.gov/cancer_information/doc.aspx?viewid=15e3f2d5-5cdd-4697-a2ba-f3388d732642



Pregnancy and Breast Cancer Risk

Introduction

Every woman's hormone levels change throughout her life for a variety of reasons, and hormone changes can lead to changes in the breasts. Hormone changes that occur during pregnancy may influence a woman's chances of developing breast cancer later in life. Research continues to help us understand reproductive events and breast cancer risk. The National Cancer Institute (NCI) is currently funding research that may lead to discoveries that identify ways to mimic pregnancy's protective effects and translate them into effective prevention strategies.

Pregnancy-Related Factors that Protect Against Breast Cancer

Some factors associated with pregnancy are known to reduce a woman's chance of developing breast cancer later in life:

- The younger a woman has her first child, the lower her risk of developing breast cancer during her lifetime.
- A woman who has her first child after the age of 35 has approximately twice the risk of developing breast cancer as a woman who has a child before age 20.
- A woman who has her first child around age 30 has approximately the same lifetime risk of developing breast cancer as a woman who has never given birth.
- Having more than one child decreases a woman's chances of developing breast cancer. In particular, having more than one child at a younger age decreases a woman's chances of developing breast cancer during her lifetime.
- Although not fully understood, research suggests that pre-eclampsia, a pathologic condition that sometimes develops during pregnancy, is associated with a decrease in breast cancer risk in the offspring, and there is some evidence of a protective effect for the mother.
- After pregnancy, breastfeeding for a long period of time (for example, a year or longer) further reduces breast cancer risk by a small amount.



Pregnancy-Related Factors that Increase Breast Cancer Risk

Some factors associated with pregnancy are known to increase a woman's chances of developing breast cancer:

- After a woman gives birth, her risk of breast cancer is temporarily increased. This temporary increase lasts only for a few years.
- A woman who during pregnancy took DES (diethylstilbesterol), a synthetic form of estrogen that was used between the early 1940s and 1971, has a slightly higher risk of developing breast cancer. (So far, research does not show an increased breast cancer risk for their female offspring who were exposed to DES before birth. Those women are sometimes referred to as "DES daughters.")

Other Breast Cancer Risk Factors Not Related to Pregnancy

At present, other factors known to increase a woman's chance of developing breast cancer include age (a woman's chances of getting breast cancer increase as she gets older), a family history of breast cancer in a first degree relative (mother, sister, or daughter), an early age at first menstrual period (before age 12), a late age at menopause (after age 55), use of menopausal hormone replacement drugs, and certain breast conditions.

Obesity is also a risk factor for breast cancer in postmenopausal women. More information about these and other breast cancer risk factors is found in NCI's publication *What You Need To Know About™ Breast Cancer.*

Misunderstandings About Breast Cancer Risk Factors

There are a number of misconceptions about what can cause breast cancer. These include, but are not limited to, using deodorants or antiperspirants, wearing an underwire bra, having a miscarriage or induced abortion, or bumping or bruising breast tissue. Even though doctors can seldom explain why one person gets cancer and another does not, it is clear that none of these factors increase a woman's risk of breast cancer. In addition, cancer is not contagious; no one can "catch" cancer from another person.

Preventing Breast Cancer

There are some things women can do to reduce their breast cancer risk.

Because some studies suggest that the more alcoholic beverages a woman drinks the greater her risk of breast cancer, it is important to limit alcohol intake. Maintaining a healthy body weight is important because being overweight increases risk of postmenopausal breast cancer. New evidence suggests that being physically active may also reduce risk. Physical activity that is sustained throughout lifetime or, at a minimum, performed after menopause, may be particularly beneficial in reducing breast cancer risk. Eating a diet high in fruits and vegetables, and energy

and fat intake balanced to energy expended in exercise are useful approaches to avoiding weight gain in adult life.

Detecting Breast Cancer

A woman can be an active participant in improving her chances for early detection of breast cancer. NCI recommends that, beginning in their 40s, women have a mammogram every year or two. Women who have a higher than average risk of breast cancer (for example, women with a family history of breast cancer) should seek expert medical advice about whether they should be screened before age 40, and how frequently they should be screened.

###

Related National Cancer Institute (NCI) Materials

- National Cancer Institute Fact Sheet 3.75, *Abortion, Miscarriage, and Breast Cancer Risk*
  http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage
- *What You Need To Know About™ Breast Cancer*
  http://www.cancer.gov/cancerinfo/wyntk/breast
- General Information About Breast Cancer
  http://www.cancer.gov/cancer_information/cancer_type/breast/
- Summary Report: Early Reproductive Events and Breast Cancer Workshop
  http://www.cancer.gov/cancerinfo/ere-workshop-report

NCI Resources

Cancer Information Service (toll-free)
Telephone: 1–800–4–CANCER (1–800–422–6237)
TTY: 1–800–332–8615

Online
NCI's Web site: http://www.cancer.gov
LiveHelp, NCI's live online assistance:
https://cissecure.nci.nih.gov/livehelp/welcome.asp

This fact sheet was reviewed on 12/30/03

About Breast Cancer

Facts and Figures

Risk factors for breast cancer

- Demographic factors
- Family history
- Medical history
- Hormonal and reproductive risk factors
- Other risk factors
- Genetic and familial factors
- References

There are few well established risk factors for breast cancer and these do not account for the major international differences or allow for practical preventive measures (Table 2). Genetic factors are responsible for only a small percentage of cases.(6) Environmental factors have been speculated as playing a major role since incidence rates vary greatly between countries and rates among migrants moving from both low- and high-risk countries converge to the rate of the destination country.(7) However, the environmental factors responsible for this variation are at present unknown.

Table 2. Established risk factors for breast cancer in women

Factor	High-risk group	Low-risk group
	Relative risk >4.0	Relative risk <1.0
Age	Old	Young
Country of birth	North America, Northern Europe	Asia, Africa
Mother and sister with history of breast cancer, especially if diagnosed at an early age	Yes	No
Biopsy-confirmed atypical hyperplasia and a history of breast cancer in a first degree relative	Yes	No
	Relative risk=2.1B4.0	Relative risk <1.0
Nodular densities on the mammogram	Densities occupying >75% of breast volume	Parenchyma composed entirely of fat
History of cancer in one breast	Yes	No
Mother or sister with history of breast cancer, diagnosed at an early age	Yes	No
Biopsy-confirmed atypical hyperplasia without a family history of breast cancer	Yes	No
Radiation to chest	Yes	No
	Relative risk=1.1B2.0	Relative risk <1.0
Socio-economic status	High	Low

Race/ethnicity breast cancer at >45 years breast cancer at <45 years	 White Black	 Hispanic, Asian Hispanic, Asian
Religion	Jewish	Seventh-day Adventist, Mormon
Oophorectomy before age 40	No	Yes
Nulliparity, breast cancer at >40 years of age	Yes	No
Age at first full-term pregnancy	>30 years	<20 years
Age at menarche	<11 years	>15 years
Age at menopause	>55 years	<45 years
History of primary cancer in endometrium, ovary	Yes	No
Obesity breast cancer at >50 years breast cancer at <50 years	 Obese Thin	 Thin Obese

Demographic factors

Age is the most recognised risk factor for breast cancer, and incidence increases with age. Women of high socio-economic status are at greater risk of breast cancer than women of low socio-economic status with possible reasons including differences in reproductive factors, lifestyle factors, and greater numbers of higher educated women attending mammography screening.

Family history

The risk of breast cancer is doubled among women with a first-degree relative diagnosed with breast cancer before the age of 40 years. (8)

The risk associated with an affected second degree relative is lower, at 1.2- to 1.5-fold. Genetic and familial factors are described in greater detail below.

Medical history

Women with biopsy-confirmed benign breast disease are at increased risk of subsequent breast cancer. The risk of invasive breast cancer depends on the specific type of benign breast disease. High relative risks (RR) are found for benign proliferative disease with atypical hyperplasia (2.5–5.3), particularly if there is a family history of breast cancer, and moderate risks are associated with proliferative disease without atypia (RR 1.6–2.2). Women with lobular carcinoma in situ are also at high risk of developing invasive breast cancer (RR 6.0–12).(9)

Hormonal and reproductive risk factors

Early age at menarche, late age at menopause, late age at first birth and nulliparity are associated with an elevated risk of breast cancer.

Conversely, bilateral oophorectomy before the age of 40 years is protective against breast

The relationship between exogenous hormone use [oral contraceptive pill (OCP), hormone replacement therapy (HRT) and depot-medroxyprogesterone acetate (DMPA)] and risk of breast cancer is not conclusive. A recent meta-analysis of 54 studies relating OCP use to breast cancer found that women who are currently using combined OCP or have used them in the past 10 years are at a slightly increased risk (RR 1.07-1.24) compared to never users.(10) There is continuing debate about the relative effect of long-term HRT use on the risk of breast cancer with conflicting results being reported.(11,12)

Other risk factors

Several other factors implicated in the development of breast cancer include parity, length of menstrual cycle, breast feeding, diethylstilbestrol use during pregnancy, infertility, spontaneous and induced abortion, physical activity, stress, height, alcohol consumption and dietary factors. Current evidence suggests that breast cancer may also be affected by the intra-uterine environment and exposures during adolescence.(13) However, the evidence for these factors is not conclusive because of inconsistency in results or concern that unidentified confounding may explain the association.

Genetic and familial factors

A family history may be due to chance, to non-genetic risk factors shared by relatives, or may be due to the inheritance of a specific germline mutation from either maternal or paternal relatives. Between 5% to 10% of all breast cancers diagnosed in women aged 45 or younger are directly attributable to inherited factors. Inherited breast cancer may be distinguished clinically from sporadic breast cancer by a younger age of onset, a higher prevalence of bilateral breast cancer, and the presence of associated tumors in family members.

Mutations of BRCA1, BRCA2, and the p53 tumor-suppressor gene have been found to markedly increase the risk of breast and ovarian cancer and perhaps colon, rectum and prostate cancer.(14) These genes appear to be transmitted in an autosomal dominant manner.(6,8)

Mutations in BRCA1 are relatively uncommon, being carried by about 1 in 1000 women and explains only 1% or 2% of all breast cancer.(15)

Germline mutations of the BRCA1 gene, located on chromosome 17q21, were initially estimated to be associated with a 50% risk of breast cancer by about age 50 and an 85% lifetime risk in high-risk families.(14,16) A more broad-based survey among a group of Ashkenazi Jews in the Washington DC region showed a lifetime risk of about 50% for women with mutations in either BRCA1 or BRCA2.(17) In addition, the risk of a second primary in the contralateral breast for a woman with BRCA1 mutations appears to be similar to the risk of the first primary (65% for mutated BRCA1 gene carriers who live to age 70).(14)

Preliminary data suggest that the prognosis of patients with BRCA1 mutations may be slightly better than that of women with sporadic tumors (18,19) but this remains to be confirmed.

Over 80 distinct mutations in BRCA1 have been characterised in high-risk families.(20) It is not known whether all mutations on BRCA1 carry the same risk. The implication of mutations that occur in the absence of a strong family history of the disease is also uncertain.

BRCA2 has been located on chromosome 13 and is associated with early-onset breast cancer and breast cancer in males, and to a lesser degree with ovarian cancer.(21) The level of breast cancer risk with mutations of BRCA2 is similar to that of BRCA1.

More common genes, such as the AT gene for ataxia-telangiectasia and the HRAS1 gene have also been implicated in the contribution to familial breast cancer.(22,23) However, the evidence linking these genes with an increased risk of developing cancer is not conclusive.

Prepared by Anna Rangan

NSW Breast Cancer Institute

Find out about Antibiotics and Breast Cancer

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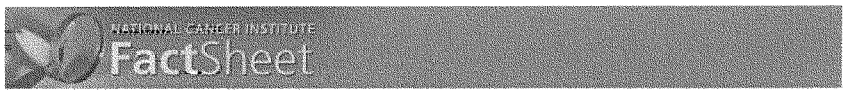
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Source: http://www.bci.org.au/public/facts1.htm



Abortion, Miscarriage, and Breast Cancer Risk

Introduction

A woman's hormone levels normally change throughout her life for a variety of reasons, and these hormonal changes can lead to changes in her breasts. Many such hormonal changes occur during pregnancy, changes that may influence a woman's chances of developing breast cancer later in life. As a result, over several decades a considerable amount of research has been and continues to be conducted to determine whether having an induced abortion, or a miscarriage (also known as spontaneous abortion), influences a woman's chances of developing breast cancer later in life.

Current Knowledge

In February 2003, the National Cancer Institute (NCI) convened a workshop of over 100 of the world's leading experts who study pregnancy and breast cancer risk. Workshop participants reviewed existing population-based, clinical, and animal studies on the relationship between pregnancy and breast cancer risk, including studies of induced and spontaneous abortions. They concluded that having an abortion or miscarriage does not increase a woman's subsequent risk of developing breast cancer. A summary of their findings, titled *Summary*



Report: Early Reproductive Events and Breast Cancer Workshop, can be found at http://cancer.gov/cancerinfo/ere-workshop-report.

Related NCI Materials

- National Cancer Institute Fact Sheet 3.77, *Pregnancy and Breast Cancer Risk* http://www.cancer.gov/cancertopics/factsheet/Risk/pregnancy
- *What You Need To Know About™ Breast Cancer* http://cancer.gov/cancerinfo/wyntk/breast

Background

The relationship between induced and spontaneous abortion and breast cancer risk has been the subject of extensive research beginning in the late 1950s. Until the mid-1990s, the evidence was inconsistent. Findings from some studies suggested there was no increase in risk of breast cancer among women who had had an abortion, while findings from other studies suggested there was an increased risk. Most of these studies, however, were flawed in a number of ways that can lead to unreliable results. Only a small number of women were included in many of these studies, and for most, the data were collected only after breast cancer had been diagnosed, and women's histories of miscarriage and abortion were based on their "self-report" rather than on their medical records. Since then, better-designed studies have been conducted. These newer studies examined large numbers of women, collected data before breast cancer was found, and gathered medical history information from medical records rather than simply from self-reports, thereby generating more reliable findings. The newer studies consistently showed no association between induced and spontaneous abortions and breast cancer risk.

Ongoing Research Supported by the National Cancer Institute

Basic, clinical, and population research will continue to be supported which investigate the relationship and the mechanisms of how hormones in general and during pregnancy influence the development of breast cancer.

Important Information About Breast Cancer Risk Factors

At present, the factors known to increase a woman's chance of developing breast cancer include age (a woman's chances of getting breast cancer increase as she gets older), a family history of breast cancer, an early age at first menstrual period, a late age at menopause, a late age at the time of birth of her first full-term baby, and certain breast conditions. Obesity is also a risk factor for breast cancer in postmenopausal women. More information about breast cancer risk factors is found in NCI's publication *What You Need To Know About™ Breast Cancer*.

Important Information About Identifying Breast Cancer

NCI recommends that, beginning in their 40s, women receive mammography screening every year or two. Women who have a higher than average risk of breast cancer (for example, women with a family history of breast cancer) should seek expert medical advice about whether they should be screened before age 40, and how frequently they should be screened.

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Sources of National Cancer Institute Information

Cancer Information Service
Toll-free: 1–800–4–CANCER (1–800–422–6237)
TTY (for deaf and hard of hearing callers): 1–800–332–8615

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Testimony of Phyllis Snyder,

President of the National Council Jewish Women,

on the Nomination of Judge Samuel A. Alito, Jr. to be

Associate Justice of the US Supreme Court

January 11, 2006

On behalf of 90,000 members and supporters of the National Council of Jewish Women (NCJW), I am submitting testimony in opposition to the nomination of Judge Samuel A. Alito, Jr., to become an Associate Justice of the US Supreme Court. NCJW is deeply concerned that our courts have become a battleground where those who seek to roll back the progress of the last half-century are attempting to do by judicial edict what they cannot do by legislative action. Our courts exist to protect our individual constitutional rights and to provide a buffer for religious, racial, ethnic, and political minorities against an arbitrary majority. Judge Alito's lifelong view of our constitutional rights is sharply at odds with the values we espouse and with the progress we believe has been made as a result, among other things, of the civil rights and women's movements and the Supreme Court's continuing efforts to maintain separation of religion and state.

Rather than address details of Judge Alito's legal career that are already known to the Judiciary Committee, I would like to convey our conclusions regarding what kind of justice Judge Alito would be based on the totality of his record to date.

As a young man, Judge Alito joined a conservative alumni organization formed to oppose coeducation and affirmative action at his alma mater, Princeton University. Several years later, when he applied for a promotion in the Reagan Justice Department, he noted his membership in that group and his active participation in the Federalist Society, a group devoted to a far right wing legal agenda. He described himself as motivated to enter law school by his opposition to decisions of the Supreme Court led by Chief Justice Earl Warren on criminal procedure, separation of religion and state, and legislative reapportionment (the

one-man, one-vote decision). He also expressed pride in his work on briefs opposing the right to choose an abortion – a right affirmed by the Supreme Court 12 years earlier.

Judge Alito's subsequent career in the Department of Justice reveals a consistent dedication to efforts to apply a cramped view of the Constitution to questions of individual liberty and federal power. In a May 1985 memo he outlined a legal strategy to undermine *Roe* that coincides with the strategy used by *Roe's* opponents in the years since – a strategy that has since been embodied in his judicial decisions on abortion cases.

Independent assessments of Judge Alito's 15-year record as a judge on the 3rd Circuit Court of Appeals have concluded that his decisions are driven by an ultraconservative compass. An analysis of his career by the Knight Ridder newspaper chain concluded that, "During his 15 years on the federal bench, Supreme Court nominee Samuel Alito has worked quietly but resolutely to weave a conservative legal agenda into the fabric of the nation's laws." In three areas that most concern NCJW – the right to privacy, antidiscrimination law, and separation of religion and state – Judge Alito has blazed a path far from the consensus that has governed these issues for the last 30-50 years.

Judge Alito strongly opposes *Roe v. Wade* on constitutional grounds. He not only believes that abortion is wrong, which is his right, but that it is unconstitutional, and there is every reason to believe, based on his long record, that he will support every restriction imposed upon it. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the only case to reach the 3rd Circuit regarding *Roe v. Wade* where Judge Alito was not constricted by precedent, he voted to uphold a state law that would have required a woman to inform her husband if she sought an abortion. His ruling disregarded evidence of the hardship this provision would impose on women estranged or separated from their husbands; women whose husbands had abandoned them; women who were the victims of spousal abuse; or women who feared the consequences should their husbands discover they were pregnant. Moreover, it disregarded the fundamental principle that women have an independent right to control their own bodies. A majority of the court agreed that, "A State may not give to a man the kind of dominion over his wife that parents exercise over their children."

Judge Alito's extensive list of rulings regarding claims of employment discrimination also reveal a cramped view of civil rights laws and the ills they are designed to correct. He has ruled consistently to make it harder for victims of discrimination to prove their case and easier for employers to avoid responsibility for discriminatory actions. In one such race discrimination case, Judge Alito's dissent was dismissed by the majority of judges on the case, who said that his approach would usurp the jury's role such that "Title VII [of the Civil Rights Act of 1964] would be eviscerated."

Finally, although Judge Alito has an admirable view of the right to free expression of religious views, his record on the bench demonstrates that he also would permit the government to sponsor religious displays, looks favorably on school prayer, and generally displays a lack of sensitivity regarding the rights of religious minorities forced to support majority religious expression through their tax dollars.

Judge Alito has been nominated to fill the seat now held by Justice Sandra Day O'Connor, the swing vote on the court for more than 20 years. He is not the man for this job. His ideological approach to the law, no matter how carefully couched in the language of judicial neutrality, is the opposite of the approach taken by Justice O'Connor. She has sought to balance competing interests and has adopted a pragmatic approach to the law. He would pull the court far to the right and would surely provide a vote for the side that seeks to make a hollow shell of *Roe v. Wade*, if not overturn it altogether.

With the demise of the nomination of Harriet Miers to the Supreme Court, it became clear that the far right was determined to see a justice appointed who would implement an extreme right wing agenda from the bench. In Judge Alito, this wish appears to have been granted. We are extremely disappointed that the President chose this path and gave in to those forces demanding a nominee dedicated to rolling back fundamental constitutional rights, rather than protecting them. We urge the Senate to reject his nomination.

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November 29, 2005

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
711 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Specter:

I am writing to you on behalf of 90,000 members and supporters of the National Council of Jewish Women (NCJW) to express our strong opposition to the nomination of Judge Samuel A. Alito, Jr. to fill the seat of Justice Sandra Day O'Connor on the US Supreme Court. We have decided to oppose Judge Alito for many reasons, most notably because of his record concerning the right to privacy, his views on civil rights and women's equality, and his support for weakening the wall of separation between religion and state. In light of this record, NCJW believes that Judge Alito should not be confirmed for a lifetime position on the Supreme Court.

When Justice Sandra Day O'Connor announced her intention to retire from the Supreme Court, NCJW called upon President Bush to seek a mainstream consensus nominee that would unite and not divide the nation. Instead, he has selected a nominee who is deeply ideological with a demonstrated commitment to pulling the court to the far right.

Judge Alito is clearly not a nominee in the tradition of Justice O'Connor, who sought to balance competing interests and adopted a pragmatic approach to the law. Rather, over the course of his career, Judge Alito has ruled to severely restrict a woman's constitutional right to abortion and against civil rights protections for both women and minorities. He has shown a cramped view of the power of Congress to legislate, ruling, for example, that Congress lacked authority to ban fully automatic machine guns and that Congress overstepped its bounds in passing the Family and Medical Leave Act.

With the withdrawal of the nomination of Harriet Miers to the Supreme Court, it became clear that the extreme right wing was determined to see a justice confirmed who would implement their agenda from the bench. Judging from his record, Samuel Alito appears to be just such a nominee. We are extremely disappointed that the President chose this path and gave in to those forces demanding a nominee dedicated to rolling back fundamental constitutional rights, rather than protecting them. We urge the Senate to reject Judge Alito's nomination.

We applaud your intention to hold hearings that will thoroughly explore Judge Alito's views and judicial philosophy. While we hope that he will be candid in his answers, the hearing is only part of the record that senators must take into consideration as they determine whether or not a nominee is fit to be confirmed to be an Associate Justice of the Supreme Court. With the stakes so high, it is all the more critical that the Senate take into account Alito's entire record -- not just his brief appearance before the Judiciary Committee. President Bush must immediately turn over all of the records requested by the senators. And Judge Alito must now be forthcoming regarding his judicial philosophy and views on settled legal questions.

NCJW believes that the most basic qualification for a lifetime seat on the federal bench is a commitment to fundamental rights and freedoms. What we know of Judge Alito's record raises sufficient doubt that he meets that essential qualification and therefore we urge the Committee to reject his confirmation.

Sincerely,

Phyllis Snyder

Phyllis Snyder
NCJW President

Cc: Members of the Senate Judiciary Committee

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Of Women's Organizations
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Senator Arlen Specter
Chairman, Committee on the Judiciary
U.S. Senate

Senator Patrick Leahy
Ranking Member, Committee on the Judiciary
U.S. Senate

January 11, 2006

Chairman Specter and Senator Leahy,

The National Council of Women's Organizations, the oldest and largest coalition of the nation's women's groups, urges the Senate to reject the nomination of Samuel Alito to the United States Supreme Court. Judge Alito's extreme position on a range of issues, including reproductive rights, workplace discrimination and violence against women, make him the wrong choice to replace retiring Justice Sandra Day O'Connor.

In nominating Samuel Alito after Harriet Myers withdrew from consideration, President Bush chose to put political expediency ahead of the rights and well-being of this nation's women and girls. Mr. Bush's right-wing base clamored for rejection of Ms. Myers because, as conservative as she is, they felt she was not 100% pure on their issues. Samuel Alito, however, is apparently their man.

Judge Alito has a long record demonstrating hostility to women's reproductive rights. In the 1980's, he repeatedly advocated the overturning of Roe v. Wade. In the 1990's, as an appellate judge, he argued to uphold a Pennsylvania statute requiring women to notify their husbands before having an abortion – a position rejected by Justice O'Connor's 5-4 opinion in Planned Parenthood v. Casey. Nowhere in his writings, however, does he express any concern that the days of back-alley abortions could return if women do not have safe, legal means to terminate unwanted pregnancies. Nor have we been able to find any statement of concern, in any of his writings, for women's fundamental right to be in control of their own reproductive health decisions.

Indeed, Judge Alito has even expressed hostility to contraception. In 1985, as a Justice Department attorney, he wrote that some forms of birth control are "abortifacients," and saw no constitutional problem with a state law restricting women's access to them. Extreme anti-abortion organizations have long argued that the IUD and some birth control pills are "abortifacients" – subject to the same kinds of restrictions that may be placed on women's access to abortion – because they may prevent a fertilized egg from becoming implanted on the uterine wall. This view runs counter to accepted medical understanding, which is that pregnancy does not begin until after implantation. Yet it is the view embraced by Samuel Alito.

Judge Alito's opinions demonstrate an abiding deference to the powerful at the expense of ordinary people. He has argued, in cases such as Sheridan v. DuPont and Bray v. Marriott Hotels, for erecting higher and higher procedural hurdles that would prevent victims of employment discrimination from being able to present their case to a jury. He argued, in Doe v. Groody, to uphold a police strip search of a woman and her ten-year-old daughter even though they were not named in the search warrant and were simply at home when the house was searched. He ruled, on all but one issue, against a female police officer who was subjected to two years of pervasive sexual harassment in Robinson v. City of Pittsburgh. He has repeatedly criticized affirmative action policies, and struck down a school district's affirmative action plan in Taxman v. Board of Education. He ruled, in Chittister v. Dept. of Community and Economic Development, that state governments did not have to comply with provisions of the Family and Medical Leave Act. Women have fought hard over the last four decades, against resistance, skepticism and backlash, to win fundamental rights. If confirmed, Judge Alito will be in a position to undermine our gains for generations to come. We urge you to stand firm for women's rights and reject this nomination.

Sincerely,

Susan Scanlan
Chair

Terry O'Neil
Executive Director

CC: Committee on the Judiciary

NCIL

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Topeka, Kansas

Region VIII
William Young
Salt Lake City, Utah

Region IX
Louis Frick
San Diego, California

Region X
John Dziennik
Portland, Oregon

November 28, 2005

The Honorable Arlen Specter
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter and Senator Leahy:

We write to inform you that the National Council on Independent Living (NCIL) strongly opposes the nomination of Judge Samuel Alito to replace Justice Sandra Day O'Connor as an Associate Justice of the United States Supreme Court.

NCIL is the oldest cross-disability, national grassroots organization run by and for people with disabilities. Our membership is comprised of centers for independent living, state independent living councils, people with disabilities and other disability rights organizations. As a membership organization, NCIL advances independent living and the rights of people with disabilities through consumer-driven advocacy. NCIL envisions a world in which people with disabilities are valued equally and participate fully.

Judge Alito's 15-year track record on the Third Circuit Court of Appeals compels NCIL to formally oppose a US Supreme Court nominee for the first time. Judge Alito's apparent hostility to the *Olmstead* precedent, his activist attacks on Congress' power to enact key civil rights legislation that would endanger laws such as the Americans with Disabilities Act, and his discomfort with enforcement of key safeguards in the Medicaid statute make his confirmation a grave and direct threat to the civil rights of persons with disabilities.

A key part of our work is to eliminate the institutional bias of Medicaid by moving persons with disabilities out of institutions and into community settings so they can control their own destinies and live independently. NCIL also works tirelessly to ensure that the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, the Fair Housing Act Amendments, the Individuals with Disabilities Education Act and other crucial civil rights laws are fully implemented and enforced.

A thorough review of Judge Alito's long record has demonstrated to persons with disabilities that as a Supreme Court Justice, he would be ideologically predisposed to use the law to roll back the rights we fought so hard to secure and to eliminate recourse for persons with disabilities who are subjected to illegal discrimination. His record on the Third Circuit Court of Appeals is full of examples of results-oriented judicial activism on federalism and access to justice cases and of inordinately rigid interpretations of civil rights statutes. His ideological agenda is undeniable. We are convinced that the same approach to federalism found in Alito's ruling in *Chittister v. Department of Community & Economic Development*[1] in which he ruled that Congress lacked the power to pass the Family and Medical Leave Act (FMLA) would lead an Associate Supreme Court Justice Alito to strike down the Americans with Disabilities Act. His decision in *Chittister* places him to the right of the justice he has been nominated to replace, Sandra Day O'Connor, as well as the late Chief Justice William Rehnquist, who both were part of the 6-3 Majority that upheld the FMLA's leave provisions in *Nevada v. Hibbs.*[2] Rehnquist was unwilling to even hold states responsible for providing access to justice for persons with disabilities. What kind of a chance would persons with disabilities possibly have with an Associate Justice Alito?

If this was not problematic enough, consider the interpretation of the Commerce Clause exemplified by Judge Alito's contention that machine gun sales cannot be regulated under the Commerce Clause in *United States v. Rybar.* This interpretation, which contradicts over 60 years of precedent, poses a direct threat to the ADA's regulatory scheme.[3]

Judge Alito's decisions in housing cases have deprived persons with disabilities of the accessible housing that they need to liberate them from incarceration in institutions and allow them to live independently in the community. His 1999 ruling in *ADAPT v. HUD*[4] gave a free pass to federal agencies to ignore the rules and

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[1] *Chittister v. Department of Community & Economic Development*, 226 F.3d 223 (3d Cir. 2000).

[2] *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

[3] *United States v. Rybar*, 103 F.3d 273, 286-94 (Alito, J., dissenting). The Supreme Court's recent decision in *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), squarely rejects the reasoning of Alito's dissent in the gun possession case.

[4] *ADAPT v. HUD*, 170 F.3d 381 (3d Cir. 1999).

regulations they have promulgated and has contributed to a trend that has severely undermined fair housing enforcement in the 3rd Circuit, despite rampant non-compliance with these requirements by public housing authorities.[5] Also, in *Lapid Laurel, L.L.C. v. Zoning Board of Adjustment of Scotch Plains* (2002), Judge Alito joined a decision seriously weakening the protections of the Fair Housing Act. This ruling excused local zoning boards from engaging in an interactive process to identify reasonable accommodations needed to provide equal access for people with disabilities.[6] A 2005 HUD PD&R study has found that people with disabilities face discrimination in up to half of all rental inquiries.[7] It is evident that Judge Alito is more concerned with protecting state and local governments from litigation than he is with enforcing the fair housing laws.

Judge Alito's vote to rehear *Helen L. v. DiDario* (1995) *en banc* raises grave doubts as to whether Judge Alito supports, and would fully uphold, the ADA's integration mandate.[8] The Supreme Court held in *Olmstead v. L.C.* (1999) that unnecessary institutionalization is a form of discrimination. In *Helen L*, a key predecessor of the *Olmstead* decision, the Third Circuit ruled in favor of plaintiffs who had been denied community placements by Pennsylvania's Department of Public Welfare. The ruling held that "the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled." When Pennsylvania moved for the Third Circuit to rehear the case and reverse its ruling, the motion was rejected for lack of votes. However, Judge Alito favored rehearing the case, strongly suggesting that he objected to its core holdings. Justice O'Connor was a part of the *Olmstead* majority. The *Olmstead* decision has become a crucial touchstone of public policy – and with good reason. When we have hardly turned the corner on the institutional bias in the Medicaid system, we cannot afford to have a justice who would roll back our rights to community integration on the Supreme Court.

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[5] See also, *Three Rivers Center for Independent Living v. Housing Authority of Pittsburgh*, 382 F.3d 412 (3d Cir. 2004). Judge Alito was not involved in this ruling.

[6] *Lapid Laurel, L.L.C. v. Zoning Board of Adjustment of Scotch Plains*, 284 F.3d 442 (3d Cir.2002).

[7] Department of Housing and Urban Development, Policy Development and Research, *Housing Discrimination Study 2000 (HDS 2000): Discrimination Against Persons with Disabilities: Barriers at Every Step*, released July 25, 2005, available online at http://www.huduser.org/publications/hsgspec/dds.html.

[8] *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995).

In a concurrence in *Sabree v. Houstoun* (2003),[9] Judge Alito reluctantly agreed that individuals who have been denied services under Medicaid were permitted to sue to enforce their rights, but seemed to question that proposition. He described the present rights of beneficiaries as "currently binding precedent" but suggested that he expected that this would change in time. The current environment has seen draconian budgetary cuts in a number of states' Medicaid programs, which are often being done without regard to the impact on the health and welfare of beneficiaries or the institutional bias in the Medicaid system. Individuals with disabilities on Medicaid need judges who are not looking to push the envelope to narrow their legal recourse or to prevent individuals from holding states accountable for violations of the Medicaid statute. Judge Alito's concurrence raises grave concerns that he presents a clear and present danger to the rights of people with disabilities using Medicaid.

Finally, too many of Alito's decisions reflect an activist, hostile and unacceptably restrictive reading and application of disability rights statutes including the Rehabilitation Act of 1973 and the Americans with Disabilities Act. In *Nathanson v. Medical College of Pennsylvania* (1991), Judge Alito's dissent from a Third Circuit ruling that a medical student could take her school to trial for failure to reasonably accommodate her back injury was condemned by his colleagues. They stated, "...[F]ew if any Rehabilitation Act cases would survive summary judgment if such an analysis were applied to each handicapped individual's request for accommodations."[10] Moreover, in *Katekovich v. Team Rent A Car of Pittsburgh, Inc.*, (2002) Judge Alito joined in a troubling decision that ignored Congress' clear intent and permitted an employer to fire an employee with a disability who had been hospitalized for three weeks due to depression and a sleep disorder.[11] In an example of legislating from the bench in its purest form, Judge Alito joined the Third Circuit in ruling that neither the ADA nor the FMLA covered the employee. The court failed to consider whether she was regarded by the employer as having a disability. The Third Circuit also effectively reversed the burden of proof under the FMLA by ruling that Katekovich had not presented sufficient evidence that she was capable of returning to work. In fact, the FMLA explicitly places the burden of proof on the **employer** to demonstrate that the worker is **unable** to return.

NCIL refuses to stand idly by as a President who has promised us a "New Freedom Initiative" to implement the *Olmstead* decision and to uphold the Americans with Disabilities Act nominates a judicial activist whose record strongly suggests that he is predisposed to dismantle many of these landmark civil rights achievements. His nomination, which would dramatically shift the ideological balance of the US

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[9] *Sabree v. Houstoun,* 367 F.3d 180 (3d Cir. 2003).

[10] *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1387 n.13 (3d Cir. 1991).

[11] *Katekovich v. Team Rent A Car of Pittsburgh, Inc.*, 36 Fed. Appx. 688 (3d Cir. 2002).

Supreme Court, presents a stark threat to the fundamental rights of persons with disabilities that were only won recently through great effort. Our commitment to the belief that people with disabilities are to be valued as equals in American society requires that we take an unprecedented act in our 23-year history to formally, and without reservation, oppose a nominee to the Supreme Court of the United States. We strongly and without hesitation urge you to reject this nomination. By doing so, you would send a message to President Bush that he needs to nominate judges committed to honoring his father's legacy by upholding the Americans with Disabilities Act and guaranteeing access to the courts for persons with disabilities to vindicate their fundamental rights.

Respectfully,

John Lancaster
Executive Director, NCIL

Kelly Buckland
President, NCIL

NDAA

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November 21, 2005

The Honorable Arlen Specter
Chairman of the Committee on the Judiciary
United States Senate
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Dear Mr. Chairman:

The upcoming hearings concerning the confirmation of Judge Samuel Alito to fill the vacancy on the United States Supreme Court is of great importance to prosecutors, others who work within law enforcement and all Americans.

At NDAA's recent Board of Directors meeting, we passed a Resolution of support and endorsement of Judge Alito recognizing his considerable experience, intelligence and respect for the law. Enclosed is a copy of our Resolution and the accompanying News Release.

We trust that you and your colleagues will balance our endorsement along with the views of other interested parties as you consider Judge Alto's ability to be confirmed as a Justice on the United States Supreme Court.

Please let us know if you have questions or concerns. We look forward to working with you in the future on other issues of mutual interest and importance.

With high regard and thanks,

Sincerely,

PAUL A. LOGLI
State's Attorney, Winnebago County, Rockford, Illinois
President, National District Attorneys Association

THOMAS J. CHARRON
Executive Director, National District Attorneys Association
Enclosures (2)



National District Attorneys Association
99 Canal Center Plaza, Suite 510, Alexandria, Virginia 22314
703.549.9222 / 703.836.3195 Fax
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RESOLUTION

NOMINATION OF JUDGE SAMUEL ALITO

WHEREAS Judge Samuel Alito of the Third Circuit Court of Appeals has been nominated by the President of the United States to fill a vacancy on the U.S. Supreme Court created by the announced retirement of Justice Sandra Day O'Connor; and

WHEREAS, the United States Senate, now considering the views of a wide range of interested parties in performing its Constitutional duties to Advise and Consent, should also hear the "Voice of America's Prosecutors," the National District Attorney's Association; and

WHEREAS, Judge Alito's career has been marked with exceptional accomplishment and integrity as a student, lawyer, prosecutor and Judge. Judge Alito served all the American people in the Office of Solicitor General of the Department of Justice, arguing a dozen cases before the Supreme Court. Judge Alito served with distinction on the front lines as prosecutor, both as an Assistant United States Attorney and as a United States Attorney; and

WHEREAS, on the Third Circuit Court of Appeals, Judge Alito has consistently and faithfully applied the law to the facts without regard to where that path would lead in a particular case. This has led Judge Alito to decide cases for and against the prosecution, but the National District Attorney's Association believes the American People's rights and safety from crime are best protected when Judges reach a result through reasoning based on the law, not the result desired. Judge Alito's record reflects he is such a judge; and

WHEREAS, the National District Attorney's Association is comprised of members as diverse as those we serve with comparably diverse views on politics, religion and public policy. However, on protecting America's families and neighborhoods from crime we speak with one voice.

THEREFORE BE IT RESOLVED, that the National District Attorney's Association supports the confirmation of Judge Samuel Alito to the United States Supreme Court.

Adopted by the Board of Directors, November 5, 2005 (Chicago, Illinois)
2005.12FAL

Jan-05-2006 02:24pm From-44 MONTGOMERY,SUITE 2080 4156779445 T-755 P.002/021 F-138

NELA Advocates for Employee Rights
National Employment Lawyers Association

Founder
Paul H. Tobias

President
Janet E. Hill

Executive Director
Teresa E. Chow

VIA FACSIMILE AND FEDERAL EXPRESS

January 5, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
711 Hart Senate Office Building
Washington, D.C. 20510-3802

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510-4502

Dear Senators Specter and Leahy,

Enclosed is the National Employment Lawyers Association's (NELA)[1] extensive review of Judge Samuel Alito's employment rulings. As more fully explained in the enclosed report, NELA strongly opposes Judge Alito's nomination to the Supreme Court of the United States given his aversion and lack of commitment to civil rights in the workplace.

Thank you for your attention to this matter. If you have any questions, please feel free to contact me at (415) 296.7629.

Sincerely,

Marissa M. Tirona
Program Director
National Employment Lawyers Association

cc: Members of the Senate Judiciary Committee

[1] NELA is the country's only professional organization exclusively comprised of attorneys who represent plaintiffs in employment discrimination and other employment-related claims. NELA and its 67 state and local affiliates have over 3,000 members.



NATIONAL
FAMILY
PLANNING &
REPRODUCTIVE
HEALTH
ASSOCIATION

January 9, 2006

The Honorable Arlen Specter, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy:

I am writing on behalf of the National Family Planning and Reproductive Health Association (NFPRHA), a membership organization dedicated to improving access to reproductive health care for all women, to ask you to reject the nomination of Samuel Alito to the U.S. Supreme Court. Alito's clear record of hostility toward fundamental freedoms – especially for women – would radically tip the balance of the court away from protecting basic rights supported by a clear majority of Americans.

Judge Alito's now-infamous memos demonstrate a visceral opposition to *Roe v. Wade*. In clearly stating that the landmark decision should be overturned and outlining a strategy to accomplish that goal, he laid bare his judicial philosophy. The idea that Alito maintains an open mind on the right to privacy in regard to contraception and abortion is simply not credible.

Specifically, Judge Alito's 1985 job application letter for a promotion in the Reagan Justice Department articulated Alito's view that "the Constitution does not protect a right to an abortion." Recent efforts to dismiss the document as a mere job application that should not be used to judge his views seem disingenuous, particularly in light of the second lengthier memo written that same year confirming these same beliefs. In that 17-page memo written as a Justice Department lawyer, Alito maps out a strategy for the Reagan Administration to "advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime, mitigating its effects."

We are not only concerned about Judge Alito's views on abortion, but his views on contraception as well– which virtually all Americans support and use in the course of their reproductive lives. He went so far as to conflate abortion and contraception, labeling certain contraceptive methods as "abortifacients." These two documents, along with his dissent in *Casey*, leave no doubt as to the kind of justice Alito would be on an issue of profound importance for so many Americans.

To replace a centrist such as Justice Sandra Day O'Connor with a conservative ideologue such as Samuel Alito could eviscerate the rights we have come to take for granted by allowing him to finish the agenda laid out in his 1985 memorandum. Further, when it comes to basic constitutional guarantees for women's rights, health, and privacy, Alito's views are outside the mainstream of American public opinion and outside the mainstream of Supreme Court precedent.

The stakes for the American people with this nomination cannot be overstated. The Supreme Court is an institution that should protect our rights, not limit them. I strongly urge you to reject the nomination of Samuel Alito to the U.S. Supreme Court. Thank you for your consideration.

Sincerely,

Judith M. DeSarno

Judith M. DeSarno
President/CEO

1627 K St. N.W. ▲ 12th Floor ▲ Washington, D.C. 20006-1702 ♦ Tel: 202-293-3114 ♦ Fax: 202-293-1990 ♦ www.nfprha.org



January 11, 2006

The Honorable Arlen Specter, Chairman
The Honorable Patrick J. Leahy, Ranking Member
Members of the Committee
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Specter, Ranking Member Leahy and Members of the Committee on the Judiciary of the U.S. Senate:

On behalf of the National Gay and Lesbian Task Force and its thousands of lesbian, gay, bisexual and transgender ("LGBT") activists across the United States who work for the full and equal civil rights of LGBT people and their families, I write to express the Task Force's opposition to the confirmation of U.S. Court of Appeals Judge Samuel A. Alito as an associate justice of the Supreme Court of the United States.

Founded in 1973, the Task Force is the first national LGBT civil rights and advocacy organization and remains the movement's leading voice for freedom, justice and equality. We work to build the political strength of our community; strengthen state and local allies; and organize broad-based campaigns to build public support for the complete equality of LGBT people. As part of a broad social justice movement, the Task Force works to create a country that respects and protects the diversity of human expression and identity where all people may participate fully in our society.

Given the Task Force's mission, the lack of comprehensive civil rights for LGBT people and the emerging but fragile constitutional protections for the rights of LGBT people, we care deeply about who is appointed to the Supreme Court. We also, as part of our mission, share and support the interests of the larger progressive civil rights community in the make-up on the court.

In our capacity as a member of that broader community, we oppose the confirmation of Judge Alito for the reasons fully set forth in the Jan. 6 letter from the Leadership Conference on Civil Rights to Chairman Specter and ranking Member Leahy.

Our opposition to this confirmation is founded on Judge Alito's apparent hostility to the concept of a due process liberty interest type of privacy protected by the Constitution and described in *Lawrence v. Texas* as an "autonomy of self," including a right to private consensual intimate activity without interference from the state; his reliance on 2004 circuit case law that appears to erode the Equal Protection right of LGBT people, as held in *Romer v. Evans*, to be free of sweeping legal and legislative disabilities based on the biases and moralistic views of others; his

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declared interest in a more robust presence for religion in public and common area spaces as religion has been, and continues to be, misused as a weapon against the civil rights of and equality under the law for LGBT people; his record in the Reagan administration Justice Department and on the bench, of narrowly reading nondiscrimination laws to exclude those discriminated against for fear of HIV/AIDS contagion and of limiting the power of Congress to legislate to protect Americans from unfair and unreasonable discrimination — the protection that LGBT Americans hope someday to have in employment and all other areas of American life; and Judge Alito's belief the precedence of the executive branch, which is likely to translate to support for continued irrational and unfair discrimination against LGBT people in the military and anywhere else such discrimination might be asserted as in the national security interest.

Accordingly, we urge that you vote against the confirmation of Judge Samuel Alito to be an associate justice on the Supreme Court.

Thank you for your consideration of our views.

Sincerely,

Matt Foreman

Matt Foreman
Executive Director

OPENING ARGUMENT
Alito: A Sampling of Misleading Media Coverage

By Stuart <mailto:staylor@nationaljournal.com> Taylor Jr., National Journal © National Journal Group Inc. Monday, Dec. 12, 2005

A sometimes subtle but unmistakable pattern has emerged in major news organizations' coverage of Judge Samuel Alito's Supreme <http://www.whitehouse.gov/news/releases/2005/10/20051031.html> Court nomination.

Through various mixes of factual distortions, tendentious wording, and uncritical parroting of misleading attacks by liberal critics, some (but not all) reporters insinuate that Alito is a slippery character who will say whatever senators want to hear, especially by "distancing himself" from past statements that (these reporters imply) show him to be a conservative ideologue.

I focus here not on the consistently mindless liberal hysteria of the New York Times' editorial page. Nor on such egregious factual errors as the assertion on C-SPAN, by Stephen Henderson of Knight Ridder Newspapers, that in a study of Alito's more than 300 judicial opinions, "we didn't find a single case in which Judge Alito sided with African-Americans ... [who were] alleging racial bias." This, Henderson added, is "rather remarkable."

What is remarkable is that any reporter could have overlooked the at least seven cases in which Alito has sided with African-Americans alleging racial bias. Also remarkable is the illiterate statistical analysis and loaded language used by Henderson and Howard Mintz in a 2,652-word <http://www.philly.com/mld/philly/news/nation/13297090.htm?source=rss&channel=philly_nation> article published (in whole or in part) by some 18 newspapers. It makes the highly misleading claim that in 15 years as a judge, Alito has sought "to weave a conservative legal agenda into the fabric of the nation's laws," including "a standard higher than the Supreme Court requires" for proving job discrimination.

The systematic slanting -- conscious or unconscious -- of this and many other news reports has helped fuel a disingenuous campaign by liberal groups and senators to caricature Alito as a conservative ideologue. In fact, this is a judge who -- while surely too conservative for the taste of liberal ideologues -- is widely admired by liberals, moderates, and conservatives who know him well as fair-minded, committed to apolitical judging, and wedded to no ideological agenda other than restraint in the exercise of judicial power.

Here are some other examples of slanted reports about Alito, not including those noted in my November <http://nationaljournal.com/members/buzz/2005/openingargument/110705.htm> 7 and 21 <http://stage.nationaljournal.com/members/buzz/2005/openingargument/112105.htm> columns:

* A December <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/02/AR2005120200962.html> 3 Washington Post front-pager by Charles Babington stressed Alito's supposed effort to

"distance himself" from two 1985 documents in which he had asserted that (among other things) "I am and always have been a conservative" and "the Constitution does not protect a right to an abortion." Babington added that this distancing "may expose him to accusations of insincerity or irresolution, advocates said."

Indeed. Articles such as Babington's have fueled a clamor about Alito's supposed "credibility gap" by liberal groups and attack-dog senators like <http://nationaljournal.com/pubs/almanac/2006/people/ma/mas1.htm> Edward Kennedy of Massachusetts. Liberal editorialists and columnists have joined in.

Such suggestions of insincerity are not based on anything that Alito has said. They are based on misleading characterizations by reporters of what senators say Alito has said in private meetings with them. Needless to say, some of these senators are spinning their own agendas.

One who seemed to play it straight was California Democrat <http://nationaljournal.com/pubs/almanac/2006/people/ca/cas1.htm> Dianne Feinstein, a good bet to vote against Alito. She reported that Alito had told her: "First of all, it was different then.... I was an advocate seeking a ... political job. And that was 1985. I'm now a judge.... I'm not an advocate; I don't give heed to my personal views. What I do is interpret the law." Added Feinstein: "I believe he was very sincere."

Feinstein did not say that Alito had implied that his 1985 application had been anything other than a sincere expression of his beliefs at the time. And an administration supporter with knowledge of the private meetings tells me that Alito has made clear to senators that he stands by what he wrote then.

Alito has also, of course, told senators that the 1985 documents are less relevant than his 15-year record of apolitical judging and respect for precedents -- especially precedents that (like Roe v. Wade <http://laws.findlaw.com/us/410/113.html>) have been reaffirmed repeatedly since 1985. Nothing "insincere or irresolute" about that.

The December 3 Babington article stressed that Alito had written in 1985 that he was " 'particularly proud' of fighting affirmative-action programs." But Alito had not used the words "affirmative action." He had expressed pride in opposing "racial and ethnic quotas." (Babington noted this in a second reference, without making it clear that this was all that Alito had said.)

The distinction is important. The vast majority of Americans share Alito's opposition to quotas. By falsely suggesting that Alito had condemned all forms of "affirmative action" -- a broader and more benign-sounding phrase -- Babington added a we-don't-like-him spin.

* In a December <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/30/AR2005113000723.html> 1 Washington Post front-pager, Amy Goldstein and Jo Becker found it remarkable that Alito had "referred to a doctor who performs [abortions] as an 'abortionist' and railed against a ... decision that had struck down an ordinance that he said was 'designed to preclude the mindless dumping of aborted fetuses into garbage piles.' "

But some abortion doctors call themselves abortionists. Alito's memo used "abortionists" once, while referring to such specialists as "doctors" or "physicians" some 15 times. And in the words of Edward Whelan, head of the conservative Ethics and Public Policy Center: "If we can refer to a doctor who does podiatry as a podiatrist and a doctor who does cardiology as a cardiologist, why can't we refer to a doctor who does abortions as an abortionist?"

"Railed against" is, of course, a phrase often used to imply ranting and raving -- the antithesis of the thoughtful analysis in the Alito memo. And that colorful quote about "mindless dumping of aborted fetuses"? Those were not Alito's words, as the reporters asserted. He was dutifully quoting the city's explanation of its own ordinance.

* A December 5 New York Times front-pager by David Kirkpatrick <http://www.nytimes.com/2005/12/05/politics/politicsspecial1/05father.html?n=Top%2fReference%2fTimes%20Topics%2fPeople%2fA%2fAlito%2c%20Samuel%20A%2e%20Jr%2e> focused on how "Judge Alito has often invoked his father's legacy to help deflect questions from skeptical Democrats." Portions of the article can be read as reflecting well on Alito. But it also contains strange and utterly unsupported insinuations that Alito is perhaps being insincere in touting his father as a role model -- even that he may have fabricated stories about his father to make himself look good.

"Still," Kirkpatrick writes, "some colleagues and friends of the elder Mr. Alito, who died in 1987, said they had never heard some of the stories his son has recounted," including a story that his father had "in college once defended a black basketball player from discrimination on the team."

I read this as implying that Alito, to pad his racial-sensitivity resume, had perhaps made the whole thing up. So I was surprised to find that Kirkpatrick had dug up hard evidence that this story was true -- and had cited it for the benefit of those readers who managed to make it to his 16th paragraph. The evidence is a 1935 editorial in the campus newspaper denouncing the college for benching the black player for a game with a segregated teachers college. Alito's father was editor-in-chief of the newspaper.

* A December 6 Boston Globe front-pager by Michael Kranish breathlessly reported that Alito was noted as "present" when the 12-judge U.S. Court of Appeals for the 3rd Circuit declined to rehear a three-judge panel's decision in the case of one Larry Kopp, in 1992.

Why is this front-page news? Well, reports Kranish, Alito had signed Kopp's bank fraud indictment five years before, as U.S. attorney for New Jersey. And on taking the bench, he had promised not to participate in the case. So if he participated, he broke his promise!

One problem: It seems quite unlikely that Alito did participate. Most petitions for rehearing simply die automatically without a vote in the 3rd Circuit, because usually no judge requests a vote. And court clerks often mark judges "present" at such sessions whether they vote or not, or are recused.

Then there is the little problem with the headline. It reads: "Alito's policy on recusals is questioned." But the article identifies nobody (other than Kranish) who has questioned Alito's supposed role in the Kopp case.

To be sure, many critics have questioned Alito's participation in other cases -- without citing a shred of evidence of any conflict of interest, ever. That's a story for another day.

Meanwhile, lest this column be dismissed as pro-Bush propaganda, I hereby associate myself with a comment by Walter Murphy, the distinguished constitutional scholar who was Alito's thesis adviser at Princeton University:

"I confess surprise that a man so dreadfully intellectually and morally challenged as George W. Bush would want a person as intellectually gifted, independent, and morally principled as Sam Alito on the bench."

-- Stuart Taylor Jr. is a senior writer and columnist for National Journal magazine, where "Opening Argument" appears. His e-mail address is staylor@nationaljournal.com.

nationaljournal.com

OPENING ARGUMENT

The Case of Alito v. O'Connor

By Stuart Taylor Jr., *National Journal*
© National Journal Group Inc.
Monday, Jan. 9, 2006

Most analysts predict (and I agree) that if confirmed, Judge **Samuel Alito** will be more conservative than Justice **Sandra Day O'Connor**, whom he would succeed on the Supreme Court. That's why O'Connor was practically begged to stay on by liberal Democratic senators such as **Barbara Boxer** of California and **Patrick Leahy** of Vermont; moderate Republican senators such as **Arlen Specter** of Pennsylvania and **Olympia Snowe** and **Susan Collins** of Maine; and liberal groups such as the National Organization for Women.

But amid the debate over Alito's writings and decisions, some of the most telling signs of a right-wing agenda have received too little attention.

Alito's critics have ignored evidence that his 15 years of precedent-respecting work as a judge tell more about him than a handful of memos that he wrote . . . more than 20 years ago.

Affirmative action. The judge has repeatedly blocked or crippled programs designed to protect blacks against the continuing effects of American apartheid. One decision, which struck down a school board's policy of considering race in layoff decisions, thwarted an effort to keep a few black teachers as role models for black students. A second blocked a similar program to shield recently hired black police officers from layoffs. A third blocked a city from opening opportunities for minority-owned construction companies by striking down its program to channel 30 percent of public works funds to them.

Voting rights. Making it harder for black and Hispanic candidates to overcome white racial-bloc voting, the judge has repeatedly struck down majority-black and majority-Hispanic voting districts because of their supposedly irregular shape. But the judge saw no problem with the gerrymandering of bizarrely shaped districts by Pennsylvania's Republican-controlled Legislature to rig elections against Democrats!

Civil rights and women's rights. Decision after decision has made it harder for victims of racial and gender discrimination to vindicate their rights. One used a narrow reading of Title IX, the federal law banning gender discrimination by federally funded schools and colleges, to block victims from suing unless the federal money went to the particular discriminatory program. A second blocked victims of racial and other discrimination from suing federally funded programs and institutions unless they can prove intent to discriminate -- often an impossible burden. A third barred victims of rape and domestic violence from suing under the federal Violence Against Women Act.

Gay rights. One decision allowed states to prosecute and brand gay people as criminals for enjoying sexual relations, even in the privacy of their own bedrooms. Another supported a homophobic group's discriminatory exclusion of gay boys and men, citing the group's "freedom of association."

Religion. The judge has often breached the wall of separation between church and state. Decisions boosting governmental subsidies for Catholic and other religious schools include one that supported "voucher" programs condemned by teachers groups and another that approved a state tax deduction for tuition paid to religious schools. Other decisions have forced public schools to open their doors to evangelical Bible clubs; forced a state university to subsidize a Christian student magazine; allowed a state legislature to pay a chaplain to open each day's session with a prayer; and supported official displays of explicitly Christian symbols, including a tax-funded Christian nativity scene as part of a city's holiday display.

States' rights -- and guns. One decision crippled enforcement of the Brady gun control law by striking down its requirement that local law enforcement officials perform background checks on handgun purchasers. A second struck down a federal law that sought to protect children by barring possession of guns in or near schools. A third immunized states from suits under the federal Fair Labor Standards Act, leaving 4.7 million state employees with no remedy.

Death penalty. The judge has been relentless in pushing death-row inmates toward execution chambers -- even in the face of eye-catching evidence of possible innocence and systematic racial discrimination. One decision expedited the execution of a coal miner -- whose guilt is doubted by experts -- because his lawyer had missed a state court filing deadline *by one day*. Two dissents supported executions of 16-year-olds and of defendants so insane that they have no idea what they did.

Civil liberties. One decision gave a virtual blank check for government investigators to conduct aerial surveillance of citizens -- even by hovering over the fenced yards of private homes. A second upheld the forfeiture of a woman's car because *her faithless husband* had been parked in it while receiving oral sex from a prostitute. Two more gave presidents absolute immunity and attorneys general almost absolute immunity from lawsuits for their official acts, including the Nixon administration's illegal wiretapping of political opponents. And the judge approved a police officer's fatal shooting of an unarmed, 15-year-old black youth, in the back, because he was suspected of fleeing the scene of a minor burglary.

Choice. The judge has called abortion "morally repugnant"; declared *Roe v. Wade* to be "on a collision course with itself"; claimed that governments have "compelling interests in the protection of potential human life ... throughout pregnancy"; and forced terrified minors to notify often-abusive parents (or beg judges for permission) before they can obtain abortions.

Environment. Among other anti-environment decisions, the judge overturned a long-established Clean Water Act regulation that had protected ponds and many wetlands from dredging and filling by profiteering developers.

Big business. One decision supported Big Tobacco's position that it could not be regulated in any way by the federal Food and Drug Administration -- not even to prevent use of TV ads to hook children and teenagers on cigarettes. A second overturned a jury's $145 million award of punitive damages against a big insurance company that had refused in bad faith to settle a valid car-crash claim and thereby exposed a policyholder to personal liability.

I could go on. But as you've probably figured out by now, I have been playing a little trick. None of the opinions, dissents, or votes described above (accurately if incompletely) were Judge Alito's. All were Justice O'Connor's.

That would be the same **Sandra Day O'Connor** who is hailed on the Web sites of Alito's most bitter opponents as "moderate" (Naral Pro-Choice America); as "a critical vote ... in numerous cases to protect

Americans' rights and liberties" (People for the American Way); and as "beholden to nothing and to no one except the law" (NOW).

My purpose has been to illustrate how easily the tactics used by liberal groups to tar Alito could be used to portray even the sainted, moderate O'Connor as a fanatical conservative who "has sought to dismantle reproductive choice, undermine civil-rights enforcement, weaken environmental protections, restrict individuals' ability to seek justice in the courts when their rights are trampled by corporations, and diminish constitutional protections for abusive government intrusion into Americans' privacy," to borrow from a recent People for the American Way depiction of Alito.

I have, to be sure, taken certain liberties by using loaded language and by selectively omitting factual context and the many O'Connor decisions and votes that could be used to portray her as quite liberal.

But I have done no more slanting than many liberal groups -- and some journalists -- have done in their misleading campaign to caricature Alito. And while I have failed (until now) to mention that O'Connor has drifted markedly toward the liberal side of the spectrum over the past two decades, Alito's critics have similarly ignored much evidence that his 15 years of steady, scholarly, precedent-respecting work as a judge tell us more about him than a handful of widely (and misleadingly) publicized memos that he wrote more than 20 years ago.

Not to mention the critics' efforts to drown out the virtually unanimous praise voiced by the many moderates and liberals (as well as conservatives) who know Alito well: colleagues (current and former), classmates, friends, and former law clerks. Sure, they say, Alito is a conservative. But he also believes deeply that judges should be constrained by established legal rules and hard facts -- and should not be looking to promote political agendas. This helps explain why the American Bar Association's Standing Committee on Federal Judiciary has unanimously rated Alito "well qualified" for the Supreme Court -- the highest possible rating.

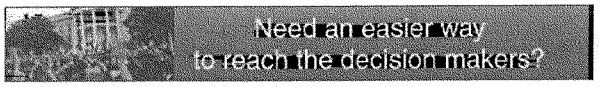
After reading hundreds of news articles and interviewing dozens of people during the nearly 10 weeks since Alito's nomination, I have yet to come across a single suggestion (even anonymous) by anyone well acquainted with the man that he will bring a radical conservative agenda to the Court. If I have missed anyone out there, please let me know.

-- Stuart Taylor Jr. is a senior writer and columnist for National Journal *magazine, where "Opening Argument" appears. His e-mail address is staylor@nationaljournal.com.*

[Opening Argument Archives]

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NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH

January 11, 2006

The Honorable Arlen Specter
Chairman
United States Senate Judiciary Committee
711 Hart Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Specter and Senator Leahy:

I am writing to you on behalf of the National Latina Institute for Reproductive Health, a New York-based organization that works to ensure the fundamental human right to reproductive health for Latinas, their families and their communities through public education, policy advocacy and community mobilization. It is for these reasons that we are deeply concerned about the nomination of Judge Samuel Alito to the United States Supreme Court and urge you to oppose his confirmation.

NLIRH works hard to ensure that elected officials promote and protect social justice and reproductive freedom through the implementation of positive legislation and effective health policies. We work on Supreme Court issues because there are a number of issues that are important to Latinas, including abortion and affirmative action. A new Supreme Court Justice could tip the balance of the Court toward the conservative right and drastically limit the rights of Latinas. This is why we have some concerns about the recent nomination of Judge Samuel Alito to the United States Supreme Court. We hope that you too are concerned about President Bush's choice to replace Justice Sandra Day O'Connor.

Alito's record on an individual's right to be free from inappropriate governmental intrusion is deplorable. In *Planned Parenthood v. Casey*, Alito supported a restriction on abortion access that required women to notify their spouses before obtaining an abortion—a restriction that was later found unconstitutional by the Supreme Court because of its impact on domestic violence survivors.

Alito also has a long documented history of hostility towards women's reproductive civil rights and freedom. On a recently released job application submitted by Alito in 1985 for a position in the Reagan Administration, Alito presented himself as a concise conservative who was "particularly proud" of contributing to cases arguing "that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion." These extreme, right-wing perspectives do not belong on a court where reasonable judicial interpretation is a necessity.

National Latina Institute for Reproductive Health
50 Broad Street, Suite 1825, New York, NY 10003
T: (212) 422-2553 F: (212) 422-2556

Senators, we urge you to vote against Alito's confirmation. Many rights will be in danger if this nominee is put in such a powerful position. In short, we ask you to work in solidarity with other Senators to defeat this nomination and to stand up for our health and well-being.

Sincerely,



Silvia Henriquez, Executive Director

National Latina Institute for Reproductive Health
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Testimony of the National Organization for Women on the Nomination of Samuel Alito

Submitted January 18, 2006

On Tuesday, January 24, the members of the Senate Judiciary Committee will cast a historic vote to fill the Supreme Court seat currently held by the first woman justice of the U.S. Supreme Court, Sandra Day O'Connor.

In 1981, NOW testified for the confirmation of Justice O'Connor because, although she was undoubtedly conservative, we believed that she had demonstrated respect for individual rights and equal opportunities. Although we have disagreed many times with her opinions, she has supported our right to be free from harassment at school and discrimination at work, the right to privacy in our homes and our reproductive decisions, the right to an equal education for girls and women, and the value of diversity in our society.

After a thorough examination of his 15-year record on the bench, and 18 hours of committee hearings, NOW is convinced that Samuel Alito would take the Court, and our lives, in a very different direction. For that reason, the National Organization for Women is unequivocally opposed to the confirmation of Samuel Alito as an Associate Justice of the U.S. Supreme Court.

Samuel Alito urged us to determine what kind of Justice he would be by looking at the kind of judge he has been. And in more than 300 decisions, he established a pattern of narrowing many of the civil rights, environmental and employment protections enacted by the Congress, such as the Family and Medical Leave Act and laws against sex discrimination and sexual harassment. In his writings, he made it clear that he believes many forms of birth control are "abortifacient," and that he would be a strategic architect of the overturn of *Roe v. Wade.* In his answers to more than 700 questions, Judge Alito said nothing to assuage our concerns.

What we do know is that he has a consistent record of favoring the rich over the poor, corporate interests over consumers, employers over and employees, and government over the individual -- and he reaches for procedural justifications to ensure that the "little person" does not get his or her day in court. He favors establishment of religion, and he opposes affirmative action which has been the vehicle for advancement for multitudes of women and people of color.

Let it be on the record that a confirmation of Samuel Alito will undermine much of the progress for which our nation is justifiably proud – for individual liberty, for civil rights and for women's rights.

The president nominates justices to the Supreme Court and the Senate is charged with a co-equal responsibility to decide whether to consent to those nominees. We call on the 18 members of this committee to take your role in our democratic balance of powers seriously, and not simply rubber-stamp George W. Bush's choice for the High Court.

It is unacceptable for Senators to confirm a judge whose record so clearly shows that he would enshrine a right-wing agenda for generations to come. Samuel Alito is the wrong judge at the wrong time for women and for the country.

Respectfully submitted,

Kim Gandy, President
National Organization for Women
1100 H Street NW, Third Floor
Washington, DC 20005
202-628-8669 x120

National Organization for Women

Kim Gandy
President
Olga Vives
Executive Vice President

Melody Drnach
Action Vice President
Latifa Lyles
Membership Vice President

December 13, 2005

Dear Senator,

NOW is strongly opposed to the elevation of Judge Samuel Alito to the Supreme Court of the United States, and with every passing day more information appears that reconfirms our opposition. We urge you to review his record, writings and judicial philosophy and join us in opposing his nomination.

Not only is NOW disappointed that President Bush has proposed to replace Justice Sandra Day O'Connor with yet another white male ultra-conservative, but we are deeply disturbed by the twenty-year track record that places Judge Alito on the far right of the judicial spectrum, especially when it comes to women's and civil rights. If Samuel Alito is confirmed by the U.S. Senate, many of our fundamental rights will be at great risk and could well be lost entirely.

A bedrock principle for NOW is full Constitutional rights for women and at the heart of that equality is self determination for women when they deal with their reproductive health care and childbearing decisions. When applying for a position in the Reagan administration in 1985, Alito stated he was "particularly proud" of his work on cases arguing "that the Constitution does not protect a right to an abortion." A memo released later shows that Alito told his boss that two pending cases provided an "opportunity to advance the goals of overruling Roe v. Wade and, in the meantime, of mitigating its effects." These are not the actions of someone simply trying to please his boss, but proud convictions that we have no reason to believe have altered in the past two decades.

Also troubling is his proud touting of his membership in a conservative Princeton alumni group that complained about the admission of women and the number of minority students on the elite college campus. How will Judge Alito deal with educational opportunity and Title IX? How will Judge Alito deal with pay equity and workplace policies as well as affirmative action and job benefit issues that disproportionately affect women? How will Judge Alito deal with challenges to federal legislation guaranteeing disability rights, lesbian and gay rights, and freedom from domestic and sexual violence? We believe he will rule on the side of narrowing our freedoms and barring our redress in court.

Please consider all of these issues as you review Samuel Alito's fitness to serve on our highest court in the land. Based on his record, he will not come down on the side of fairness and equality for all. We ask that you vote against his nomination.

Sincerely,

Kim Gandy
President

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National Partnership for Women & Families

January 11, 2006

Senator Arlen Specter
Chairman
Senate Judiciary Committee
United States Senate
711 Hart Senate Office Bldg.
Washington, DC 20510

Senator Patrick Leahy
Ranking Member
Senate Judiciary Committee
United States Senate
433 Russell Senate Office Bldg.
Washington, DC 20510

Dear Senators:

On behalf of the National Partnership for Women & Families (National Partnership), I am writing in opposition to the nomination of Judge Samuel Alito to the United States Supreme Court. For over thirty years, the National Partnership has been a leading advocate in support of women's rights. From working to outlaw sexual harassment, to fighting to prohibit pregnancy discrimination, to leading the effort to ensure family and medical leave for over 50 million Americans, the National Partnership has fought for every major policy advance for women and families in the last three decades. The National Partnership also has monitored every Supreme Court nomination that has occurred since our inception, extensively researching and analyzing the records of pending nominees. Our work has been driven by our commitment to the core values of fairness, equality, opportunity, and justice – and it is these values that underlie the principles, policies, and initiatives we have pursued throughout our history.

Judge Alito's nomination comes at a particularly critical time. Justice Sandra Day O'Connor's retirement threatens to alter the balance on the U.S. Supreme Court and undermine years of progress on women's rights, civil rights and the right to privacy. The Court has been closely divided on many critical issues, and Justice O'Connor often has cast the deciding vote in cases with enormous implications for women, people of color, seniors, people with disabilities and others. Thus, there is much at stake with her replacement.

The National Partnership looked closely at Judge Alito's available record, examining his writings and opinions on a range of issues from employment to reproductive rights to affirmative action, and more. Central to our assessment was whether his record evinced a demonstrated commitment to equal justice under law, and a commitment to apply the law in a fair, even-handed manner, regardless of his own views. Our analysis led us to only one possible conclusion: Judge Alito would turn the Supreme Court sharply to the right, and vote to reverse crucial gains from recent years. From protections against discrimination such as sexual and racial harassment, to a woman's right to make her own reproductive health decisions, to accountability if states violate the Family & Medical Leave Act (FMLA), Judge Alito's appointment would put the rights and liberties of women, working people, people of color, and families in serious jeopardy. It is a record that does not merit elevation to the nation's highest court.

Evaluating Samuel Alito and his Record. Time and again, Judge Alito has interpreted the law in an overly restrictive and unnecessarily rigid manner, at times taking positions so regressive that his court colleagues categorically rejected them. There are few examples of Judge Alito siding with victims of job discrimination, but no shortage of cases in which he sided with employers charged with discrimination. It is clear that he would deny critical rights and protections to women and people of color.

- Judge Alito would make it harder for workers to challenge state employers for violating the FMLA. He ruled that states are immune from lawsuits by state workers alleging violations of the FMLA's medical leave provisions. In doing so, he ignored the persistent gender stereotypes that often have limited women's job opportunities, and concluded that Congress' creation of a leave remedy was not justified.

- He frequently erects evidentiary or procedural hurdles that make it difficult for plaintiffs to win employment discrimination cases or even have their day in court. He has a propensity for discounting the evidence presented by victims of discrimination, while deferring to the evidence presented by employers, even in the face of inaccuracies and discrepancies. In one case, Judge Alito defended an employer's decision not to promote an African American female employee, despite evidence of irregularities in the hiring and interview process. He was willing to accept on its face the employer position that she was not the "best" qualified candidate, without examining whether racial bias was the reason the employer reached that conclusion. Judge Alito would not have allowed this case to even go to trial.

- Judge Alito's briefs urging the Supreme Court to strike down affirmative action programs raise serious questions about whether he would uphold the Court's precedent, or undo the careful balance the Court struck to achieve diversity, nondiscrimination and equal opportunity goals. His views could turn back the clock on advances that have been critical to the success of women and people of color.

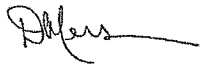
- He consistently questions the constitutional right to privacy, touting his work on cases in which he argued that the Constitution does not protect a right to an abortion, and indicating his personal belief that *Roe v.* Wade should be overturned. As a government lawyer, Judge Alito was the architect of a strategy to uphold restrictive regulations that would make it harder for women to make their own reproductive health decisions without government interference and ultimately lead to complete elimination of women's right to choose.

- His judicial philosophy often results in higher burdens for plaintiffs, greater deference to states or institutional defendants, and limits on Congressional authority.

When President Bush nominated Third Circuit Court of Appeals Judge Samuel A. Alito, Jr. to replace Justice O'Connor, he asked Congress to confirm one of the most conservative judges in the nation to take her seat – a judge who would put at risk our right to make our own private family decisions without government intrusion, to be free from gender-based stereotypes, and to

have full and fair access to jobs, education and fair pay. We all deserve a Supreme Court justice who is committed to the principles of equality and fairness enshrined in our Constitution, and at the heart of hard-won gains central to women's success. Judge Alito would not be that Justice. The National Partnership urges the Senate to reject his nomination.

Respectfully Submitted,



Debra L. Ness
President

CC:

Senator Orrin Hatch
Senator Charles Grassley
Senator Jon Kyl
Senator Mike DeWine
Senator Jeff Sessions
Senator Lindsey Graham
Senator John Cornyn
Senator Sam Brownback
Senator Tom Coburn
Senator Edward Kennedy
Senator Joseph Biden
Senator Herbert Kohl
Senator Dianne Feinstein
Senator Russell Feingold
Senator Charles Schumer
Senator Richard Durbin

National Partnership for Women & Families

TESTIMONY
OF
DEBRA L. NESS,
PRESIDENT OF
THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES,
TO THE UNITED STATES SENATE JUDICIARY COMMITTEE
ON THE
NOMINATION OF JUDGE SAMUEL ALITO
TO BECOME AN ASSOCIATE JUSTICE
OF THE
UNITED STATES SUPREME COURT

January 18, 2006

I am Debra L. Ness, President of the National Partnership for Women & Families, and I submit this testimony on behalf of the National Partnership in opposition to the nomination of Judge Samuel Alito to become an Associate Justice of the United States Supreme Court. The National Partnership is a national advocacy organization that has been working since 1971 to advance women's rights, with a particular focus on employment opportunity, work-family policy, and health care policy. From working to outlaw sexual harassment, to fighting to prohibit pregnancy discrimination, to leading the effort to ensure family and medical leave for over 50 million Americans, the National Partnership has fought for every major policy advance for women and families in the last three decades. The National Partnership also has monitored every Supreme Court nomination that has occurred since our inception, extensively researching and analyzing the records of pending nominees. Our work has been driven by our commitment to the core values of fairness, equality, opportunity, and justice – and it is these values that underlie the principles, policies, and initiatives we have pursued throughout our history.

The National Partnership looked closely at Judge Alito's available record, examining his writings and opinions on a range of issues from employment to reproductive rights to affirmative action, and more. Central to our assessment was whether his record evinced a demonstrated commitment to equal justice under law, and a commitment to apply the law in a fair, even-handed manner, regardless of his own views. Our analysis led us to only one possible conclusion: Judge Alito would turn the Supreme Court sharply to the right, and vote to reverse crucial gains from recent years. From protections against discrimination such as sexual and racial harassment, to a woman's right to make her own reproductive health decisions, to accountability if states violate the Family & Medical Leave Act (FMLA), Judge Alito's appointment would put the rights and liberties of women, working people, people of color, and families in serious jeopardy. It is a record that does not merit elevation to the nation's highest court.

Evaluating Samuel Alito and His Record. Judge Alito's available record paints a picture that is deeply troubling. He adopts overly restrictive and unnecessarily rigid interpretations of the law that often deny critical rights and protections to women and people of color. For example:

- Judge Alito would make it harder for workers to challenge state employers for violating the Family & Medical Leave Act. In *Chittister v. Department of Community and*

Economic Development,[1] Judge Alito wrote for a Third Circuit panel that the state of Pennsylvania was immune from lawsuits by state workers alleging violations of the FMLA's medical leave provisions. The decision effectively insulated the state from FMLA claims, and undermined the ability of these workers to access medical leave when needed. If the Supreme Court adopted these views, millions of workers could lose their ability to vindicate their rights under the Family & Medical Leave Act.

- Judge Alito has taken a very restrictive approach in employment discrimination cases, resulting in few successes for plaintiffs. In *Bray v. Marriott*,[2] he would have let stand an employer's decision not to hire an African American female employee who applied for a promotion, even though there was considerable evidence of irregularities in the hiring and interview process. Judge Alito argued in a dissent in that case that the employer's failure to follow its own rules was not sufficient to prove discrimination against the plaintiff. For him, the employer's argument that the plaintiff was not the best qualified should have been accepted at face value. In contrast, the majority concluded there were enough questions about the employer's motives and conduct to allow the plaintiff her day in court. Moreover, the majority chided Judge Alito's analysis for effectively eviscerating the antidiscrimination purposes of the law, by accepting the employer's reasoning without adequate review to determine whether racial bias influenced the hiring decision. They stressed that what mattered was not whether the company was seeking the "best" candidate, but "whether a reasonable factfinder could conclude that Bray was not deemed the best because she is Black."

- Judge Alito's record on affirmative action raises serious questions about whether he would uphold the Court's precedent, or turn back the clock on advances that have been critical to the success of women and people of color. As a government lawyer, Judge Alito helped prepare briefs urging the Supreme Court to strike down affirmative action efforts aimed at remedying longstanding racial discrimination. His mixed record as a judge on the Third Circuit largely mirrors these views, indicating little support for targeted affirmative efforts to ensure equal opportunity. Judge Alito's elevation to the Court likely would put at risk the careful balance struck by the Court to achieve diversity, nondiscrimination, and equal opportunity goals – and potentially undo hard-won gains for women and people of color.

- Judge Alito's record strongly indicates that he would deny our constitutional right to privacy and undermine existing Court precedent on the issue. In a 1985 job application, he touted his work on Reagan Administration-era cases that argued the Constitution does not protect a right to an abortion – a position with which he indicated he personally agreed. In a memorandum discussing the strategy for the government's *amicus* brief in a pending case involving a Pennsylvania abortion regulation, he stressed the importance of finding a way to give states maximum latitude to adopt abortion restrictions to undermine, if not overrule, *Roe v. Wade*. After leaving the Administration and becoming a judge on the Third Circuit Court of Appeals, he wrote a dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] arguing to uphold burdensome restrictions and hurdles aimed at women seeking an abortion. The Supreme Court ultimately rejected his position, but he once again underscored a desire to place new limits on a woman's ability to make her own reproductive health decisions.

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[1] 226 F.3d 223 (3d Cir. 2000).
[2] 110 F.3d 986 (3d Cir. 1997).
[3] 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

After careful consideration of his available record, the National Partnership for Women & Families concludes that Judge Samuel Alito should not be elevated to the Supreme Court. If his views were to prevail on the Court, women would lose ground – in achieving equal opportunity in the workplace, in their ability to make health care decisions without government intrusion, in having access to family and medical leave, and in getting their cases heard in court.

I. JUDGE SAMUEL ALITO'S RESTRICTIVE INTERPRETATIONS OF LAWS PROTECTING CIVIL AND INDIVIDUAL RIGHTS THREATEN TO UNDO CRITICAL GAINS FOR WOMEN

Many of the gains made by women over the last four decades have grown out of our nation's commitment to equality. The Supreme Court has been at the heart of that progress – its rulings interpreting constitutional and legal rights have secured essential protections for women in the workplace, in schools, in making health care decisions, and at home. As a result, it is *essential* that any nominee to the Supreme Court have a *demonstrated commitment* to the equal justice principles that have been the basis for women's equality. By that measure, Judge Alito's record falls far short. His restrictive interpretations of laws aimed at prohibiting discrimination and ensuring equal opportunity for women and people of color too often have resulted in denying individuals their day in court. He frequently favors imposing higher burdens on plaintiffs that would make it harder for them to vindicate their rights. If adopted by the Supreme Court, Judge Alito's positions would turn back the clock, erode hard-won gains and pose a serious danger to the critical legal rights women depend on every day.

A. Understanding the Context

Judge Alito's available record dates back to his work in the Reagan Administration, where he helped shape legal policy at the Department of Justice.[4] At the start of the 1980s, the incoming Reagan Administration provoked substantial controversy by moving aggressively to re-interpret longstanding civil rights laws and policies, and retreat on initiatives and positions that had proven key to achieving equality for women and people of color.[5] These efforts included strategies to change the direction of the courts through legal advocacy and judicial appointments, and trying to roll back rulings particularly on civil and individual rights with which the Administration disagreed.[6] His own words reveal that Judge Alito was deeply immersed in the Administration's work, helping to craft briefs and develop strategy to advance the Administration's goals.[7] While the full scope of his work is unknown,[8] it is clear that he provided leadership on some of the most

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[4] In August 1981, Judge Alito began working at the Department of Justice in the Reagan Administration in the office of the Solicitor General. In December 1985, he moved to DOJ's Office of Legal Counsel. He left the Administration after being appointed United States Attorney for the District of New Jersey in 1987.

[5] David F. Pike, *Rights Lawyers Rebel at Justice*, Nat'l Law Journal, October 12, 1981.

[6] Dawn E. Johnsen, *Ronald Regan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 Ind. L.J. 363 (2003).

[7] In a 1985 job application to become Deputy Assistant Attorney General in DOJ's Office of Legal Counsel, he wrote that it was "an honor and source of personal satisfaction for me to serve in the office of the Solicitor General during President Reagan's administration and to help to advance legal positions in which I personally believe very strongly. I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion." Department of Justice Application of Samuel A. Alito, Jr. for the Position of Deputy Assistant Attorney General, Nov. 15, 1985.

[8] Many of Judge Alito's memoranda, briefs, and other documents from his time in the Solicitor General's office and the Office of Legal Counsel at the Department of Justice are being withheld by the Bush Administration. Thus, it is difficult to get a comprehensive picture of the work he performed and the substantive issues he worked on during that time.

controversial issues – such as abortion and affirmative action – frequently staking out the most restrictive positions. A thorough review of Judge Alito's record demonstrates consistency throughout, from his career in the Reagan Justice Department through his 15-year tenure on the Third Circuit Court of Appeals. He restricts core rights and protections, erects barriers for plaintiffs and preserves state power. His words demonstrate personal agreement with many of the legal positions he has taken.[9] But more importantly, his words reveal that the positions he has taken are not simply arguments on behalf of a client, but rather reflect his views on the way the law should work. In sum, it provides a clear and disconcerting picture of the approach to and interpretation of the law he would bring to the Supreme Court.

B. Employment Discrimination and Equal Employment Opportunity

A review of Judge Alito's available written decisions on employment discrimination reveals that plaintiffs before him frequently face significant hurdles in turning to the courts to vindicate their rights.[10]

1. The Family & Medical Leave Act

The Family & Medical Leave Act (FMLA), signed into law in 1993, broke new ground by requiring employers to provide employees with 12 weeks of leave for family or medical emergencies. The enactment of the FMLA was the culmination of a ten-year struggle to pass legislation aimed at creating a level playing field for women and men seeking to balance work and family obligations. Too often, job opportunities for women were limited by persistent stereotypes about their work ethic, commitment, and overall abilities. Women frequently were perceived as "too costly" or "unreliable" in part because of their health care needs, including the potential need for time off from work to deal with a variety of medical conditions such as complications or recovery from pregnancy. These discriminatory attitudes resulted in qualified women losing out on valuable job opportunities – with hiring and promotion decisions driven by biased perceptions, rather than competence or capacity to do the job.

The FMLA, which provides for 12 weeks of family or medical leave for all eligible employees, was a legislative response designed to remedy this ongoing gender discrimination in the workplace. The availability of leave provides women as well as men with the necessary flexibility to take care of their health or family responsibilities without fear of repercussions at work such as losing or being denied a job. Without such a requirement, too many employers could make arbitrary decisions about who is entitled to leave and who is not, based in part on gender-based stereotypes about "proper" caregiving and wage earning roles. Judge Alito's views about the FMLA have drawn particular attention because he has argued that the goal of remedying gender discrimination was not sufficient to justify the medical leave remedy provided by the FMLA. He also has questioned whether Congress' enactment of the FMLA was a valid use of its constitutionally defined powers. Both of these views, if adopted more broadly by the Supreme Court, would have devastating consequences for workers seeking to make use of the FMLA's protections. These views also reflect a fundamental disagreement about the real purposes of the FMLA and its legislative history, which is clear and direct about

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[9] In his 1985 job application, supra n. 12, Judge Alito states: "I am and always have been a conservative and an adherent to the same philosophical views that I believe are central to this Administration."

[10] This analysis focuses primarily on opinions written by Judge Alito to gain a better understanding of his legal analysis and views. Because many of his unpublished opinions were unavailable, we were limited in our ability to undertake an exhaustive assessment of his unpublished writings, although some that were available have been included.

the critical link between family and medical leave on the one hand, and deterring discriminatory behavior by employers on the other.

The Legislative History of the Family & Medical Leave Act Makes Clear That the FMLA's Medical and Family Leave Provisions Were Crafted to Remedy Longstanding Discrimination. The legislation that ultimately was enacted as the Family & Medical Leave Act was the culmination of a decade-long evolution. Although there were many hearings and reports and different versions of the legislation over many years, there were several core goals advocates consistently sought to address.

- First, the legislation was intended to remedy persistent discrimination facing women – and men – in the workplace. Too frequently, employers avoided hiring women because of longstanding stereotypes, including assumptions that women would become pregnant and take leave. Employers that hired women often limited certain types of leave, like pregnancy leave, to women only, without providing men the same opportunity to take time off to care for a newborn child. The goal of the FMLA, from the earliest drafts to the final version of the legislation, was to counteract these discriminatory perceptions by creating a gender-neutral leave remedy available to men and women.

- Second, the legislation was intended to fill in gaps in the law to help women balance their health care needs with their work responsibilities. While pregnancy discrimination was already illegal, the law only required employers to treat pregnancy the way they would treat other temporary disabilities. The FMLA's concept of a serious health condition included pregnancy, in part, to enable women to take medical leave for pregnancy complications that might otherwise not be covered by their employer. Without leave for serious health problems, many women, particularly low-income women and women of color, were disadvantaged by existing gaps in the law because they often were employed in jobs without adequate coverage for medical emergencies. Thus, if they took time off for an illness, they risked losing their jobs.

- Third, the legislation was intended to provide a comprehensive remedy for the intersecting work, family, and medical challenges facing both women and men. Gender stereotypes that cast women and men into certain roles often led employers to treat female and male employees differently, with different expectations, different opportunities for advancement, and different responsibilities. These stereotypes often were multi-layered, encompassing perceptions about women and men that cut across the workplace, family, health, and caregiving spheres. Creating a family and medical leave remedy provided women and men with equal access to leave, so that employers could no longer rely on their own arbitrary attitudes to make decisions about who was more deserving of such protections.

All of these goals are reflected in the FMLA's findings and legislative history. For example, the FMLA's purposes explicitly note that the FMLA's medical leave provision was designed to prevent unconstitutional sex discrimination.

> "SEC. 2. FINDINGS AND PURPOSES.
>
> (b) PURPOSES.-It is the purpose of this Act-
>
> (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

> (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition; ...
> (4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, *minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability)* and for compelling family reasons, on a gender-neutral basis; and
> (5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause." [Emphasis supplied.][11]

Section 2(b)(4) explicitly refers to medical leave, stating that a Congressional purpose in including "leave...for eligible medical reasons (including maternity-related disability)" in the FMLA was to "minimize[ ] the potential for employment discrimination on the basis of sex." Discussions in Congressional committee reports about the FMLA and its roots in the Equal Protection clause (in addition to the Commerce Clause) also stressed how the medical leave provisions of the Act effectuated non-discrimination:

> Equal Protection and Non-Discrimination
>
> *A law providing special protection to women or any narrowly defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. Employers might be less inclined to hire women or some other category of worker provided special treatment.* For example, legislation addressing the needs of pregnant women only would give employers an economic incentive to discriminate against women in hiring policies; legislation addressing the needs of all workers equally does not have this effect. *The FMLA avoids providing employers the temptation to discriminate by addressing the serious leave needs of all employees*.... The evidence ... suggests that the incidence of serious medical conditions that would be covered by medical leave under the bill is virtually the same for men and women. Employers will find that women and men will take medical leave with equal frequency.

FAMILY AND MEDICAL LEAVE ACT OF 1990, House Report No. 101-28(I) (Apr. 13, 1989), 101ST Cong., 2ND Sess. 1990, 1989 WL 223041 (Leg.Hist.), at 14-15. [Emphasis supplied.]

The unique challenges facing women in the workplace also were discussed at length in many of the hearings over the years that the FMLA and early versions of the bill were under consideration:

> Thus, while Title VII, as amended by the PDA, has required that benefits and protections be provided to millions of previously unprotected women wage earners in this country, it leaves gaps which an antidiscrimination law, by its nature, cannot fill. This bill, H.R. 2020, is designed to fill those gaps. ...In doing so, the bill conforms to principles of equality previously established under the PDA because pregnancy-related illness and injury would be included within this medical leave protection.....More fundamentally, the bill addresses itself to a much larger structural inequity in the workplace, guaranteeing minimum

[11] Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C.A. § 2601 (a)(6); (b)(1)-(5).

> protection to that disproportionately female, nonwhite segment of the labor force least likely to have job security when illness strikes.

Joint House Oversight Hearing on the Parental and Disability Leave Act, H.R. 2020 Before the Subcommittees on Labor-Management Relations and Labor Standards of the Committee on Education and Labor, and the Subcommittees on Civil Service and Compensation and Employee Benefits of the Committee on Post Office and Civil Service, 99th Cong. 7-8 (1985) (Statement of Wendy Williams, Associate Professor of Law, Georgetown University Law Center).

> The bill's simple two-fold test for availability of leave means that employers will be required to treat employees affected by pregnancy, childbirth, and related medical conditions in the same manner as they treat other employees similar in their ability or inability to work—in harmony with their obligations under the Pregnancy Discrimination Act of 1978. ...The [bill] wisely upholds that well-established principle, thereby protecting working women from the danger that pregnancy-based distinctions could be extended to limit their employment opportunities.

Joint Hearing Before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the Committee on Education and Labor House of Representatives, 99th Congress (1986), The Parental and Medical Leave Act of 1986 (Statement of Women's Legal Defense Fund).

> Another significant *benefit of the temporary medical leave* provided by this legislation is the form of protection it offers women workers who bear children. *Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability.* Legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect.

S. REP. 102-68, 102ND Cong., 1ST Sess. 1991, 1991 WL 144271 (Leg. Hist.) at 35 [emphasis supplied].

All of these statements make clear the critical connection between the FMLA's goal to remedy gender discrimination in employer practices and the provision of family **and** medical leave. It is this history that Judge Alito largely ignored when he ruled in a case that required him to analyze the FMLA's antidiscrimination purposes.

Judge Alito's Analysis of the FMLA's Medical Leave Provision Undermines Important FMLA Protections. In *Chittister v. Department of Community and Economic Development*,[12] the Third Circuit considered whether a state employee could sue his state employer for removing him from his job after he took medical leave.[13] The employee, David Chittister, requested sick leave

[12] 226 F.3d 223 (3d Cir. 2000).

[13] Some state employers have argued that state workers cannot sue their state for violating their FMLA rights because the Constitution's 11th Amendment gives states sovereign immunity – meaning that states are immunized, or shielded, from being sued in federal court except under certain circumstances. At issue in these types of legal challenges is whether Congress was authorized under the Constitution to enact the FMLA and apply it to certain actors. The Constitution's 14th Amendment is one source of authority for

from his employer, the Pennsylvania Department of Community and Economic Development (the Pennsylvania DCED). The leave was initially granted, and during the tenth week of the leave, Mr. Chittister was terminated. Mr. Chittister filed a claim against the Pennsylvania DCED under the FMLA. The Pennsylvania DCED defended the case by arguing its 11th Amendment sovereign immunity shielded it and other state employers from such lawsuits. In an opinion written by Judge Alito, the Third Circuit panel ruled that Congress did not have the power to subject states to suit for violating the FMLA's medical leave provisions. He ruled that requiring employers to provide medical leave was not a proper remedy for gender discrimination, characterizing it as a disproportionate remedy when compared to the harm at issue. Specifically, Judge Alito concluded that 12 weeks of unpaid leave "[i]s so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[14] Further, he also questioned whether there was sufficient evidence of gender discrimination to justify the creation of a 12 week leave requirement.

The Supreme Court, however, reached a very different conclusion in a case raising similar issues to those in *Chittister*. In *Nevada Department of Human Resources v. Hibbs*, the Court considered whether a state worker could sue his state employer for violating the FMLA's family leave requirements.[15] In this case, the employee, William Hibbs, took leave to care for his ailing wife. When his employer, the Nevada Department of Human Resources (Nevada DHR) terminated Mr. Hibbs, he filed a claim under the FMLA. Just as in *Chittister*, the Nevada DHR defended the case by arguing that its 11th Amendment sovereign immunity shielded it from suit. In a 6-3 decision written by Chief Justice William Rehnquist, the Court concluded that the goal of remedying gender discrimination in employment was a sufficient reason to allow Congress to abrogate or dissolve states' sovereign immunity. The Court found that Congress appropriately remedied gender discrimination by providing for up to12 weeks of unpaid family leave, and that making a specific amount of leave available to both women and men helps dispel employer stereotypes about women's domestic roles as primary caregivers.

While the plaintiffs in *Chittister* and *Hibbs* were requesting two different types of FMLA leave, the broader implications of Judge Alito's ruling in *Chittister* raise serious concerns about his views on medical leave, family leave, and the overall length of leave available to workers under the FMLA.

- First, Judge Alito concludes in *Chittister* that Congress did not have the authority to abrogate the state's immunity with respect to the medical leave provisions of the FMLA. In doing so, he dismisses as unpersuasive the gender discrimination rationale used by Congress to enact the FMLA. Instead, he argues that the law offers no evidence of intentional gender discrimination in sick leave policies.[16] But his analysis ignores the

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Congressional action – Congress is empowered to pass laws to enforce the 14th Amendment, which among other things prohibits states from denying persons equal protection under the law. Here, Congress' passage of the FMLA effectuated the 14th Amendment's equal protection purposes by providing a gender-neutral remedy for longstanding gender-based discrimination and stereotypes about women and the workplace.

[14] *Chittister*, 226 F.3d at 229.

[15] 538 U.S. 721 (2003).

[16] Contrary to Judge Alito's assertions, Congress did consider evidence of and make findings about "personal sick leave practices that amounted to intentional gender discrimination" – and there *was* "substantial evidence of ... violations [of the Equal Protection Clause] in the legislative record." *Chittister*, 226 F.3d at 228, 229. When considering the FMLA, Congress examined leave statutes applicable to states (as well as to private and local employers) and state (as well as private and local) employers' family and medical leave actual practices. Despite the Pregnancy Discrimination Act, it found that many state (as well as private and local) employers had leave policies that were discriminatory on their face or discriminated in practice in the provision of leave. Thus, Congress could reasonably conclude that existing laws were not

legislative history and how persistent, discriminatory stereotypes about women – including perceptions about their health care needs, the costs of such care, and the potential need for time away from work – coupled with inadequate health care coverage for pregnancy and other health conditions, can be used to deny women job opportunities. This is precisely the type of discrimination the FMLA sought to address. If his views prevailed in the Supreme Court, millions of state workers would be prevented from filing claims against their employers when denied medical leave under the FMLA.

- Second, Judge Alito questions whether the FMLA's leave requirement is a proper remedy for discrimination, in effect arguing that an affirmative requirement to provide leave far exceeds what is necessary to remedy alleged discriminatory conduct. **His criticism arguably questions whether requiring leave as a remedy – in either the family or medical leave context – is ever warranted.** In contrast, in *Hibbs*, the Supreme Court held that the FMLA's family-care provision is an appropriate remedy to ensure that women would not be penalized because of perceptions about their caregiving responsibilities, and to avoid having family leave viewed as a drain on the workforce caused by female employees.

- Finally, the language of the opinion suggests that Judge Alito also questions whether the length of leave provided by the FMLA is an appropriate and proportionate remedy for discrimination. The Supreme Court in *Hibbs* found that "[i]n choosing 12 weeks as the appropriate leave floor, Congress chose 'a middle ground, a period long enough to serve "the needs of families" but not so long that it would upset "the legitimate interests of employers." ' "[17] Judge Alito's skepticism in *Chittister* may indicate that he would reach a different conclusion than the *Hibbs* majority.

The implications of *Chittister* become even more clear when reading the dissent in *Hibbs*, which relied in part on Judge Alito's reasoning.[18] Just as Judge Alito concludes the FMLA "...creates a substantive entitlement to sick leave" rather than a remedy for discrimination,[19] the dissenters in *Hibbs* chastised Congress for enacting "a substantive entitlement program of its own."[20] **In both cases, Judge Alito and the *Hibbs* dissenters flatly dismiss the crucial connection between providing leave and remedying discrimination. Thus, if Judge Alito's views take hold on the Court, meaningful FMLA rights for millions of state workers could evaporate.**

Other Supreme Court Analysis of State Sovereign Immunity Issues. While Judge Alito's opinion mirrored decisions reached by other circuit courts, nothing in the Supreme Court's precedent, as later demonstrated by *Hibbs*, or Third Circuit precedent required the *Chittister* result. Questions about the scope of the 11th Amendment to the United States Constitution and state sovereign immunity have a long history before the Supreme Court. Over the decades, the Court's rulings have searched for the proper balance between Congressional authority and state autonomy, setting forth standards governing the valid uses of federal power. In *Fitzpatrick v. Bitzer*,[21] the Court held that Congress could subject states to private lawsuits for damages

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sufficient to ensure non-discrimination, and that it would have to do more: it would have to establish affirmative obligations to provide leave on a gender-neutral basis through the FMLA.

[17] Hibbs, 538 U.S. at 739.

[18] *Id.* at 746.

[19] Chittister, 226 F.3d at 229.

[20] Hibbs, 538 U.S. at 754.

[21] 427 U.S. 445 (1976).

pursuant to its power to enforce the equal protection mandate the 14th Amendment.[22] In that case, a class of male employees of the state of Connecticut filed suit to challenge the state's retirement benefits plan. They claimed the plan discriminated on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, the landmark employment discrimination law that prohibits unlawful employment practices on the basis of race, color, religion, sex, or national origin. The Court made clear that state sovereign immunity was "necessarily limited by the enforcement provisions of §5 of the 14th Amendment;" thus, Congress could pass "appropriate legislation" to enforce the amendment's substantive provisions.[23]

But the 1990s ushered in a shift in the Court's direction, with a series of cases preserving state sovereign immunity and invalidating Congressional action. In *Seminole Tribe of Florida v. Florida*,[24] the Court ruled that, beyond its enforcement powers under §5 of the 14th Amendment, Congress' powers were limited. Thus, the power given to Congress under Article I of the Constitution was not sufficient to waive state sovereign immunity. Just a few years later, the Court ruled that Congress was not authorized to subject states to lawsuits for violating the Age Discrimination in Employment Act in *Kimel v. Florida Board of Regents*.[25] The Court in that case concluded that the ADEA's waiver of state sovereign immunity was not a valid exercise of Congress' authority under §5 of the 14th Amendment. Further, the Court distinguished age from race or gender discrimination, arguing that Congress had exceeded its enforcement mandate by seeking to allow suits against states for age-related practices that would be subject to a lower level of scrutiny – and thus sustained more easily – under the equal protection clause.

These recent cases document the Court's efforts to constrain Congress' power over states. But the Court's rulings also have signaled that race and gender discrimination cases might lead to different results, in part because they require a higher, more rigorous standard of review when evaluating whether equal protection violations have occurred. This higher standard means that it is tougher for states to justify discriminatory practices, and conversely provides stronger support for holding states accountable for violating the law. Indeed, lower circuit courts, for example, considering 11th Amendment challenges to the Equal Pay Act, which prohibits gender discrimination in wages, uniformly concluded that states were not immune from such lawsuits.[26] Similarly, courts have rejected attempts to reverse *Fitzpatrick* and its application to Title VII, which prohibits race and gender discrimination in employment.[27] The Supreme Court has declined numerous opportunities to reverse these decisions.[28] While these cases involve statutes

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[22] Section 5 of the 14th Amendment gives Congress the power to enforce the 14th Amendment's substantive provisions. It reads: "Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Constitution XIV.

[23] *Fitzpatrick v. Bitzer*, 427 U.S. at 456.

[24] 517 U.S. 44 (1996).

[25] 528 U.S. 62, 72 (2000).

[26] *See, e.g.,* Varner v. Illinois State Univ., 226 F.3d 927 (7th Cir. 2000).

[27] *See e.g.* Okruhlik v. University of Arkansas ex rel. May, 255 F.3d 615 (8th Cir. 2001); Johnson v. Univ. of Cincinnati, 215 F.3d 561, 571 (6th Cir. 2000); In re: Employment Discrimination Litig. Against the State of Ala., 198 F.3d 1305, 1316-17 (11th Cir. 1999); Ussery v. Louisiana, 150 F.3d 431, 434-35 (5th Cir. 1998); Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 696 n. 4 (3d Cir. 1996); Cerrato v. San Francisco Cmty. Coll., 26 F.3d 968, 975-76 (9th Cir. 1994).

[28] The Supreme Court did strike down portions of the Violence Against Women Act (VAWA). United States v. Morrison, 529 U.S. 528 (2000). That case can be distinguished because, there, the Court reasoned that neither § 5 of the 14th Amendment nor the Commerce Clause were sufficient sources of authority because the law granted civil remedies to violence victims against *private individuals*, not states. VAWA's civil remedies were not directed "at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias." Morrison, 529 U.S. at 626.

other than the FMLA, they demonstrate that many lower courts have denied states immunity from claims involving race and gender discrimination without placing an unfair burden on states.

The Future of the FMLA Before the Supreme Court. In the wake of *Hibbs*, courts have reached different conclusions about whether that ruling should be read to allow lawsuits against states that violate the FMLA's medical leave protections. Since *Hibbs,* two circuits have held that state employees can bring FMLA claims against their employers in cases of both family and medical leave, and two circuit cases have held that state employees can only bring FMLA claims against their employers in family leave cases – creating a split in the circuits on the question of access to medical leave.[29] Thus, the next Supreme Court justice is likely to consider many of the very arguments at issue in *Chittister* and *Hibbs*. And, because Justice O'Connor and Justice Rehnquist, both part of the *Hibbs* majority, will no longer be on the Court, the fate of the FMLA will be in the hands of the next Supreme Court justice, who is likely to cast the decisive vote in an FMLA case. Judge Alito's views, therefore, are deeply disconcerting because they raise serious doubts about his willingness to preserve the rights of state employees who depend on the FMLA, or to ensure that state employees and their families have the same protections as private sector workers.

2. Title VII of the Civil Rights Act of 1964 and Other Workplace Discrimination Protections

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits job discrimination on the basis of race, sex, color, religion, and national origin, and is thus among Americans' most important civil rights protections. Title VII paved the way for the development of sex discrimination jurisprudence over the last four decades, forever changing hiring, promotion, pay, and benefits practices for women. Thanks to Title VII, for example, employers both private and public can no longer advertise openings for "men's" and "women's" jobs. Nor can they engage in sexual harassment or pregnancy discrimination. Nor can they impose different hiring standards for men and women, like requiring that women - but not men - be unmarried or without young children to qualify for jobs. Because stereotypes and biases about women and their abilities still limit women's pay, their career advancement, and their efforts to achieve economic independence and stability, Title VII remains a key tool for dismantling barriers to workplace equality. Women depend on the courts to interpret antidiscrimination law fairly and vigorously.

Yet Judge Alito's decisions erect excessively high barriers to victims' ability to prove illegal job discrimination, frustrating civil rights laws' important purposes of remedying the injuries caused by discrimination and deterring future wrongdoing. First, his judicial opinions reveal a disturbing propensity to discount plaintiffs' evidence of discrimination while simultaneously deferring to employers' evidence despite inaccuracies and discrepancies. Second, his decisions expose a greater concern for protecting the court's docket than for preserving victims' rights.

Bray v. Marriott Hotels. Judge Alito displayed this deference to employers at the expense of plaintiffs, for example, in a race discrimination case where the judges in the majority predicted that "Title VII would be eviscerated if our analysis were to halt where [Judge Alito's] dissent suggests."[30] In *Bray*, the plaintiff alleged that her employer had denied her a promotion because of her race, while the defendant countered that it had simply chosen a more qualified

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[29] *Compare* Bylsma v. Freeman, et al., 346 F.3d 1324 (11th Cir. 2003), and Montgomery v. Maryland, et al., 72 Fed.Appx. 17 (4th Cir. July 30, 2003), *with* Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities, 422 F.3d (6th Cir. 2005) *and* Brockman v. Wyoming Dep't of Family Services, et al., 342 F.3d 1159 (10th Cir. 2003).

[30] Bray v. Marriott Hotels, 110 F. 3d 986, 993 (3d Cir. 1997).

candidate. The majority ruled that Ms. Bray was entitled to have a jury decide her case. Noting discrepancies and inaccuracies in the employer's testimony about its evaluation of Ms. Bray's qualifications, along with evidence that the employer deviated from its usual evaluation and promotion practices and that Ms. Bray had more experience than the successful white candidate, the majority concluded that the case should proceed to trial.

More specifically, the majority found that "[a] reasonable jury could conclude from [the key decisionmaker's] concededly inaccurate assessment of Bray that the decision to reject her and interview [the white candidate] was driven by racial bias and not by the explanations offered by Marriott."[31] The majority similarly held that a reasonable jury could find that racial bias explained the employer's deviation from its normal procedures (for example, by giving the white candidate an extra opportunity for a performance evaluation).

But Judge Alito dissented, arguing that Ms. Bray was not even entitled to a trial on the merits. He acknowledged both that the employer "may have treated Bray unfairly," and that there were inconsistencies in the employer's testimony and behavior.[32] Yet he explained away the irregularities one by one, failing to consider the possibility that – considered collectively – they would allow a jury reasonably to conclude that racial bias infected the employer's evaluation of the two candidates. In short, he deferred to the employer's explanation despite its discrepancies, and urged that the defendant be awarded summary judgment rather than face a jury.[33]

Rather than focusing on the possibility that Ms. Bray had been the victim of race discrimination, Judge Alito instead viewed the majority's decision as simply adding to the court's docket: "I have no doubt that in the future we are going to get many more cases where an employer is choosing between candidates of roughly equal qualifications and the candidate who is not hired or promoted claims discrimination."[34] Nowhere did he consider the chance that such candidates might in fact be victims of illegal bias.

Indeed, the Third Circuit majority rejected Judge Alito's approach, observing that he addresses

> each of the discrepancies in this record in isolation and concludes that none of them creates a material issue of fact. We have previously noted that such an analysis is improper in a discrimination case . . . . Thus, we must determine whether *the totality of the evidence* would allow a reasonable factfinder to conclude that Bray has established the alleged bias.[35]

The majority went on to characterize Judge Alito's dissent as reflecting an unnecessarily narrow view of Title VII that threatened to undermine its protections:

> We do not believe that Title VII analysis is so tightly constricted. This statute must not be applied in a manner that ignores the sad reality that racial animus can all too easily warp an individual's perspective to the point that he or she never considers the member of a protected class the 'best' candidate regardless of that person's credentials. The dissent's position would immunize an employer from the reach of Title VII if the employer's belief that it had selected the "best" candidate was the result of conscious racial basis. Thus, the issue here is not

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[31] *Id.* at 993.
[32] *Id.* at 1000.
[33] *See id.* at 1000-03.
[34] *Id.* at 1003.
[35] *Id.* at 991 (emphasis in original; citations omitted).

> merely whether Marriott was seeking the "best" candidates but whether a reasonable factfinder could conclude that Bray was not deemed the best because she is Black. *Indeed, Title VII would be eviscerated if our analysis were to halt where the dissent suggests.*[36]

Glass v. Philadelphia Electric Co. Judge Alito downplayed a plaintiff's evidence of illegal bias in yet another dissent, where he supported the exclusion of evidence he acknowledged was relevant to a plaintiff's race discrimination claim. *Glass v. Philadelphia Electric Co.*[37] The plaintiff, Mr. Glass, alleged that he was denied a number of promotions because of his race, noting that he possessed the education and experience required for the openings, only to be rejected in favor of younger white candidates who did not have comparable experience. The defendant claimed that it passed Mr. Glass over for promotion in part because of his poor performance review at a particular plant – Mr. Glass's only less than fully satisfactory performance evaluation in more than 23 years of employment. The lower court allowed the employer to introduce evidence of this poor performance review to explain its decision not to promote him. The lower court refused, however, to admit Mr. Glass' evidence that – at the time of that review – senior employees subjected him to racially derogatory remarks and posted hostile and demeaning images about him, thus impairing his ability to train and perform.

On appeal, the Third Circuit panel majority (Reagan appointee Judge Becker and George H.W. Bush appointee Judge Roth) found that the lower court had abused its discretion by excluding Mr. Glass's evidence that he had been racially harassed at the time of his poor review. The majority noted that such evidence was relevant both to indicate that the employer engaged in race discrimination generally and to explain why Mr. Glass's performance might have suffered at the time.

Judge Alito dissented, arguing that while Mr. Glass's evidence was relevant to his claim, its value was outweighed by the additional complexity its introduction would have added. He cited as examples potential disputes between the parties about whether the racial harassment actually occurred or affected the performance evaluation. To Judge Alito, the burden these additional skirmishes posed to the court and to the defendant outweighed the evidence's value to Mr. Glass's case.[38] Nowhere did he confront the fundamental unfairness generated by his approach, which would allow the employer to offer evidence against the plaintiff, while denying the plaintiff the opportunity to rebut with relevant and important evidence of his own. Again, Judge Alito demonstrated an unsettling tendency to defer to the employer's version of events, at the expense of the plaintiff's ability to prove illegal job discrimination.

Sheridan v. E.I. DuPont de Nemours and Co. Judge Alito again demonstrated his willingness to defer to the employer's defense to discrimination despite its inaccuracies, while downplaying the plaintiff's evidence of illegal bias, in a solo dissent from an *en banc* decision. In *Sheridan v. E.I. DuPont de Nemours and Co.*, the entire 11-judge panel[39] – except for Judge Alito – voted to uphold a jury's verdict that Barbara Sheridan was the victim of illegal sex discrimination.[40] There, the defendant argued that its adverse treatment of Ms. Sheridan was based on factors other than her sex, alleging, among other things, that she had inappropriately "comped" customers with free food and/or drinks in violation of company policy. Ms. Sheridan,

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[36] *Id.* at 993 (emphasis added).
[37] 34 F.3d 188 (3d Cir. 1994).
[38] *See id.* at 199.
[39] One member of the *en banc* panel died before the final decision was issued, thus the official vote was 10-1 in favor of the plaintiff.
[40] 100 F.3d 1061 (3d Cir. 1996).

however, undermined this defense with the employer's own documentation that she was on jury duty or otherwise not scheduled to work on many of the dates she was alleged to be inappropriately comping. She also pointed out that the employer's ostensible comping concerns closely followed her complaints of sex discrimination. The other ten Third Circuit judges found that – because Ms. Sheridan had proven that the employer's proffered explanation for its actions was untrue – the evidence supported the jury's conclusion that sex discrimination was likely the true reason for her adverse treatment.

But Judge Alito voted to displace the jury's verdict, arguing that Ms. Sheridan's ability to prove that the employer's defense was untrue was not enough to support the jury's finding of sex discrimination. Instead, Judge Alito apparently would have required additional evidence linking the employer's behavior and Ms. Sheridan's sex. More specifically, Judge Alito maintained that an employer might lie about the motivations for its behavior for reasons unrelated to sex discrimination – for example, if its decision were actually due to race discrimination or some other illegal or embarrassing basis rather than sex discrimination. Under Justice Alito's theory, just because the employer lied in its defense didn't mean that it was necessarily covering up sex discrimination.[41] Thus, Judge Alito would have deferred to an employer's claim that it had not engaged in sex discrimination *even though* the alternative explanation it offered for its behavior had been disproven.

The majority rejected Judge Alito's approach as encouraging Title VII defendants to deceive the court, thus undermining antidiscrimination protections specifically and the judicial system generally:

> The other situation posited by the dissent for its unwillingness to join the otherwise unanimous en banc court is that [situation] created where an employer "may not wish to disclose his real reasons for not promoting B over A." The persistence in maintaining that the employment action was taken because the plaintiff was unqualified or the position was being eliminated due to a reduction in force when the employer knows that the real reason is nepotism would violate the spirit if not the language of Rule 11 of the Federal Rules of Civil Procedure. The dissent gives no reason why a plaintiff alleging discrimination is not entitled to the real reason for the personnel decision, no matter how uncomfortable the truth may be to the employer. Surely, the judicial system has little to gain by the dissent's approach.[42]

Pirolli v. World Flavors, Inc. Finally, in an unpublished opinion, Judge Alito dissented from the majority's decision to allow a plaintiff with a mental disability to take his claims that he had been sexually harassed – indeed, sexually assaulted – before a jury.[43] In that case, the plaintiff, Mr. Pirolli, presented the following evidence: his "co-worker attempted to push a broom pole into his behind as others watched," "multiple incidents of a co-worker rubbing his penis against Pirolli's behind," and "an incident in the changing room which caused Pirolli to fear he would be raped."[44] The employer did not dispute these facts, but instead argued – and the lower court agreed – that Mr. Pirolli was not singled out for abuse, but was instead subjected to the sort of "macho horseplay and adolescent roughhousing" that was commonplace in that workplace.[45]

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[41] *See id.* at 1086.
[42] *Id.* at 1070 (citations omitted).
[43] Pirolli v. World Flavors, Inc, No. 99-2043 (3d Cir. June 11, 2001).
[44] Slip op. at 5 and 7.
[45] Id. at 6.

The majority reversed, finding that Mr. Pirolli had indeed offered enough evidence to warrant a jury trial on his claims: "The report contains specific allegations of persistent conduct that a reasonable jury could view as having occurred because of his sex and as severe and pervasive enough to create an abusive work environment . . . ."[46] The majority also noted that the plaintiff's alleged treatment differed considerably from the other "physical horseplay and roughhousing" endemic to that workplace, "such as punching and wrestling around, squirting water and throwing balls of tape."[47]

Yet Judge Alito dissented, arguing instead that Mr. Pirolli was not entitled to a trial on the merits, and that the defendant should instead be awarded summary judgment rather than face a jury trial. Instead of addressing Mr. Pirolli's strong evidence of harassment, Judge Alito focused on deficiencies in the lawyer's brief: "I cannot join the majority, however, because this argument is not adequately presented in Pirolli's brief. . . . In the long term, both the quality of our decisions and our ability to handle our caseload will suffer if we insist on deciding questions that are not presented to us in a minimally adequate fashion."[48]

The majority opinion had noted that the lawyer's brief was "perhaps less than pellucid," but nonetheless found "that the briefs are adequate to present the critical issues, that the case potentially involved issues important in the administration of Title VII, and that 'the [lower court's] error is so plain that manifest injustice would otherwise result.'"[49] In stunning contrast, Judge Alito demonstrated considerably more concern for protecting the court's docket than for enforcing the right of a mentally disabled man to be free from discrimination and assault.[50]

Keller v. Orix Credit Alliance. Judge Alito again raised an unusually high barrier for plaintiffs seeking to prove job discrimination in *Keller v. Orix Credit Alliance, Inc.*[51] There he wrote for the *en banc* majority in an age discrimination case, concluding that the plaintiff, Mr. Keller, was not entitled to a trial on the merits, and that the defendant should instead be awarded summary judgment rather than face a jury trial. In so holding, Judge Alito discounted evidence that the company CEO disparaged Mr. Keller's age shortly before he was terminated: "If you are getting too old for the job, maybe you should hire one or two young bankers." Judge Alito found this evidence of little value, stressing that it occurred four or five months before Mr. Keller's discharge and did not threaten firing.[52]

But four judges dissented from Judge Alito's view, including Reagan appointee Judge Mansmann and two judges appointed by the first President Bush (Judges Lewis and Roth). The dissenters maintained that a reasonable jury could conclude that age discrimination explained Mr. Keller's termination, in light of the CEO's age-based criticism of his performance, along with evidence that he was replaced by a younger employee. As several of the dissenters pointed out, evidence

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[46] Id. at 7.
[47] Id. at 8.
[48] Slip op. (dissenting opinion) at 1, 2-3.
[49] Slip op. at 3-4 (citations omitted)
[50] Ironically, although he complained about the quality of the plaintiff's brief, Judge Alito signed an order denying a motion by the Equal Employment Opportunity Commission (EEOC) to file to a brief in the case that could have provided greater substantive analysis and argument on plaintiff's behalf. Unfortunately, the EEOC had received inaccurate information about the timing for the brief. When it asked to file a brief after the filing deadline, which was within the court's discretion, the request was denied by Judge Alito and his colleagues. Motion of the Equal Employment Opportunity Commission to file brief as Amicus Curiae, *Pirolli v. World Flavors*, No. 99-2043, denied by Judge Samuel Alito (February 5, 2001).
[51] 130 F.3d 1101 (3d Cir. 1996).
[52] *See id.* at 1112.

of this type – age-related criticism regarding the plaintiff's job performance a few months before the speaker made an adverse employment decision regarding the plaintiff – is quite rare and usually considered strong enough to allow a case to proceed to trial: "The key inquiry is not the number of times a comment is made but the context in which it is made."[53]

3. Affirmative Action

Gender-based affirmative action is an antidote to the sex discrimination that too often infects decisions about jobs, education, and business opportunities. Affirmative action has provided qualified women with opportunities previously denied them: thanks to affirmative action, women today are road dispatchers, professors, corporate executives, carpenters, engineers, and police officers.

For this reason, the Supreme Court has consistently made clear that gender or race can be taken into account in programs designed to expand opportunities for women and people of color. The Court also has established that lawful programs can adopt flexible goals and timetables to measure the effectiveness and success of different strategies. As Justice O'Connor emphasized, "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minorities in this country is an unfortunately reality and government is not disqualified from acting in response to it."[54] Indeed, Justice O'Connor – whom Judge Alito has been nominated to replace – played a key role in developing the Supreme Court's affirmative action jurisprudence, most recently casting the deciding vote to uphold the University of Michigan School of Law's race-conscious admissions program as a properly-designed means for achieving its compelling interest in a racially diverse student body.[55]

Despite the ongoing need for affirmative action, Judge Alito made clear his opposition to such programs – which he mischaracterized as "quotas" – in his 1985 application for a political appointment to the Department of Justice: "I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed . . . ."[56] Indeed, he co-wrote briefs in several key cases in which the Reagan Administration attacked various affirmative action programs. Yet the Supreme Court often rejected the positions taken in these briefs – of which Judge Alito was particularly proud – as undermining key antidiscrimination protections.

Local No. 93, International Ass'n of Firefighters v. Cleveland. For example, while working at the Department of Justice, Judge Alito was one of the authors of the Reagan Administration's *amicus* brief challenging an affirmative action program in *Local No. 93, International Ass'n of Firefighters v. Cleveland*.[57] In that case, African-American and Latino firefighters sued the city of Cleveland, alleging race and national origin discrimination in promotions and other areas. The city settled the lawsuit by agreeing to a consent decree that established various race-conscious programs to ensure the promotion of more minority firefighters. The local union, joined by the Reagan Administration, argued that the affirmative action measures constituted reverse discrimination forbidden under Title VII, especially since they would allow for the promotion of African-Americans and Latino firefighters who had not been specifically identified as victims of the city's discrimination.

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[53] *Id.* at 1116.
[54] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
[55] Grutter v. Bollinger, 539 U.S. 306 (2003).
[56] 1985 job application, supra n. 12.
[57] 478 U.S. 501 (1986).

The Supreme Court, including Justice O'Connor, upheld the programs and rejected the government's arguments.[58] The Court pointed out that "Congress intended voluntary compliance" – like a consent decree in settlement of a discrimination lawsuit – "to be the preferred means of achieving the objectives of Title VII."[59] The Court went on to hold that the consent decree was fully in conformity with Title VII's text and purposes by expanding employment opportunities for all African-Americans and Latinos. In contrast, Judge Alito's brief, if adopted by the court, would have denied plaintiffs and employers the ability to fashion effective consent decrees to resolve discrimination complaints and expand employment opportunities.

Local 28, Sheet Metal Workers International Ass'n v. EEOC. Similarly, Judge Alito co-authored the Reagan Administration's brief opposing affirmative action remedies for repeated discrimination in *Local 28, Sheet Metal Workers International Ass'n v. EEOC*.[60] In that case, a lower court found that the defendant union engaged in consistent and egregious race discrimination in recruiting, selecting, training, and admitting new members. After the union later repeatedly failed to stop its discrimination and ignored the court's remedial orders, the lower court required the union to achieve a 29 percent minority membership goal – a target that reflected the availability of eligible minority workers. Judge Alito's brief took the position that Title VII does not permit such affirmative race-conscious goals as a remedy for past discrimination.

This position was again rejected by the Court.[61] As Justice Powell wrote in providing a fifth vote to uphold the lower court, the court's order was an appropriate and narrowly tailored response to the defendant's "contemptuous racial discrimination and successive attempts to evade all efforts to end that discrimination. . . . It would be difficult to find defendants more determined to discriminate against minorities."[62] Yet Judge Alito's brief, if adopted by the Court, would have stripped courts of this important tool in addressing persistent and proven discrimination.

Taxman v. Board of Education. Once on the bench, Judge Alito also voted to strike down an affirmative action program in *Taxman v. Board of Education*.[63] There he joined an en banc majority that found that Title VII did not permit a school district faced with a lay-off decision to choose to retain an African-American rather than a white teacher when the two teachers were found to be equally qualified with the exact same seniority. Unlike the job discrimination cases discussed above, where Judge Alito readily deferred to employers' justifications for their employment decisions, here he refused to defer to the school's determination that a racially diverse faculty would further its educational mission.

Four judges – including Reagan appointee Judge Scirica and G.H.W. Bush appointee Judge Lewis – dissented. As Judge Scirica pointed out, the school board

> concluded that a diverse faculty also serves a compelling educational purpose; namely, it benefits students in the business department by exposing them to teachers with varied backgrounds. The Board implemented a program that, in limited circumstances, allows consideration of race as a factor in school employment decision. The Board did not countenance the layoff of a more-

[58] *Id.*
[59] *Id.* at 515.
[60] 478 U.S. 421 (1986).
[61] *Id.*
[62] *Id.* at 484-85.
[63] 91 F.3d 1547 (3d Cir. 1996).

> qualified teacher in the place of a less-qualified one. It did not prefer teachers junior in seniority to those with more experience. Rather it concluded that when teachers are equal in ability and in all other respects – and only then – diversity of the faculty is a relevant consideration.[64]

He and the other dissenters – unlike Judge Alito – concluded that Title VII permitted schools to consider racial diversity under those circumstances.

C. Equal Educational Opportunity

Protections aimed at eliminating gender discrimination and expanding fair treatment have helped provide opportunities for women and girls in schools and universities. The Supreme Court has used the Constitution's Equal Protection Clause to invalidate longstanding practices that denied educational opportunities to one gender and not the other.[65] The groundbreaking law, Title IX of the Education Amendments of 1972, also prohibits gender discrimination in federally funded education programs or activities. That law has helped break down barriers that often excluded women and girls from activities such as school athletics, math and science programs, and educational scholarships.

Concerned Alumni of Princeton. In the 1985 job application he submitted for a job at the Department of Justice, Judge Alito listed himself as a member of Concerned Alumni of Princeton University (CAP). Throughout its 15-year existence, CAP was notorious for its outspoken, inflammatory rhetoric opposing Princeton's decision to enroll female students. Indeed, CAP reportedly advocated limiting the percentage of women admitted to the school.[66] It also derided Princeton's efforts to increase the number of minority students, contending that children of alumni were more deserving of admission. In 1975, an alumni panel reviewed admission issues and condemned CAP's characterization of Princeton's policies. The panel, which included current Senate Majority leader Bill Frist, determined that CAP "presented a distorted, narrow and hostile view of the university that cannot help but have misinformed and even alarmed many alumni."[67] It is unclear when Judge Alito joined the group and what role he played in its activities. But his listing of his CAP affiliation is distressing given the views the organization espoused throughout its history. In particular, the group's hostility towards the inclusion of women and minorities on Princeton's campus raises serious concerns about his commitment to gender and racial equality both inside and out of the academic setting.

D. Other Civil Rights Issues

1. Voting Rights and Reapportionment

The right to vote is a fundamental cornerstone of our democracy, premised on the idea that each citizen ought to have a role in shaping his or her government. The Constitution did not originally extend the franchise to every person, however, and only in the recent past—after a series of Supreme Court voting cases—has each citizen been granted this fundamental right. Key among the voting cases is *Reynolds v. Simms*,[68] in which the Supreme Court held that the size of

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[64] *Id.* at 1576.
[65] *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).
[66] Scott Shepard, *Critics Dust Off Old Files to Assail Court Nominee*, Atlanta Journal-Constitution Nov. 20, 2005, at 7C.
[67] David D. Kirkpatrick, *From Alito's Past, a Window on Conservatives at Princeton*, N.Y. TIMES, Nov. 27, 2005, at A1.
[68] 377 U.S. 533 (1964).

legislative districts could not be drawn to dilute the vote of those in densely populated cities, thus strengthening the power of smaller numbers of rural votes. The Court held that:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society...the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[69]

The "one person, one vote" principal embodied in *Reynolds* makes clear that not only does every citizen deserve the franchise, but no citizen's vote should have greater strength and significance than another's. But Judge Alito seems to question this core principle. In a 1985 job application, Judge Alito wrote that as a young man he "developed a deep interest in constitutional law, motivated in large part by disagreement with the Warren Court decisions... [such as] reapportionment."[70] He does not mention specific cases, but the Warren Court decided several important voting cases during its tenure, such as *Baker v. Carr*[71] and *State of South Carolina. v. Katzenbach*.[72] These cases have been instrumental in advancing the rights of all citizens, and Judge Alito's apparent criticism of this line of cases is disconcerting.

II. RESTRICTING ACCESS TO REPRODUCTIVE HEALTH

A. Understanding the Context

In 1965, in *Griswold v Connecticut*,[73] the Court recognized a fundamental constitutional right to reproductive liberty and privacy, holding that the state cannot criminalize the use of contraceptives by married persons. Several years later, in *Eisenstadt v. Baird*, the Court extended that ruling to unmarried persons, holding that if "the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[74] Although the Justices offered multiple rationales for the decisions in those cases, one that resides at the center of reproductive privacy is a "liberty" protected by the 14th Amendment's Due Process Clause. The idea that the Constitution protects so intimate a decision as to whether to use contraception is commonplace today. In 1973, the *Baird* and *Griswold* decisions became the basis for the ruling in *Roe v. Wade* in which the Court invalidated state laws criminalizing abortion and recognized that a woman's right to decide whether or not to end a pregnancy is a "fundamental" right protected by the Due Process Clause.[75] The decision was controversial. Opponents of *Roe* mobilized politically and, since that time, have worked to overrule the *Roe* decision.

By 1992, after Presidents Reagan and Bush had appointed five new Justices, it seemed that the Supreme Court might well be poised to overrule *Roe*. But in *Planned Parenthood v. Casey*,[76] instead of overturning *Roe,* the Court reaffirmed what it characterized as the right of a woman to be free from "undue" governmental burdens in making the decision whether or not to have an

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[69] Reynolds v. Sims, 377 U.S. 533 (1964).
[70] 1985 job application, supra n. 12.
[71] 369 U.S. 186 (1962) (holding apportionment an appropriate matter for judicial review under the 14th Amendment).
[72] 383 U.S. 301 (1966) (holding that the Voting Rights Act of 1965 was an appropriate measure given Congressional responsibilities under the Fifteenth Amendment).
[73] 381 U.S. 479 (1965).
[74] 405 U.S. 438, 453 (1972) (emphasis in original).
[75] 410 U.S. 113 (1973).
[76] 505 U.S. 833 (1992).

abortion in the pre-viability period. The *Casey* Court also affirmed *Roe*'s holding that any governmental regulation of abortion – post-viability, as well as pre-viability – must except cases in which a woman's life or health is at risk. But while a six-Justice majority (including Justice O'Connor) rejected calls to overturn *Roe*, the Court instead refashioned the legal analysis used to evaluate abortion-related provisions. Under *Roe*'s "fundamental rights" analysis, restrictions on the right to have an abortion were judged under a "strict scrutiny" standard – a demanding standard that allowed very few pre-viability restrictions. *Casey* replaced that standard with a new and less protective "undue burden" test, under which abortion restrictions would be upheld so long as they did not "unduly" burden a woman's right to decide whether or not to end pregnancy. Although providing greater protection for abortion rights than the broad deference to legislatures allowed under the "rational relationship" standard that Judge Samuel Alito appears to support, the "undue burden" test could allow for new and very substantial abortion restrictions depending on how the Court defined and applied this new test.

In *Stenberg v. Carhart*,[77] the Supreme Court, applying *Casey*, invalidated a Nebraska statute that prohibited the use of abortion procedures falling within what the law labeled "partial birth" abortions. The vote in *Stenberg* was five to four. The majority (including Justice O'Connor as the critical fifth vote) held that the statute was impermissible for two reasons: first, it lacked an express health exception for cases in which the procedure was necessary to protect a woman's health; and second, it "unduly burdened" the right to terminate a pregnancy because its language would have banned the most common form of second-trimester surgical abortion. But Justice Kennedy – who had voted with the majority in *Casey* – applied the "undue burden" standard differently, and, breaking with Justice O'Connor and the other members of the *Casey* majority, became one of the four Justices who would have sustained the statute. As *Stenberg* makes clear, what constitutes an "undue" burden is both critically important and subject to interpretation – and with the Court so closely divided, subject particularly to the interpretation of Justice O'Connor's successor.

The new Justice will have an immediate opportunity to restrict or even eliminate the protections of *Roe* and *Casey*. In the 2005-06 term, two abortion-related cases are under consideration: *Ayotte v. Planned Parenthood* and *Scheidler v. National Organization for Women*. At issue in *Ayotte v. Planned Parenthood* is a New Hampshire statute prohibiting a minor from obtaining an abortion until at least 48 hours after her parents have been notified. The statute fails to include an exception for cases in which the 48-hour delay would threaten the health of the young woman, however seriously. The case thus presents an opportunity for the Court – with its first new justices in eleven years – to consider whether health protections for pregnant women, which under *Roe* and *Casey* have always been a bright-line constitutional requirement, are still necessary. *Ayotte* also may allow the newly constituted Court to revisit a broader question: whether, as *Casey* held, an abortion restriction that operates in practice as an undue burden may be invalidated "on its face" before it takes effect, to avoid harm to women; or whether the restrictions may take effect regardless, leaving women seeking abortions – including abortions necessary to protect their health – to convince judges that the restrictions must be waived in their cases because it is unconstitutional as applied to them. The other abortion-related decision before the Court this term is *Scheidler v. National Organization for Women*, decades-long litigation regarding the appropriate mechanisms to prohibit acts and threats of physical violence against abortion clinics and their employees and patients. At issue in *Scheidler*'s third appearance before the Court is the validity of a permanent nationwide injunction that prohibits the defendants from trespassing, obstructing access to, or damaging certain clinic property, or using violence or threats of violence against certain clinics, their employees, or their patients. Although Justice O'Connor participated in the oral arguments in these cases, a decision is not expected in either case until

[77] 530 U.S. 914 (2000).

after Justice O'Connor's successor has been confirmed. Thus, it is entirely possible that Justice O'Connor's successor will be involved in the final decisionmaking.

In short, this is a pivotal moment for the Court and reproductive health. Judge Alito's long-standing opposition to reproductive rights gives great cause for concern. As detailed below:

- Judge Alito has consistently advocated for the overturn of *Roe v. Wade* in professional writings over the course of two decades. There is every reason to fear that he will not respect *Roe's* core holding if elevated to the Supreme Court, where he no longer feels constrained by precedent.
- The legal philosophy that Judge Alito advocated in his analysis of a spousal notification provision in *Planned Parenthood v. Casey*,[78] supported a deference to state abortion restrictions that would severely curtail constitutional protections for women.
- Judge Alito's opinions applying the Supreme Court's precedents reveal his efforts to disassociate himself from the mainstream jurisprudence underlying the right to abortion.

Importantly, there is nothing in Judge Alito's record that indicates that he has abandoned his personal and professional commitment to overturning *Roe*. As a Supreme Court Justice, rather than a lower-court judge, he would no longer be constrained to follow the Court's precedents and would be free once again to argue, as discussed below, that the Constitution does not protect the right to abortion. Everything we know about Judge Alito suggests that his addition to the Court at this moment in time would undermine the cause of women's health and reproductive freedom and result in a dramatic overturning of established reproductive rights jurisprudence.

B. Judge Alito's Record: Limiting Access to Reproductive Health Care

1. Commitment to Overturning *Roe*

In his personal and professional writings over the course of two decades, Judge Alito consistently advocated for the overturn of *Roe v. Wade*. In a memorandum he drafted while serving in the Justice Department, his application for promotion within the Department, and the opinions he issued as a judge on the Third Circuit Court of Appeals, his writings demonstrate hostility to established abortion rights jurisprudence. Judge Alito's statements on *Roe* reflect a legal philosophy that leaves him little room to acknowledge reproductive freedoms.

In 1985, when serving as Assistant to the U.S. Solicitor General, Judge Alito analyzed whether the Reagan Administration should participate in *Thornburgh v. American College of Obstetricians and Gynecologists* by posing the rhetorical question, "What can be made of this opportunity to advance the goals of bringing about the eventual overturning of *Roe v. Wade* and, in the meantime, of mitigating its effects?"[79] He recommends that "in the course of the brief we should make clear that we disagree with *Roe v. Wade* and would welcome the opportunity to brief the issue of whether, and to what extent, that decision should be overruled."[80] Moreover, he advocates a strategy that "does not even tacitly concede *Roe's* legitimacy,"[81] while urging the Court to uphold numerous state restrictions on access to abortions. Judge Alito's recommendation calls for the Administration to demonstrate the overall "reasonableness" of

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[78] Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F2d 682 (3d Cir. 1991), (Alito, J. concurring and dissenting).
[79] Memorandum from Samuel Alito to Charles Fried re Thornburgh v. American College of Obstetricians and Gynecologists, at 8.
[80] *Id.* at 9.
[81] *Id.* at 8.

abortion restrictions, thereby discouraging the Court from focusing its analysis on the harmful effect of the restriction on a few individuals. In his personal writings and from the bench, he continues to embrace this strategy of narrowly construing the scope of the judicially-recognized right to an abortion and advocating for restrictions.

Judge Alito highlighted these views and expressed his personal commitment to them later in 1985, when he applied for the job of Deputy Assistant to the Attorney General. He notes that he is "particularly proud of [his] contributions" in cases in which the government argued that the "Constitution does not protect a right to an abortion."[82] This statement of his deeply held personal views reflects a Constitutional philosophy that is fundamentally incompatible with longstanding Supreme Court precedents.

Judge Alito's expressions of support for this restrictive legal philosophy are not limited to his writings as an employee of the Reagan Administration or as an advocate seeking a job. In *Planned Parenthood v. Casey*,[83] a case he considered on the Third Circuit Court of Appeals for which the Supreme Court had not clearly established relevant precedent, he advanced the same legal philosophy evident six years earlier in his memorandum on *Thornburgh* and in his job application essay. Judge Alito concurred with the Third Circuit's decision to uphold four of Pennsylvania's restrictions on abortion, but dissented from the majority's finding that a fifth restriction, requiring spousal notification, was unconstitutional. In reaching this conclusion, he applied the constitutional philosophy he articulated as a government attorney six years earlier by both upholding restrictions on access to abortions and arguing that under his interpretation of Justice O'Connor's undue burden test, the spousal notification requirement should be reviewed under a "rational relationship" standard that allows great deference to the legislature. Both the majority of the Third Circuit and the Supreme Court rejected Judge Alito's argument.

In subsequent legal opinions in cases involving abortion issues, Judge Alito applies established precedent to hold that the relevant abortion restrictions are unconstitutional. All of these opinions, however, are in cases where Supreme Court precedent clearly constrained his judicial discretion.[84] As discussed below, these opinions do not provide evidence of a shift in his commitment to overturn *Roe* but rather suggest that, if freed from such constraints, he would once again seek to advance his view that the Constitution does not protect the right to abortion.

2. ***Planned Parenthood v. Casey***

Judge Alito's opinion in *Casey v. Planned Parenthood of Southeastern Pennsylvania*,[85] offers a clear window into how he would analyze the framework for the constitutional right to an abortion, unconstrained by governing judicial precedent. In this opinion, which concurred in part and dissented in part from the Third Circuit's ruling, he argued that the Pennsylvania law requiring a woman to notify her husband before she could legally obtain an abortion was constitutional, even though it does not contain an exception for women likely to face abuse, other than physical injury, as a result of notifying their husbands.

When analyzing the spousal notification provision, Judge Alito argued that even if the appropriate standard for analyzing the provision is the undue burden test (a substantive point, which as noted above he does not concede), an "undue burden may not be established simply by showing that a

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[82] 1985 job application, supra n. 12

[83] 942 F.2d 682 (3d Cir. 1991)(Alito, J. concurring in part and dissenting in part).

[84] *See* Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997); Planned Parenthood of Central New Jersey v. Farmer, 220 F.3d 127 (3d Cir. 2000).

[85] 942 F.2d 682 (3d Cir. 1991)(Alito, J. concurring in part and dissenting in part).

law will have a heavy impact on a few women, but instead a broader inhibiting effect must be shown."[86] He dismisses the substantial evidence of the significant risks the requirement would impose on a class of women, including risks of physical and emotional abuse, assault on her children, and withdrawal of emotional, social, and financial support, and instead relies on the testimony stating that the overwhelming majority of women seeking abortions are not married and that the vast majority of married women voluntarily inform their husbands. Although he notes that the risk of domestic violence was "a matter of grave concern," he discounts the constitutional significance of this concern, noting "whether the legislature's approach represents sound public policy is not for us to decide." Having rejected the constitutional significance of the harms the regulation poses to such women, he concludes that the spousal notification requirement is constitutional because it advances "the state's interest in furthering the husband's interest in the fetus."

The majority of the Third Circuit panel and the Supreme Court rejected Judge Alito's opinion on the spousal notification requirement and deemed the restriction unconstitutional. Rather than dismissing the plight of abused women as constitutionally insignificant, Justice O'Connor's constitutional analysis of the spousal notification provision hinges on the impact of the restriction on a small class of women. Justice O'Connor's opinion for the Court notes that the notification requirement fails to consider the "millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands" who "may have very good reasons for not wishing to tell their husbands of their decision to obtain an abortion."[87]

The Court notes that the impact of the spousal notification provision that Judge Alito ruled was constitutionally permissible would be to subjugate the woman's constitutional right to reproductive autonomy to her husband's interests. O'Connor rejects this view of the marital relationship as "no longer consistent with our understanding of the family, the individual and the Constitution." In direct contrast to Judge Alito's support for the provision, which the Court notes would allow husbands veto power over their wives' decisions, the Court affirms the fundamental premise that "women do not lose their constitutionally protected liberty when they marry."

If Judge Alito's approach in *Casey* (rather than O'Connor's) were the law of the land, constitutional protection for the right to choose abortion would be significantly curtailed and perhaps eliminated. The rights of married women would be subordinated to that of their husbands and any abortion regulation would be upheld as long as the burden of each individual restriction is felt by only a small percentage of the total population potentially effected by the law, regardless of how substantial the harm is for that population. It is possible that the confirmation of Samuel Alito as a Supreme Court Justice would provide the crucial vote necessary to overturn *Roe v. Wade* and to once again permit states to criminalize abortion. At least, it appears that confirmation will result in a marked shift from the jurisprudence set forth by Justice O'Connor in *Casey* that would undermine women's autonomy and reproductive rights.

3. ***Planned Parenthood v. Farmer & Alexander v. Whitman***

In his judicial opinions in the decade after *Casey*, Judge Alito makes considerable efforts to dissociate himself from mainstream jurisprudence on the constitutional right to an abortion. In two notable concurrences, Alito agrees with the outcome reached by the majority, but he distances himself from the court's reasoning in favor of stark statements that the Supreme Court dictated the outcome. These opinions suggest that, absent the constraints imposed upon Circuit Courts by Supreme Court precedent, Judge Alito would rule in a different manner. When

[86] *Id.*
[87] *Id.* at 898.

combined with the views expressed in his personal and professional writings, these concurrences suggest that his legal philosophy deviates from the mainstream of reproductive rights jurisprudence and indicate that, given the opportunity, he would use a seat on the Supreme Court to revisit the underlying principles on which the right to choose abortion is based.

In *Planned Parenthood of Central New Jersey v. Farmer,* the Third Circuit relies on the precedents of *Roe*, *Casey*, and *Carhart v. Stenberg* to overturn New Jersey's late term abortion ban.[88] In his concurrence, Judge Alito asserts that *Stenberg* is "the one authority that dictates" the court's result. He makes no mention of – and does not acknowledge – the longstanding constitutional principles and reasoning in *Roe* and *Casey* applied by the majority in reaching its result, and applied by the majority of circuits in similar cases. This omission is particularly striking given that the Supreme Court itself relied on these same core principles in *Roe* and *Casey* in deciding *Stenberg*. By emphasizing solely that he was constrained by the Supreme Court's precedent in *Stenberg*, he indicates his antipathy toward the majority's recognition of *Roe* and *Casey* as relevant precedent in this case. Had the Supreme Court not decided *Stenberg*, a case involving a statute substantially similar to the New Jersey law, as it did, Judge Alito very well might have reached a different conclusion in *Farmer*. Without the constraint he currently faces as a Circuit Court judge to comply with Supreme Court precedent, he could uphold a similar law in the future.

In *Alexander v. Whitman*, Judge Alito wrote a separate opinion to distance himself from the majority's discussion of the legal status of an unborn fetus in a wrongful death case.[89] His brief concurrence notes that he is in "almost complete agreement with the court's opinion," regarding the scope of the New Jersey wrongful death statute at issue and he agrees with the majority's finding that the Supreme Court held that a fetus is not a "person" under the 14th Amendment. Judge Alito, however, is compelled to object to the majority's further elaboration on this precedent through its reference to "constitutional non-persons." Given his efforts to avoid any articulation on this matter beyond the simple statement that the court is bound by Supreme Court precedent, his concurrence raises the question of whether absent such constraints he would seek to revisit the issue of fetal "personhood."

If elevated to the Supreme Court, Judge Alito would no longer be bound by precedent in the same way he is as a judge on the Third Circuit. His record suggests that as a Supreme Court justice, he would be the fifth vote to reconsider whether regulations governing abortion still must include an exception for cases where a woman's life or health is at risk. He also could cast a decisive vote to review and even overrule *Roe* and other cases involving the constitutional right to privacy. In the words of Justice Harry Blackmun, the author of *Roe v. Wade*, "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."[90]

III. QUESTIONS ABOUT JUDGE ALITO'S JUDICIAL PHILOSOPHY AND APPROACH TO THE LAW

A. Understanding the Context

It is particularly important to focus special attention on the philosophy and approach Samuel Alito would bring to the Supreme Court because a nominee's judicial philosophy shapes how he

[88] 220 F.3d 127 (3d Cir. 2000).
[89] 114 F.3d 1392 (3d Cir. 1997).
[90] Webster v. Reproductive Health Services, 492 U.S. 490, 559 (1989) (Blackmun, J. concurring in part and dissenting in part).

or she analyzes legal questions and interprets the law, and affects the experiences and outcomes for plaintiffs and defendants in court. A nominee who believes that a law should be read very restrictively, for example, might reach a very different conclusion than a nominee who takes a more expansive view of the law's protections. Judge Alito's record raises serious concerns that his approach to the law would result in cutting back key civil rights protections, and undermine the ability of individuals to vindicate their rights in court.

B. Record Raises Serious Questions About Alito's Philosophy

Judge Alito's available record reveals a judicial philosophy that would undermine critical rights and protections. In his public statements, he speaks about the restrained role of judges. Put into practice, however, these views translate into higher burdens for plaintiffs seeking to vindicate their rights, deference to states or institutional defendants and employers, and limits on the ability of Congress to require certain conduct from states. For example:

- Judge Alito often favors a restrictive reading of the law, which results in the most narrow interpretation of civil rights. Thus, individuals may be unable to enjoy the full reach of these protections at crucial times.
- Stressing the need for judicial restraint and discouraging judges from legislating from the bench, he has used these themes as a means to limit access to the ability of individuals to have their day in court.
- He frequently argues to constrain the power of the courts and the power of Congress, with regard to binding states. The end result is that individuals, courts, and Congress have less ability to hold states accountable to ensure compliance with the law and remedy legal violations.

As discussed below, these views have enormous implications for civil rights and women's rights. But his nomination also raises broader concerns about judicial independence. He was nominated to the Court only after the President's first nominee, Harriet Miers, withdrew her name from consideration. The Miers nomination was the subject of unrelenting attacks by some of the President's most ardent and ideologically rigid supporters on the far-right. They complained that Ms. Miers did not have a proven track record of opposition to reproductive rights – including evidence demonstrating that she would vote to overturn *Roe v. Wade* – and opposition to civil rights issues such as affirmative action. The ensuing debacle saw the President's surrogates frantically trying to assure anti-choice activists that Ms. Miers' votes would be consistent with their views, but ultimately she withdrew her nomination from consideration.

The lingering memory of the Miers uproar casts an uneasy shadow on Judge Alito's nomination. Harriet Miers was perceived as an unknown who was deemed unacceptable by those seeking to advance a specific, narrow, far-right agenda; Judge Alito was picked in the wake of that criticism presumably to satisfy the President's supporters as a nominee with a record of reliable conservatism on critical legal issues. That context raises serious questions, not only about the philosophy and views that Judge Alito would bring to the Court, but also about judicial independence, to the extent that any nominee is perceived to be "hand-picked" to satisfy a powerful, vocal constituency. Judge Alito's restrictive, narrow approach to the law, when viewed in light of this broader context, only heightens concerns that he is the candidate of choice for those seeking to move the Court backward. Thus, Judge Alito has a special burden – and an obligation – to demonstrate that he would consider each case with an independent mind, interpret the law in a fair and even-handed manner, respect fundamental rights, and adhere to equal justice principles enshrined in our laws. We believe his available record raises serious doubts about whether he can meet this standard.

1. States' Rights, Congressional Power, and Federalism

One important question crucial to preserving women's rights involves the balance courts must strike between the authority of Congress to enact laws, and the autonomy of states to establish their own laws and operate independently of other states and the federal government. Questions about a nominee's views on states' rights are important to women because placing limits on Congressional power often means making it tougher for women to vindicate their rights at the state level. Judge Alito's' record raises troubling questions about whether he would defer to states' rights at the expense of individual rights or Congressional authority.

In a 1996 case, *United States v. Rybar*,[91] Judge Alito questioned the authority of Congress to criminalize the transfer or possession of a machine gun. The case involved a licensed gun dealer who was prosecuted for selling two machine guns at a gun show in violation of federal law. The gun dealer argued the gun law was invalid because Congress had exceeded its constitutionally defined powers. The majority disagreed, ruling that the gun law was within Congress' regulatory authority pursuant to the Constitution's commerce clause.[92] They noted that the law's general ban on machine gun possession was a reasonable response to deter the sale or transfer of machine guns across state lines. Further, disputing arguments that the gun sale at issue was solely an intrastate activity, they argued that Supreme Court precedent had long recognized the authority of Congress to regulate such activities that might have substantial effects on interstate commerce.[93] In dissent, however, Judge Alito interpreted the commerce clause much more restrictively to limit Congressional authority. He argued that the gun law at issue failed to include adequate findings of the link between machine gun possession and any impact on interstate commerce. Not only was Judge Alito's analysis rejected by the *Rybar* majority, but most of the appellate courts that have ruled on analogous machine gun issues also have rejected his narrow commerce clause analysis.[94]

As already discussed, Judge Alito also used a narrow reading of Congress' authority under the 14th Amendment to deny individual lawsuits against states alleging violations of the FMLA's medical leave provision. In *Chittister v. Department of Community and Economic Development*, he argued that Congress had exceeded its power because there was insufficient connection between gender discrimination and the need for a medical leave remedy. His analysis has troubling implications for Congress and its ability to enact meaningful antidiscrimination protections, and for individuals who rely on such protections to ensure fair treatment. More broadly, his views collectively would make it tougher to hold states accountable for complying with important legal standards and protections, consistent with constitutional mandates.

IV. CONCLUSION

With the stroke of a pen, the Supreme Court can touch the lives of millions of Americans, determining the scope of their rights in the workplace, in their doctor's office, in schools, in the

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[91] 103 F.3d 273 (1996).

[92] The Constitution's commerce clause provides another source of power for Congressional action. Congress is authorized under the commerce clause to regulate interstate commerce. This authority has been used, for example, to sustain federal laws governing health and safety, the environment, civil rights, labor, and other areas.

[93] United States v. Rybar, 103 F.3d 273 *(3d. Cir. 1996)*

[94] *See* U.S. v. Beuckelaere, 91 F.3d 781 (6th Cir. 1996); U.S. v. Rambo, 74 F.3d 948 (9th Cir.), cert denied 519 U.S. 819; U.S. v. Kirk, 70 F.3d 791 (5th Cir. 1995); U.S. v. Wilks, 58 F.3d 1518 (10th Cir. 1995); U.S. v. Bell, 70 F.3d 495 (7th Cir. 1995). Additionally, the Supreme Court recently vacated and remanded a 9th Circuit case that agreed with Judge Alito's analysis. United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003), *vacated and remanded*, 125 S.Ct. 2899 (2005).

public sphere, in business, and even in their personal relationships. The justices who serve on the Court bear enormous responsibility to interpret the law in a fair and even-handed manner, to approach each case with an open mind, to respect the Court's rules and precedents, and to demonstrate an unflinching commitment to equality under the law. The Court must transcend political divisions and partisan rhetoric and give every person who comes before it a fair hearing.

To be confirmed, each Supreme Court nominee must make a convincing case that she or he will respect precedent, protect fundamental rights and advance justice. The record makes clear that Judge Samuel Alito will not. He has a long record that is remarkably consistent; his regressive views make it more difficult for victims of discrimination to vindicate their rights and for women to protect their privacy. On the Supreme Court, he would turn back the clock and take away critical rights and liberties.

- If his views on the FMLA were to prevail, meaningful FMLA rights for millions of state workers would disappear. Judge Alito's views are particularly troubling because he rejects a core tenet of the FMLA – that medical leave is a necessary and crucial remedy for longstanding gender-based discrimination and stereotypes about women in the workplace.
- Judge Alito's opposition to constitutional privacy protections that encompass the right to an abortion would deny women the ability to make their own reproductive health decisions without government interference.
- His restrictive interpretations of employment discrimination laws would make it harder for victims to vindicate their rights in court, and his opposition to affirmative action would undermine efforts to expand opportunities for women and people of color.
- Judge Alito's rigid, narrow views on the powers of Congress would make it tougher to hold states accountable for complying with a myriad of laws – from environmental protections, health and safety standards, civil rights, and women's rights.

National Urban League

Empowering Communities. Changing Lives.

January 10, 2006

Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators:

As you know, the National Urban League, Inc. ("Urban League") is the oldest community-based civil rights organization in the country. Through our 102 professionally-staffed affiliates, located in 34 states and in the District of Columbia, the Urban League works to ensure, in a non-partisan way, economic and social parity and full civil rights for African-Americans and other people of color.

Nominations to the United States Supreme Court are of particular concern to the Urban League Movement because of the high Court's tremendous power and impact on the issues relevant to our mission of securing civil rights and economic empowerment for African Americans. Since the President nominated Judge Samuel Alito, Jr. to be an Associate Justice of the United States Supreme Court, the National Urban League has carefully and exhaustively reviewed his judicial record, judicial philosophy, and professional qualifications. Our study found that Judge Alito has a long and unambiguous history of opposition to critical and established voting rights protections, civil rights remedies and social justice guarantees. Our examination also established that Judge Alito frequently injects this philosophy into his judicial decision-making, often in direct contravention of well-settled law. A copy of our report is attached.

Based upon this review, it is our conclusion that Judge Alito's stated opposition to reasonable and established civil rights remedies and voting rights protections, and his consistent record of injecting these views into his decision-making to the degree that it undermines basic civil rights protections make him unsuitable for a seat on our nation's highest court.

Therefore, we urge the Senate Judiciary Committee to reject the nomination of Judge Alito to be a Supreme Court Justice and look forward to working with you to ensure the nomination and confirmation of judges who will uphold fundamental civil rights protections.

Respectfully,

A

Marc H. Morial
President and CEO



January 9, 2006 VIA FACSIMILE

The Honorable Arlen Specter, Chair
The Honorable Patrick J. Leahy, Ranking Member
Senate Committee on the Judiciary
Dirksen Senate Office Building
Room SD-224
Washington, D.C. 20510

Re: *Nomination of Judge Samuel A. Alito, Jr. as Associate Justice of the Supreme Court of the United States*

Dear Chairman Specter and Senator Leahy:

On behalf of the National Women's Law Center, an organization that has worked since 1972 to advance and protect women's legal rights, we write to reiterate the Center's opposition to the nomination of Samuel A. Alito, Jr. to the United States Supreme Court. As a result of its extensive review of Judge Alito's record, the Center has concluded that the confirmation of Judge Alito to the Supreme Court would endanger core legal rights for women, with profound and harmful consequences for women across the country and for decades to come. This letter summarizes the bases for the Center's conclusions, which are set forth more fully in the Center's December 8, 2005 letter and detailed report.[1]

Judge Alito has worked to limit a woman's right to choose. While in the Solicitor General's office, Alito urged the government to file an *amicus* brief in *Thornburgh v. American College of Obstetricians and Gynecologists* in order to "advance the goals of bringing about the eventual overruling of Roe v. Wade and, in the meantime, of mitigating its effects." His memo argued in favor of upholding even the most burdensome and dangerous barriers to abortion. Alito then volunteered to work on the government's *Thornburgh* brief, and researched and wrote key portions. The Court rejected the brief's extreme positions -- it struck down dangerous burdens on the right to choose the brief had argued to uphold, and it refused to overturn *Roe v. Wade* as the brief had urged. In plain reference to his role in the *Thornburgh* case, Alito later wrote: "I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court . . . that the Constitution does not protect a right to an abortion." He wrote this in an application for a promotion a few months after the *Thornburgh* brief was filed.

Judge Alito's record on the Third Circuit reinforces the concerns about his approach to the right to choose. In *Planned Parenthood v. Casey*, he not only would have upheld a law requiring married women to notify their husbands before having an abortion, but took an approach to the law that would eviscerate *Roe v. Wade* by upholding many dangerous barriers to the right to choose. For example, he failed to focus on women who would be hurt by the restrictions (such as victims of domestic abuse), and would have given husbands the same kind of control over their

[1] The Nomination of Samuel Alito: A Watershed Moment For Women (Nat'l Women's Law Ctr., Wash., D.C.), Dec. 15, 2005, *available at* http://www.nwlc.org/pdf/NWLCAlitoReport12-15-05.pdf.

wives' most personal decisions that parents have over their children. A majority of the Supreme Court, in an opinion co-authored by Justice O'Connor, soundly rejected his analysis.

Judge Alito has ruled to limit Congress's authority to protect public safety and welfare. Judge Alito would have struck down a federal law prohibiting the transfer and possession of machine guns, arguing in a dissenting opinion in *United States v. Rybar* that Congress did not have the authority to enact the statute under the Commerce Clause of the Constitution. Judge Alito's Third Circuit colleagues, and eight other circuit courts to date, have disagreed with him. In another case, *Chittister v. Department of Community and Economic Development*, Judge Alito wrote an opinion that barred state employees for suing for damages when their employers violate their right to take medical leave under the Family and Medical Leave Act (FMLA). A 6-3 majority of the Supreme Court, including even Justice Rehnquist, subsequently upheld another provision of the FMLA against a similar challenge on the ground that the FMLA was enacted to address sex discrimination in the workplace. Judge Alito gave short shrift to this argument.

Judge Alito has ruled to make it more difficult for plaintiffs to prove discrimination. Judge Alito's opinions in employment discrimination cases raise significant concerns. For example, he dissented from *Sheridan v. E.I. DuPont De Nemours and Company*, a sex discrimination case in which *all 10 of the other members of the Third Circuit* joined in reversing the trial court's rejection of a jury verdict for the plaintiff. Judge Alito ignored applicable legal standards to urge overturning the jury verdict, inappropriately credited the employer's explanations for its actions, and, standing in for the jury, downplayed the plaintiff's evidence. Alito also dissented in *Bray v. Marriott Hotels*, a race discrimination case, and again would have prevented the plaintiff from bringing her case before a jury by giving the employer the benefit of the doubt. The majority said that under his approach to the evidence, "Title VII [of the Civil Rights Act of 1964] would be eviscerated."

Judge Alito's publicly available record does not reveal his views on the constitutional protection against sex discrimination under the Equal Protection Clause of the Fourteenth Amendment. But in his 1985 job application he expressed support for at least some of the central legal tenets of the Reagan Administration, and the Justice Department under Attorney General Ed Meese favored the "originalist" approach to constitutional interpretation advocated by Robert Bork,[2] which would permit almost any gender-based distinctions in law or government policy. Judge Alito's views in this area must be carefully explored at his confirmation hearing.

Throughout his career, Judge Alito has taken positions and issued rulings detrimental to women in other areas of the law, including through his membership in an organization that was openly hostile to the admission of women and minorities to his alma mater, Princeton; his participation in cases where the Solicitor General argued against affirmative action policies; his vote to uphold a strip search of a woman and her ten-year-old daughter, even though they were not named in a search warrant, in *Doe v. Groody*; his opinion in *Sabree v. Richman* strongly suggesting that if he were to join the Supreme Court, he would change the law to limit, and potentially preclude, the ability of individuals to enforce federal rights such as rights to Medicaid, public housing, child support enforcement, and public assistance; and his denial of an asylum claim by an Iranian woman who asserted that if she returned to Iran she would be persecuted for her feminist beliefs.

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[2] *See, e.g.*, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 3-7 (1988).

This is a watershed moment for women's legal rights. In recent years, the Supreme Court has decided cases affecting women's legal rights by narrow margins. Justice Sandra Day O'Connor, the first woman on the Supreme Court, often has cast the decisive vote in these cases. With the retirement of Justice O'Connor, the Court will lose not only its first female Justice, but also the Justice whose vote often has been pivotal on issues critical to women. Judge Alito's record demonstrates that if he is confirmed to the Supreme Court, he is likely to eviscerate core rights that American women rely upon, and shift the Court in a dangerous and harmful direction. Based on the information available at this time, as summarized above, we conclude that Judge Alito should not be confirmed to the Supreme Court.

Sincerely,

Nancy Duff Campbell
Co-President

Marcia D. Greenberger
Co-President

cc: Senate Judiciary Committee

Statement of Beth Nolan[1]

Before the Committee on the Judiciary
United States Senate

On the Nomination of Samuel A. Alito, Jr.
to the Supreme Court of the United States

January 12, 2006

Mr. Chairman, Senator Leahy, and Members of the Committee:

The members of this Committee and the Senate face a range of important issues in considering the nomination of Judge Alito to serve as Associate Justice of the Supreme Court. As a Justice Department report in the last months of the Reagan Administration noted, "few factors . . . are more critical to determining the course of the Nation, and yet are more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government—the federal judiciary."[2] The question for this body is how the "values and philosophy" of Judge Alito will affect the course of this nation.

I wish to address one issue in particular: How would Judge Alito, if he should become Justice Alito, approach questions of Executive power? Of course, the Supreme Court has a special role in resolving questions about the

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[1] Partner, Crowell & Moring, LLP. The views expressed in this statement are my own.

[2] U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION, at v (Oct. 11, 1988). Later, in its discussion of the Separation of Powers, the Report concluded that the meaning of the Constitution in the future would be determined largely by the individuals who sit on the Supreme Court. *See* id. at 185.

constitutionality of laws or government actions and can be expected to address many critical issues about the Executive's authority. This is especially likely given the current Administration's expansive positions on such authority.

Issues of Executive power have sometimes been viewed as esoteric or cabined – subjects of great interest only to a small circle of academics, government actors, and panelists at the Federalist Society or the American Constitution Society. I agree with those who have suggested that Executive power should be viewed as among the most important issues in these confirmation hearings, because they may be among the most important issues facing the Supreme Court in the near future. The way we understand the Executive's power in our constitutional system, and correspondingly the powers of the Legislative and Judicial Branches, greatly affects the lives of individuals here in the United States and increasingly the lives of those around the world.

From 1999 to the end of the Clinton Administration, I served in the White House as Counsel to the President. I have also served as a political deputy in the Office of Legal Counsel (the same position Judge Alito once held), as an Associate Counsel to the President, as a Constitutional Law professor, and as a career attorney in the Office of Legal Counsel, in the Reagan Administration. As might be expected of one who has served as legal counsel to the President of the United States, I believe it is essential to

defend the power of the President to undertake his constitutionally assigned responsibilities, whether considering the exercise of his powers under the Appointments Clause or under the Commander in Chief Clause. In my view, the Executive Branch is right to resist inappropriate incursions on its power from the Legislative and Judicial branches, and we should thus expect that Executive branch lawyers will strongly defend Executive power. Certainly, in my role as Counsel to the President, I sometimes was in conflict with Congress as each branch struggled to assert its views of its authority. This is just what the Framers expected, that the ambition of one branch would work to counteract the ambition of the other.[3]

This does not mean, however, that the Executive is right to assert a view of its power that is virtually unconstrained, or that fails to take account of the constitutional powers of Congress. I have always understood the role of legal adviser to the President to include interpreting Presidential power with proper respect for the coordinate branches, not solely to maximize Presidential power. This view is consistent with Justice Jackson's classic opinion in the *Steel Seizure Case*,[4] setting forth a three-tier test for examining Executive authority, and in Justice O'Connor's recent reminder in *Hamdi* that "a state of war is not a blank check for the President."[5]

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[3] THE FEDERALIST NO. 51 (Alexander Hamilton and James Madison).

[4] *Youngtown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J, concurring).

[5] *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (O'Connor, J.) (plurality op.).

Judge Alito's service on the United States Court of Appeals for the Third Circuit has not offered him much opportunity to address directly issues of Executive Power. But we have some indication of his views, including his November 2000 remarks to the Federalist Society, some of his work in the Office of Legal Counsel in the mid-1980's,[6] and his application to be a political deputy in that Office. I find particularly instructive and troubling his November 2000 Federalist Society remarks, in which Judge Alito announced his support of the "unitary executive theory." He described the unitary executive as "best captur[ing] the meaning of the Constitution's text and structure," and lamented the fact that "the Supreme Court has not exactly adopted the theory."[7] In fact, cases like *Morrison v. Olson*,[8] to which Judge Alito referred in his remarks, reflect a decisive rejection of the unitary executive theory. In that case, Justice Scalia argued alone in dissent for its application. Since then, Justice Thomas has added his voice for application of the theory, in his dissent in *Hamdi v. Rumsfeld*.[9] What Judge Alito means by

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[6] *E.g.*, Memorandum from Samuel A. Alito, Jr. Deputy Assistant Attorney General, Office of Legal Counsel to The Litigation Strategy Working Group, Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law (Feb. 5, 1986), *available at* http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf).

[7] Samuel A. Alito, Administrative Law & Regulation: Presidential Oversight and the Administrative State, Address Before the 2000 Federalist Society's National Lawyers Convention, *in* 2 ENGAGE 11, 12-13 (Nov. 2001).

[8] 487 U.S. 654 (1988).

[9] *See Hamdi*, 542 U.S. at 580 (Thomas, J., dissenting) (referring to "unitary Executive" theory).

his support for this theory is a critical question in considering his confirmation.

Just fourteen months ago, a Washington Post article referred to the unitary executive theory as an "obscure philosophy."[10] But, its proponents, like Judge Alito, have not shied away from their support for it. Nor has this President, who has referred to it frequently in signing statements and other public statements explaining his interpretation of the law. Equally important, the theory of the unitary executive has been well developed in both the academic literature and also in the Department of Justice's Office of Legal Counsel during the time Judge Alito served there.

"Unitary executive" is a small phrase with almost limitless import: At the very least, it embodies the concept of Presidential control over *all* Executive functions, including those that have traditionally been exercised by "independent" agencies and other actors not subject to the President's direct control. Under this meaning, Congress may not, by statute, insulate the Federal Reserve or the Federal Election Commission, to pick two examples, from Presidential control. The phrase is also used to embrace expansive interpretations of the President's substantive powers, and strong limits on

[10] Dana Millbank, In Cheney's Shadow, Counsel Pushes the Conservative Cause, WASH. POST, Oct. 11, 2004, A21; *see also* Christopher S. Kelley, Rethinking Presidential Power—The Unitary Executive and the George W. Bush Presidency, Paper Prepared for the 63rd Annual Meeting of the Midwest Political Science Association, April 7-10, Chicago, IL 1 (April 2005) (available at http://www.users.muohio.edu/kelleycs/paper.pdf).

the Legislative and Judicial branches. This is the apparent meaning of the phrase in many of this Administration's signing statements.

In his Federalist Society speech in November 2000, Judge Alito explicitly endorsed OLC's theory of the unitary executive as developed during the period he served in that office as a supervising Deputy. OLC precedent from that time demonstrates the significance of the "unitary executive" theory in the setting of foreign and military affairs and also highlights that the theory not only accords a broad reading to Executive power but also typically embodies a narrow view of Congressional power. That is, corresponding to the claim that the Constitution grants the President exclusive power over a matter is the understanding that the Constitution withholds from Congress any authority to regulate the execution of the law in that area.

For example, when the Reagan Administration undertook the covert arms-for-hostages operation that eventually grew into the Iran-Contra scandal, it triggered the requirement of the National Security Act that the Administration provide Congress "timely notification" of the covert operation. To determine the boundaries of this requirement, OLC read the phrase "timely notification" against the background of its view of the President's constitutional authority. OLC expressed the President's authority in sweeping terms: "The President's authority to act in the field of international relations is plenary, exclusive, and subject to no legal limitations save those

derived from the applicable provisions of the Constitution itself."[11] The same opinion offered as limited a view of Congressional power as it did a broad view of Executive power, opining that "[t]he Constitution gave to Congress *only* those powers in the area of foreign affairs that directly involve the exercise of legal authority over American citizens."[12] In a footnote appended to this statement, OLC made clear that by "American citizens" it meant "the private citizenry" and not the President or other executive officials.[13] If such claims are taken seriously, then the President is largely impervious to statutory law in the areas of foreign affairs, national security, and war, and Congress is effectively powerless to act as a constraint against presidential aggrandizement in these areas.

That version of the unitary executive sounds remarkably similar to the assertions of unreviewable and unconstrained powers the current President asserts. The now-withdrawn legal opinion on torture, the Administration's response to the McCain Amendment,[14] and the domestic surveillance

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[11] The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act, 10 Op. Off. Legal Counsel, 159, 164 (1986). This opinion was signed by the head of OLC at the time, Charles Cooper. Mr. Cooper has disclosed that Samuel Alito helped craft the administration's legal defense of its Iran-Contra operations. See http://www.washingtonpost.com/wp-dyn/content/article/2006/01/08/AR2006010801165_3.html. This opinion was one aspect of the administration's defense, and it would not have been unusual for a Deputy in Samuel Alito's position to have been substantially involved in its formulation.

[12] *Id.* at 161.

[13] *Id.* at 161 n.4.

[14] President George W. Bush's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005) ("The executive branch shall

program, the full contours of which we do not yet know, have all been premised, in significant measure, on the same aggressive view of the President's authority. That view is perhaps best encapsulated by the words of a formal OLC legal opinion issued in 2001, that statutes may not "place *any* limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response."[15] It is a good bet that this "obscure philosophy" has also been used to justify other executive actions of which we have not yet been informed.

Even accepting, as I certainly do, that questions of foreign relations and national defense are ones in which the President has great constitutional authority, and acknowledging that the struggles we face in combating terrorism are monumental and place a special burden on the President to ensure our safety, I believe that the President is obligated to interpret the Constitution and enforce the laws of the United States with due regard for the constitutional views of Congress and the laws of the United States.[16] To

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construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.").

[15] Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to the Deputy Counsel to the President, Re: The President's Constitutional Authority To Conduct Military Operations Against Terrorists And Nations Supporting Them (Sept. 25, 2001), *available at* www.usdoj.gov/olc/warpowers925.htm (emphasis added).

[16] *Youngstown Sheet & Tube*, 343 U.S. at 635-38 (Jackson, J., concurring).

the extent the unitary executive theory is understood to provide the President with authority to override those laws unilaterally, it does not accurately describe the allocation of power provided for in the Constitution.

Judge Alito indicated over twenty years ago his "strenuous" disagreement with "the usurpation by the judiciary" of the decisionmaking authority of the political branches.[17] Does this signal that he will defer to the Executive's extreme positions on its power and its claims that these positions are largely unreviewable? Or will he, like the Justice he is nominated to succeed, see a clear role for the courts in protecting our constitutional balance, and hence our civil liberties?[18] Judge Alito's statements about Executive power raise legitimate and serious questions that should be explored.

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[17] Samuel A. Alito, 1985 Personal Qualification Statement, Application for Deputy Assistant Attorney General.

[18] *See Hamdi*, (O'Connor, J.) (plurality op.) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake").

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The Majority Whip

Senate of Pennsylvania

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December 12, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

The Honorable Rick Santorum
United States Senate
511 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators:

We join together to express our tremendous admiration for Judge Samuel Alito, President Bush's selection to be our next Associate Justice of the Supreme Court. Judge Alito is a brilliant jurist who has the intellect, experience and judicial temperament to be an outstanding member of the Court.

We are asking you to ensure that he is confirmed to our nation's highest bench.

Judge Alito has a tremendous educational and professional resume, beginning with his stellar academic work at Princeton University and Yale Law School. He then served a prestigious clerkship with a man he was to later join on the Third Circuit Court of Appeals, Judge Leonard Garth.

His subsequent service as Assistant to the U.S. Attorney, and later as the U.S. Attorney in the District of New Jersey, as well as his work in the U.S. Justice Department as both Assistant to the U.S. Solicitor General and Deputy Assistant U.S. Attorney General, all serve as a marvelous set of qualifications.

In 1990, President George H.W. Bush chose him to be a Judge on the Third Circuit Court, a decision, you undoubtedly recall, you and your fellow Senators agreed to unanimously.

His fifteen years on the Third Circuit Court have shown Judge Alito to be the strict constructionist President Bush promised he would deliver, and one that Pennsylvania and the nation needs on the Court.

We are in full support of Judge Alito's confirmation to the Supreme Court. Senator, we sincerely hope that in your important role as Judiciary Committee Chairman you will ensure that there is a respectful and expeditious confirmation process and a timely confirmation.

Sincerely,

SENATOR JEFFREY E. PICCOLA

SENATOR ROBERT C. JUBELIRER

SENATOR DAVID J. BRIGHTBILL

SENATOR GIBSON E. ARMSTRONG

SENATOR PATRICK M. BROWNE

SENATOR JOE CONTI

SENATOR JAKE CORMAN

SENATOR EDWIN B. ERICKSON

SENATOR JOHN R. GORDNER

SENATOR STEWART J. GREENLEAF

SENATOR CHARLES D. LEMMOND

SENATOR ROGER A. MADIGAN

SENATOR JANE CLARE ORIE

SENATOR DOMINIC F. PILEGGI

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SENATOR TERRY L. PUNT



SENATOR JOHN R. RAFFERTY

SENATOR BOB REGOLA

SENATOR JAMES J. RHOADES

SENATOR ROBERT D. ROBBINS

SENATOR JOE SCARNATI

SENATOR ROBERT J. THOMPSON

SENATOR ROBERT M. TOMLINSON

SENATOR MICHAEL L. WAUGH

SENATOR NOAH W. WENGER

SENATOR DON WHITE

SENATOR MARY JO WHITE

SENATOR ROBERT C. WONDERLING



January 9, 2006

Hon. Arlen Specter
Chair
Senate Judiciary Committee
711 Hart Senate Office Building
Washington, DC 20510

Hon. Patrick Leahy
Ranking Member
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Re: Supreme Court Nominee Samuel Alito

Dear Senator Specter and Senator Leahy:

I am writing on behalf of People For the American Way and our more than 750,000 members and other supporters nationwide in opposition to the confirmation of Judge Samuel Alito to the United States Supreme Court. For the reasons discussed in detail in our comprehensive report of January 2006 analyzing Judge Alito's long public record, Judge Alito's confirmation would jeopardize Americans' fundamental rights and legal protections and provide a consistent vote to turn back the clock on decades of social justice progress in this country.[1] This is particularly the case since Judge Alito has been nominated to replace Justice Sandra Day O'Connor, a mainstream conservative whose swing vote on a closely divided Court has often served to preserve and protect equality and justice.

Specifically, Judge Alito's confirmation would move the Supreme Court decisively to the right in numerous areas critical to the protection of the rights and interests that Americans hold dear, including civil rights and civil liberties, reproductive freedom, and freedom of conscience. His confirmation would seriously threaten the ability of Congress to enact and enforce laws that protect the environment, that prohibit discrimination, and that otherwise promote the health, safety, and welfare of all Americans. And because Judge Alito has a record of deference to presidential and executive power, his confirmation would pose a significant danger to the checks and balances that the Framers wisely crafted into our constitutional system of government.

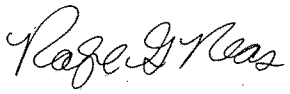
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[1] A copy of our report, *The Record and Legal Philosophy of Samuel Alito: "No One to the Right of Sam Alito on this Court,"* is available at <http://media.pfaw.org/stc/alito-final.pdf>. A copy of our report is also enclosed with this letter, and we would be pleased to submit it for inclusion in the record of the hearings on Judge Alito's nomination.

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For all these reasons and those set out in detail in our January 2006 report analyzing Judge Alito's record, we strongly urge the Judiciary Committee to reject Judge Alito's confirmation.

Sincerely,



Ralph G. Neas
President

STATEMENT OF CARTER G. PHILLIPS, MANAGING PARTNER

SIDLEY AUSTIN, LLP, WASHINGTON D.C.

THANK YOU, MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. IT IS AN HONOR AND A PRIVILEGE TO HAVE THE OPPORTUNITY TO TESTIFY BEFORE THIS COMMITTEE IN FAVOR OF THE CONFIRMATION OF JUDGE SAMUEL A. ALITO TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT. I BELIEVE IT SHOULD BE CLEAR TO ANYONE WHO HAS WATCHED THE HEARINGS DURING THE PAST FEW DAYS THAT JUDGE ALITO IS A BRILLIANT JURIST WHOSE 15 YEARS OF EXPERIENCE ON THE BENCH AND MORE THAN 25-YEAR CAREER OF DISTINGUISHED GOVERNMENT SERVICE HAVE MORE THAN PREPARED HIM TO BE A SUPERB JUSTICE ON THE UNITED STATES SUPREME COURT.

MY PURPOSE IN APPEARING HERE TODAY IS TO SHARE WITH YOU MY OWN EXPERIENCES WITH JUDGE ALITO DURING THE TIME THAT WE WORKED TOGETHER AS ASSISTANTS TO THE SOLICITOR GENERAL FROM JUNE 1981 UNTIL OCTOBER 1984, WHEN I LEFT GOVERNMENT SERVICE TO PRACTICE PRIVATELY HERE IN WASHINGTON. SINCE THAT TIME MY PRACTICE PRIMARILY HAS BEEN BEFORE THE SUPREME COURT WHERE I HAVE ARGUED ALMOST 50 CASES. I BELIEVE I AM QUALIFIED TO COMMENT BOTH ON THE JUDGE'S PROFESSIONAL AND PERSONAL QUALITIES AND HOW THEY MAKE HIM EXTREMELY WELL SUITED TO BE A SUPREME COURT JUSTICE.

JUDGE ALITO AND I INTERVIEWED FOR OUR POSITIONS IN THE SOLICITOR GENERAL'S OFFICE THE SAME DAY. LIKE ME, JUDGE ALITO HAD APPLIED TO JUDGE WADE McCREE, THE SOLICITOR GENERAL OF THE UNITED STATES DURING THE CARTER ADMINISTRATION, AND WE WERE BOTH INTERVIEWED BY JUDGE McCREE AND THE FOUR DEPUTIES IN THE OFFICE. WE SPENT A SOMEWHAT AWKWARD LUNCH TOGETHER THAT DAY BECAUSE WE WERE BOTH INTERVIEWING FOR THE SAME JOB AND WERE SEATED BY OURSELVES RATHER THAN WITH THE OTHER LAWYERS IN THE SG'S OFFICE. BUT FROM THAT CONVERSATION WE DEVELOPED A FRIENDSHIP THAT DEEPENED WHEN IT TURNED OUT THAT WE BOTH WERE HIRED BY JUDGE McCREE TO BE ASSISTANTS AND WE BOTH BEGAN OUR EMPLOYMENT IN JUNE 1981, WHILE THE JUDGE WAS STILL THE SOLICITOR GENERAL.

IT WAS CLEAR TO ME THEN AND IS STILL CLEAR TO ME THAT JUDGE ALITO DID NOT BRING WITH HIM ANY KIND OF AGENDA TO THE POSITION OF ASSISTANT TO THE SOLICITOR GENERAL. HE WOULD HAVE BEEN JUST AS COMFORTABLE IN THAT POSITION WHETHER THE PRESIDENT WAS JIMMY CARTER OR RONALD REAGAN AND WHETHER THE SOLICITOR GENERAL WAS WADE McCREE OR REX LEE.

JUDGE ALITO'S SOLE INTEREST WAS TO BE THE MOST EFFECTIVE APPELLATE AND SUPREME COURT ADVOCATE HE COULD BE ON BEHALF OF THE INTERESTS OF THE UNITED STATES. TO SAY HE WAS SUPERB IN THAT POSITION

IS AN UNDERSTATEMENT. HIS BRIEFS WERE THOUGHTFUL AND HIS WRITING WAS POWERFUL AND EFFECTIVE. HE WAS A PRODIGIOUS WORKER; TYPICALLY, HE WAS IN THE OFFICE BEFORE I ARRIVED AND STAYED UNTIL LONG AFTER I HAD GONE HOME.

JUDGE ALITO WAS AN EXTRAORDINARY RESOURCE BOTH TO ME AND TO THE OTHER LAWYERS. THE SG'S OFFICE IS VERY SMALL; THERE ARE ONLY ABOUT 20 ASSISTANTS AND IN THOSE DAYS, THE COURT WAS HEARING 160 CASES AND THE OFFICE WAS PARTICIPATING IN ABOUT 120 OF THEM. IT WAS EXTREMELY HECTIC AND IT WAS NECESSARY FOR EACH OF US TO BE ABLE TO RELY UPON OTHER ASSISTANTS TO BOUNCE IDEAS OFF OF AND TO GET FEEDBACK ABOUT WHAT KINDS OF ARGUMENTS IN A BRIEF OR MEMORANDUM WOULD BE EFFECTIVE. I SPENT MANY HOURS WITH JUDGE ALITO IN THAT PROCESS, IN PART, BECAUSE HE WAS VERY GENEROUS WITH HIS TIME, BUT ALSO BECAUSE HIS BREADTH OF KNOWLEDGE AND KEEN INTELLECT MADE HIM PERFECT FOR THOSE KINDS OF DISCUSSIONS. NO MATTER WHAT THE CASE INVOLVED OR HOW COMPLICATED IT WAS, HE FULLY UNDERSTOOD THE LEGAL PROBLEM AND PROVIDED MEANINGFUL FEEDBACK ABOUT HOW BEST TO APPROACH IT. HE WAS A VERY SPECIAL COLLEAGUE AND SOMEONE I WAS PROUD TO SERVE WITH AND APPRECIATED ALWAYS.

I ALSO HAD THE PRIVILEGE OF WATCHING JUDGE ALITO ARGUE BEFORE THE SUPREME COURT. AS HE HAS DEMONSTRATED DURING THESE HEARINGS,

HE IS AN ORAL ADVOCATE OF UNSURPASSED SKILL. I WITNESSED JUDGE ALITO PREPARE FOR AND PRESENT THE ARGUMENT IN THE *FCC v. LEAGUE OF WOMEN VOTERS* CASE WHEN HE WAS TOLD ON A FRIDAY THAT HE WOULD BE ARGUING THIS VERY DIFFICULT FIRST AMENDMENT CASE THE NEXT WEEK BECAUSE ANOTHER LAWYER IN THE OFFICE WAS SUDDENLY UNAVAILABLE TO ARGUE THE CASE. THE JUDGE'S PRESENTATION WAS MASTERFUL. THERE ARE VERY FEW LAWYERS WHO COULD HAVE DONE WHAT HE DID, MUCH LESS ACCOMPLISH IT WITH GRACE AND EFFECTIVENESS.

I KNOW THAT THERE HAS BEEN SOME CONCERN EXPRESSED AS TO WHETHER JUDGE ALITO HAD SOME KIND OF IDEOLOGICAL AGENDA DURING HIS TIME IN THE SOLICITOR GENERAL'S OFFICE. I SPOKE WITH HIM ALMOST EVERY DAY ON DOZENS, IF NOT HUNDREDS, OF CASES DURING THE MORE THAN THREE YEARS WE WORKED TOGETHER IN THAT OFFICE. I NEVER ONCE HEARD HIM MAKE AN ARGUMENT THAT REFLECTED ANY PARTICULAR POLITICAL VIEWS. TO THE CONTRARY, JUDGE ALITO'S FOCUS WAS SOLELY ON WHAT ARGUMENTS COULD BE MADE THAT WOULD BEST PROMOTE THE INTERESTS OF HIS CLIENT, THE FEDERAL GOVERNMENT. HE WAS THE CONSUMMATE PROFESSIONAL AND SOMEONE I ADMIRED GREATLY.

INDEED, AS I LOOK BACK ON THOSE YEARS, I AM STRUCK THAT OUT OF ALL OF THE LAWYERS WHO SERVED WITH JUDGE ALITO AND ME, HE WAS THE ONE WHO WAS NOMINATED TO THE FEDERAL BENCH. HE WAS SO COMPLETELY

NON-POLITICAL THAT I WOULD HAVE GUESSED HIM TO BE ONE OF THE LEAST LIKELY TO BE SELECTED TO BE A JUDGE AND NOW A JUSTICE.

SINCE JUDGE ALITO HAS BEEN ON THE THIRD CIRCUIT, I HAVE SEEN HIM DURING ORAL ARGUMENTS, READ A SUBSTANTIAL NUMBER OF HIS OPINIONS AND APPEARED BEFORE HIM. THOSE EXPERIENCES MERELY CONFIRM WHAT I ALREADY KNEW. HE IS A REMARKABLY GIFTED, DEDICATED AND FAIR PERSON WHO HAS PERFORMED SELFLESSLY AND ADMIRABLY AS A PUBLIC SERVANT FOR MORE THAN 25 YEARS. IF THERE WERE A CATEGORY ABOVE "WELL QUALIFIED" IN THE AMERICAN BAR ASSOCIATION'S RANKING SYSTEM, HE WOULD HAVE DESERVED THAT RANKING. HIS OPINIONS ARE CLEAR, TO THE POINT AND ELEGANT. HIS DEMEANOR ON THE BENCH IS ERNEST AND RESPECTFUL. HIS QUESTIONS REFLECT THAT HE IS WELL PREPARED AND UNDERSTANDS THE ISSUES FULLY.

GIVEN MY PERSONAL EXPERIENCE WITH JUDGE ALITO AS A PROFESSIONAL AND MY EXPERIENCE IN PRACTICING BEFORE THE SUPREME COURT, WHICH INCLUDES ALMOST 50 ORAL ARGUMENTS BEFORE THAT COURT, I AM ABSOLUTELY CERTAIN THAT JUDGE ALITO WILL BRING HONOR TO THE COURT AND WILL DISTINGUISH HIMSELF AS AN OUTSTANDING JUSTICE. I URGE THE COMMITTEE AND THE FULL SENATE TO VOTE TO CONFIRM JUDGE ALITO TO SIT ON THE UNITED STATES SUPREME COURT AS AN ASSOCIATE JUSTICE. MR. CHAIRMAN, THANK YOU FOR ALLOWING ME TO APPEAR.

FOR IMMEDIATE RELEASE
January 4, 2006

Contact: Amanda Davis
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Physicians for Reproductive Choice and Health® Announces Opposition to Nomination of Samuel Alito to the Supreme Court

'We oppose Judge Alito's nomination because of his support for restrictions on abortion and access to contraception, as well as his support of government interference in the doctor-patient relationship,' say physicians

New York, NY—*Physicians for Reproductive Choice and Health*® (PRCH) today announced its opposition to the nomination of Judge Samuel A. Alito to the Supreme Court of the United States. In a letter to members of the Senate Judiciary Committee, PRCH board chair Dr. Wendy Chavkin said that the physician members of PRCH are "very troubled" by Alito's 1985 memo on *Thornburg v. ACOG*, which "reveals that Judge Alito does not understand medically-accepted definitions of the physician-patient relationship or informed consent." In addition, the letter expressed doctors' concerns that Judge Alito supports "restrictions on abortion and access to contraception." Following is the text of the letter issued today by PRCH.

"I write as chair of *Physicians for Reproductive Choice and Health*® (PRCH) to express the concerns of physicians committed to reproductive health about the nomination of Judge Samuel A. Alito to the Supreme Court of the United States. We are deeply concerned, as Judge Alito's record regarding the rights of women and minorities, constitutional safeguards on unreasonable search and seizure and presidential power, workers rights and environmental protections reflects the potential for serious and long-term destructive implications on constitutional rights generally. I will focus here on those issues that are central to the work and expertise of PRCH: scientific integrity, informed consent, physician safety, access to contraception and *Roe v. Wade*.

"*Physicians for Reproductive Choice and Health*® is the only national, physician-led, nonprofit organization dedicated to enabling concerned physicians to take a more active and visible role in support of universal reproductive healthcare, including contraception and abortion. We represent physicians of many specialties, including adolescent medicine, emergency medicine, family practice, internal medicine, obstetrics/gynecology, pediatrics and psychiatry. PRCH works to promote evidence-based science and medicine, and to clarify the distinction between the scientific and the political.

"Judge Alito's memo of May 30, 1985 regarding *Thornburg v. ACOG* was the deciding factor in our decision to oppose his nomination. This memo reveals that Judge Alito does not understand medically-accepted definitions of the physician-patient relationship or informed consent and, most importantly, he does not support a woman's right to make a choice regarding an unintended pregnancy.

"We are very troubled by Judge Alito's apparent misunderstanding of the concept of informed consent, as he seems to believe that legislators—the overwhelming majority of whom have no medical or scientific

background—are better able to discern what patients need to know than do physicians. He appears to believe that providing misleading or scientifically inaccurate information is permissible when a physician is permitted to contradict or supplement it, as he explains in the *Thornburg* memo. This belief ignores the serious situations of individual patients and the confusion that ensues from receiving information from your doctor that is clearly conflicting.

"The American College of Physicians (ACP) says the doctrine of informed consent requires the physician to provide enough information to allow a patient to make an informed judgment about how to proceed. According to the ACP Ethics Manual, "The physician's presentation should be understandable to the patient, should be unbiased, and should include the physician's recommendation. The patient's (or surrogate's) concurrence must be free and uncoerced." The American Medical Association's Code of Ethics states, "The physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for the patient's care and to make recommendations for management in accordance with good medical practice." *(emphasis added)*

"In the *Thornburg* memo, Judge Alito defines the list of items required to be discussed by the state law to be "relevant, accurate, factual, and non-inflammatory," but then goes on to contradict this by adding the requirement that physicians provide information that is medically inaccurate, specifically that "certain birth control methods are 'abortifacients,' i.e., that they . . . terminate the development of a fetus after conception." The medical definition of a pregnancy specifies that pregnancy begins when the fertilized egg has implanted on the uterine wall, not when sperm and egg meet in the fallopian tube. The failure of a fertilized egg to implant on the uterine wall is not the same thing as an abortion. This failure occurs frequently, without the awareness of most women to whom it occurs.

"We are also gravely concerned about Judge Alito's apparent misunderstanding of significant personal safety issues with which abortion providers must deal on a daily basis. The *Thornburg* Court stated that laws requiring physicians to report their names and those of the facilities where they worked to the government would have "a profound chilling effect on the willingness of physicians to perform abortions." Judge Alito's insensitive response was that "(t)he invalidity of this reasoning hardly needs demonstration," and later stated that, "In truth, what probably chills them . . . is the thought of a visit from an IRS agent investigating tax shelters." This flippant attitude denies the reality that physicians are harassed and threatened every day for providing abortions and even for supporting access to comprehensive reproductive healthcare. According to statistics compiled by the National Abortion Federation, there have been almost 105,000 incidences of violence and disruption against abortion providers and abortion clinics since 1977, including almost 4,500 incidences of burglary, assault, vandalism, arson and the murder of seven healthcare providers.

"In the *Thornburg* memo, Judge Alito clearly states that he saw the case as an "opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime . . . mitigating its effects." There is ample evidence from the United States, as well as from around the world, that banning abortion will not eliminate the need for this procedure; rather, it will cause women to have unsafe procedures instead. As an organization dedicated to ensuring that people have access to quality services, we work vigorously to ensure that abortions remain legal so they can remain safe.

"Finally, we oppose Judge Alito's nomination because of his support for restrictions on abortion and access to contraception, as well as his support of government interference in the doctor-patient relationship, most clearly seen in his support of spousal notification in *Planned Parenthood v. Casey*, where his dissent would have upheld a state law that would have required a woman to notify her husband prior

to obtaining an abortion. Because bodily integrity and autonomy are at the core of a woman's right to reproductive healthcare, and because a confirmation of Judge Alito bodes irreparable damage to access to such care, *Physicians for Reproductive Choice and Health®* is forced to oppose his nomination."

Wendy Chavkin, MD, MPH
Board Chair, *Physicians for Reproductive Choice and Health®*

PHYSICIANS AVAILABLE FOR COMMENT

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Physicians for Reproductive Choice and Health® *(PRCH) is a national, physician-led, nonprofit organization founded in 1992 to enable concerned physicians to take a more active and visible role in support of universal reproductive health care. PRCH is committed to ensuring that all people have the knowledge, equal access to quality services and freedom of choice to make their own reproductive health care decisions.*

Planned Parenthood® Federation of America, Inc.

Planned Parenthood® Action Fund, Inc.

January 10, 2006

United States Senator Arlen Specter
Chairman, Committee on the Judiciary
United States Senate

United States Senator Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate

Dear Chairman Specter and Senator Leahy:

On behalf of the Planned Parenthood, the world's largest and most trusted voluntary reproductive health care provider, we urge you to oppose the nomination of Judge Samuel Alito to be Associate Justice of the United States Supreme Court. Planned Parenthood has a long-standing history of working to ensure the protection of reproductive rights, as well as working to advance the social, economic, and political rights of women. Because the United States Supreme Court wields the ultimate and unreviewable power to define the contours of women's rights, the right to privacy, reproductive freedoms, and other basic civil rights, Planned Parenthood believes that justices appointed to this Court must demonstrate an affirmative commitment to safeguarding these fundamental rights and freedoms.

We believe that not only has Samuel Alito, Judge for the Third Circuit Court of Appeals, failed to demonstrate a commitment to protecting these rights, he has revealed himself to be actively hostile toward them. Indeed, his record is one of open antagonism toward constitutional protections for reproductive rights and freedoms. Therefore, PPFA strongly opposes his nomination to the United States Supreme Court.

Alito has made clear on repeated occasions his hostility toward the right to choose. In 1985, while serving as an Assistant to the Solicitor General in the Department of Justice, Alito devised and promoted a legal strategy to bring about the eventual overruling of *Roe v. Wade*, and, in the meantime, to "mitigate its effects." In an application he submitted to become a Deputy Assistant U.S. Attorney General, he wrote that he was that he was "particularly proud" of his work on cases where the government argued that "the Constitution does not protect a right to an abortion."

His hostility continued as an appellate judge. Indeed, Judge Alito's judicial record reflects and advanced the very legal strategy he laid out years earlier to undermine the

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right to choose. Judge Alito was the lone dissenter in *Planned Parenthood of Southeastern Pennsylvania v. Casey* when the case was before the Third Circuit. Writing separately from his colleagues, Alito voted to uphold a state law that forced married women to notify their husbands prior to obtaining an abortion. On review, a majority of the Supreme Court – including Justice O'Connor – emphatically rejected Alito's interpretation as one based on outdated notions of women's role in marriage and society and held the husband notification provision unconstitutional.

Judge Alito's record demonstrates hostility to women's equality in general and reproductive rights specifically. Judge Alito has been nominated to replace Justice Sandra Day O'Connor, who has for over a decade played a crucial role in protecting these fundamental rights. If permitted to take Justice O'Connor's seat on the High Court, Judge Alito would have the power to advance his "closely held" personal view that *Roe* should be overturned, to work to unravel settled law and to influence adversely the course of the Constitution's basic protections for access to reproductive health care for more than a generation. Judge Alito's record suggests that, if confirmed, he would do just that.

On behalf of the millions of women and men who count on us to protect their reproductive health, we urge you to oppose the nomination of Judge Samuel Alito to Associate Justice and protect the right to choose.

Sincerely,

Karen Pearl

Karen Pearl
Interim President

Written Testimony of
Karen Pearl, Interim President
Planned Parenthood Federation of America and Planned Parenthood Action Fund

submitted to the

Senate Judiciary Committee

on

the Nomination of Samuel A. Alito, Jr.
to the United States Supreme Court

January 18, 2006

Testimony of Karen Pearl, Interim President
Planned Parenthood Federation of America
Planned Parenthood Action Fund
January 18, 2005

Planned Parenthood Federation of America (PPFA), the world's largest and most trusted voluntary family planning organization, and the Planned Parenthood Action Fund (PPAF), PPFA's political and advocacy arm, have a long-standing history of working to protect reproductive rights as well as working to advance the social, economic, and political rights of women. Each year, Planned Parenthood affiliated health centers provide high-quality, affordable reproductive health care and sexual health information to nearly five million people nationwide. Planned Parenthood welcomes everyone — regardless of race, age, sexuality, disability, or income. In fact, one in four American women has visited a Planned Parenthood health clinic at least once in her life. This year Planned Parenthood will celebrate 90 years of providing these vital services.

On behalf of the millions of women and men we serve each year, Planned Parenthood is committed to protecting and advancing many of the right and freedoms – such as women's rights and access to reproductive health care – that the United States Supreme Court has the power to secure or dismantle. The United States Supreme Court is responsible for interpreting the Constitution, and, as the final arbiter of law, has enormous power in deciding cases involving women's rights, the right to privacy, reproductive freedoms, and other basic civil rights that Planned Parenthood holds dear. Planned Parenthood believes that judges appointed to the Supreme Court must demonstrate a strong commitment to safeguarding these fundamental rights. PPFA and PPAF will oppose the confirmation of nominees who fail to do so.

Not only has Samuel Alito, Judge for the Third Circuit Court of Appeals, failed to demonstrate a commitment to protecting these rights, he has revealed himself to be actively hostile toward them. Indeed, his record is one of open antagonism toward constitutional protections for reproductive rights and freedoms. During his confirmation hearings, he consistently declined to disavow his prior writings and indeed left open the possibility that – given the opportunity – he would overturn *Roe v. Wade*. Therefore, PPFA and PPAF strongly oppose his nomination to the United States Supreme Court.

Judge Alito has been nominated to fill the seat of Justice Sandra Day O'Connor. In two of the most significant abortion rights cases to come before the Supreme Court in our times, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[1] and *Stenberg v. Carhart*,[2] Justice O'Connor cast the decisive fifth vote in favor of protecting the right to reproductive freedom. Replacing her with a judge – like Judge Alito – who is hostile to this cherished right could place the liberty, equality, health and safety of American women in jeopardy for generations to come.

[1] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).
[2] *Stenberg v. Carhart*, 530 U.S. 914 (2000).

Testimony of Karen Pearl, Interim President
Planned Parenthood Federation of America
Planned Parenthood Action Fund
January 18, 2005

Judge Alito Does Not Believe the Constitution Protects the Right to Choose

The Supreme Court "in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose."[3] In 1973, in *Roe v. Wade*,[4] the Supreme Court recognized for the first time that the Constitution protects a woman's right to choose to terminate a pregnancy at its early stages and protects against all government regulation of abortion that places women's health and safety at risk. Since that historic decision, women and men of this country have come to rely on these protections. In the words of the Court:

> People have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[5]

And yet, Judge Alito has made clear on repeated occasions his hostility toward this constitutional right. In 1985, while serving as an Assistant to the Solicitor General in the Department of Justice, Judge Alito devised and promoted a legal strategy to bring about the eventual overruling of *Roe v. Wade*, and, in the meantime, to "mitigat[e] its effects."[6] In a memorandum setting forth this strategy, Judge Alito likened the decision of a woman to have an abortion to that of a "judge or juror pronouncing a sentence of death" or "a military officer commanding a mission that he knows will cost lives."[7] He made clear his view that the question of whether *Roe* should be overruled is "live and open" and urged that the Solicitor General "not even tacitly concede *Roe*'s legitimacy."[8]

Contrary to assertions, Judge Alito's record while in the Reagan Justice Department was not merely the work of a disinterested advocate representing a client. Rather, Judge Alito took great pride in this work he did at the Solicitor General's office working to erode the right to choose. Indeed, he wrote in an application that he submitted to become a Deputy Assistant U.S. Attorney General that he was "particularly proud" of his work on cases where the government argued that "the Constitution does not protect a right to an abortion."[9] This was not the statement of a lawyer vigorously advocating the views of his client; Judge Alito stated unequivocally that he "personally believe[s] very strongly" in this legal position.[10]

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[3] *Stenberg*, 530 U.S. at 921.
[4] *Roe v. Wade*, 410 U.S. 113, 153 (1973).
[5] *Casey*, 505 U.S. at 856.
[6] Memorandum from Samuel A. Alito, Assistant to the Solicitor General, to Charles Fried, Solicitor General (June 3, 1985) (National Archives and Records Administration, Record Group 60, #060-89-216), at 8.
[7] *Id.* at 12.
[8] *Id.* at 17.
[9] Samuel A. Alito, attachment to PPO Non-Career Appointment Form (November 11, 1985), at 1.
[10] *Id.*

When offered numerous opportunities during his confirmation hearings to disavow his views of twenty years ago, Judge Alito repeatedly declined to do so. He made clear, repeatedly and unequivocally, his view that the question of whether *Roe* should stand is – in his mind – an open one. Despite his willingness to opine at length about other areas of law, and to openly disavow many controversial views he had expressed in younger years on other areas of law, Judge Alito steadfastly declined to offer the Committee his views on *Roe v. Wade*. We can only surmise from his silence that he continues to believe that the Constitution does not protect the right to an abortion. We are left to draw only one ominous conclusion. Given the opportunity, Judge Alito would strip future generations of American women of the opportunities, liberty and equality guaranteed to their mothers before them by *Roe v. Wade*.

Judge Alito's Record Suggests Opposition to the Constitutional Right to Certain Forms of Contraception

In the years since Judge Alito mapped out his strategy to undermine the protections *Roe* promised to American women, anti-choice legislators have been doing just that – chipping away at *Roe*, law-by-law, restriction-by-restriction, state-by-state. Legislators have enacted anti-choice laws that restrict government funding of abortion services, require mandatory delays, forced parental involvement, biased pre-procedure counseling, and create other unnecessary barriers to access. More recently, anti-choice law enforcement officials have attempted to subpoena the personal, private medical records of women who have had abortions. Ironically, there have even been renewed efforts to restrict access to birth control, including emergency contraception, without which there would no doubt be more unintended pregnancies and a higher demand for abortion services.

Like the right to choose, the right to contraception is a central component of the freedom from government interference in private matters that Americans hold dear. Contraception is fundamental to the ability to plan the number and timing of children, and the struggle to gain and maintain the right to access contraception has been a cornerstone of our advocacy.

It was not until 1965, in *Griswold v. Connecticut,* that the U.S. Supreme Court ruled that the constitutional right to privacy protects the decision of married couples to use contraceptives. In the 1972 case *Eisenstadt v. Baird*, the Court explained that the right to obtain contraceptives also extends to unmarried individuals. The Supreme Court made clear in that historic decision that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[11] During his confirmation hearings, Judge Alito articulated his view that *Griswold* and *Eisenstadt* are settled law. Yet, Judge Alito's writings call into question even the fundamental right of access to certain forms of contraception.

In his 1985 legal memorandum outlining strategies to undermine *Roe*, Judge Alito articulated his view that many common forms of contraception are in fact abortion-causing

[11] *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

agents.[12] This view is at odds with all scientific and medical evidence and is held only by the most extreme opponents of reproductive rights. Taken to a logical conclusion, Judge Alito's belief that certain forms of birth control are abortion-causing agents coupled with his belief that the government should be permitted to ban abortion altogether suggests that Judge Alito would uphold as constitutional laws banning the use of certain common forms of contraception. These radical views are out of step with those of the vast majority of Americans and contravene well-established Supreme Court precedent.

Judge Alito also testified during the hearings that the questions decided in *Griswold* and *Eisenstadt* were so settled that they could not come before him as a Third Circuit judge, or – if confirmed – as a Supreme Court justice. We at Planned Parenthood know this to be false. Our health centers throughout the country witness legislative attempts to attack family planning access, funding, and services. The next associate justice will no doubt be asked to opine on the constitutional validity of these attempts. We cannot afford a justice who will not protect Americans' access to all forms of contraception.

As a Sitting Judge, Alito Seized Upon the Opportunity to Bring to Fruition His Legal Plan to Undermine the Right to Choose

Not long after he was appointed to the Third Circuit Court of Appeals, an historic case would come before Judge Alito that provided him an opportunity to carry out the very strategy to undermine *Roe* that he articulated in his 1985 memo. In 1991, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[13] came before Judge Alito and his colleagues on the Third Circuit. In this historic case, the court was asked to consider the constitutionality of a Pennsylvania law which contained many of the same restrictions on access to abortion that Judge Alito had advocated for only 6 years earlier. The Third Circuit upheld all but one of the restrictions in the Pennsylvania law. Though the court was willing to grant the state great latitude in restricting abortion, a majority of the court concluded that the requirement that married women notify their husbands prior to obtaining an abortion went too far; accordingly, they struck down this requirement.

Judge Alito was not satisfied with his colleagues' decision upholding most of the Pennsylvania law. He dissented from the majority opinion, voting instead to uphold the husband notification requirement. On review, a majority of the Supreme Court – including Justice O'Connor – emphatically rejected Judge Alito's interpretation as one based on outdated notions of women's role in marriage and society and agreed with the majority of the Third Circuit panel that the husband notification requirement is unconstitutional. The Supreme Court emphasized that the requirement hearkens back to a time when "a different understanding of the family" prevailed, when a woman "had no legal existence separate from her husband."[14] Today,

[12] Memorandum from Samuel A. Alito, Assistant to the Solicitor General, to Charles Fried, Solicitor General, *supra* note 6, at 9 ("certain methods of birth control are 'abortifacients.'").
[13] *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).
[14] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 896-97 (1992).

however, such notions are "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution." In our modern society:

> Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power . . . [15]

Judge Alito ignored the inequitable effect of the law on married women, focusing instead on the right of the state to protect a husband's interest.

The Supreme Court majority also emphasized the grave harm the husband notification requirement would inflict on women who are victims of physical, sexual or psychological abuse at the hands of their husbands. For "the significant number of women who fear for their safety and the safety of their children," the Supreme Court concluded, husband notification would have the same impact on some women's right to choose abortion as if the state "had outlawed abortion in all cases."[16] By contrast, Judge Alito inexplicably dismissed what he described as the "heavy impact" husband notification laws would have on some abused women, suggesting that the law at issue was somehow constitutional because it would only adversely impact "a few women."[17]

Finally, Judge Alito noted that the percentage of women adversely impacted relative to the general population of women was small; the requirement would not affect unmarried women at all, nor would it affect the large majority of women who would choose voluntarily to involve their husbands in their decisions to have abortions. Thus, Judge Alito crassly concluded, the burden imposed on women by the requirement is not sufficiently great to find the law unconstitutional. The Supreme Court rejected this reasoning as well. Rather than focusing on the women for whom the law is irrelevant, the Court focused on the women for whom it imposes a burden, correctly noting that "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there."[18]

A majority of the Court found that for these women the requirement that they notify their husbands imposes a substantial obstacle to their ability to access abortion. It is the obligation of the courts to protect those – like the battered women who fear the wrath of their husbands – whose rights are most at risk. The reasoning and conclusion of Judge Alito's dissent in *Casey* clearly indicate a lack of respect for the rights of women, married or unmarried, to privacy and reproductive autonomy.

The Supreme Court split 5-4 in *Casey*, with Justice O'Connor providing the crucial fifth vote. Had Judge Alito sat in Justice O'Connor's seat in 1992 and voted to uphold the Pennsylvania law in its entirety, states would be free today to require married women to notify

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[15] *Id.* at 898.
[16] *Id.* at 894.
[17] *Casey*, 947 F.2d at 721 (Alito, J., concurring in part and dissenting in part).
[18] *Casey,* 505 U.S. 833, 894.

their husbands of their intention to obtain abortions. The "repugnant" notion that women lose some of their constitutionally protected liberty upon marriage would be enshrined in Constitutional jurisprudence.

Planned Parenthood does not only fight for women's equality and liberty in Congress and in the courts. Year to year, month to month, and day to day, we wage this battle in our health care clinics all across the country. It is there that we dispense birth control and information, treat illnesses, screen for cancer, and, indeed, save women's lives. *Roe v. Wade* is about much more than the right to abortion. It is about self-determination and bodily integrity; it's about giving women an equal place at life's table. Twenty years after *Roe* was decided, the author of *Roe*'s majority opinion Justice Blackmun described the historic ruling as "a step that had to be taken as we go down the road toward the full emancipation of women."

Judge Alito's record demonstrates hostility to women's equality in general and to reproductive rights specifically. Judge Alito has been nominated to replace Justice Sandra Day O'Connor, who has for over a decade played a crucial role in protecting these fundamental rights. If permitted to take Justice O'Connor's seat on the High Court, Judge Alito would have the power to advance his "closely held" personal view that *Roe* should be overturned, to work to unravel settled law, and to adversely influence the course of the Constitution's basic protections for access to reproductive health care for more than a generation to come. Judge Alito's record suggests that, if confirmed, he would do just that. It is for these reasons that PPFA and PPAF have joined other organizations concerned with women's rights and civil rights in opposing Judge Samuel Alito's nomination to the Supreme Court of the United States. On behalf of the millions of women and men who depend on us to protect their reproductive health, Planned Parenthood urges members of the Senate Judiciary Committee to oppose the nomination of Judge Samuel Alito to the United States Supreme Court.

30+ Precedents Justice Thomas Has Called for Unraveling

1. *Planned Parenthood v. Casey* (1992): "*Casey's* fabricated undue-burden standard . . . does not . . . merit[] adherence."[1] "*Casey* must be overruled."[2]

2. *Buckley* v. *Valeo* (1976): "I continue to believe that *Buckley* . . . should be overruled."[3]

3. *Griffin* v. *Illinois* (1956) and *Carter* v. *Kentucky* (1981): "I would be inclined to vote to overrule *Griffin* and its progeny."[4]

4. *Bacchus* v. *Dias* (1984): "*Bacchus* should be overruled."[5]

5. *McMillan* v. *Pennsylvania* (1986): "I would . . . overrule *McMillian* and reverse the Court of Appeals."[6]

6. *Penry* v. *Lynaugh* (1989): "In my view, *Penry* should be overruled."[7] *Penry* "cannot command the force of stare decisis."[8]

7. *Solem* v. *Helm* (1983): "I would not feel compelled by stare decisis to apply [*Solem*]."[9]

8. *Powers* v. *Ohio* (1991): "*Powers* . . . should be overruled."[10]

9. *BMW* v. *Gore* (1996) (limits on punitive damage awards): "I would vote to overrule *BMW*."[11]

10. *Zadvydas v. Davis* (2001): "*Zadvydas* was wrongly decided and should be overruled."[12]

[1] *Stenberg v. Carhart*, 530 U.S. 914, 982 (2000) (Thomas, J., dissenting).
[2] *Id.* (Scalia, J., dissenting) (joined by Thomas).
[3] *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) (Thomas, J., dissenting).
[4] *M.L.B. v. S.L.J.*, 519 U.S. 102, 139 (1996) (Thomas, J., dissenting); for *Carter*, see *Mitchell* v. *United States*, 526 U.S. 314 (1999) (Thomas, J., dissenting).
[5] *Granholm v. Heald*, 125 S. Ct. 1885, 1925 (2005) (Thomas, J., dissenting) ("Bacchus should be overruled, not fortified with a textually and historically unjustified "nondiscrimination against products" test.").
[6] *Harris v. United States*, 536 U.S. 545, 573 (2002) (Thomas, J., dissenting).
[7] *Graham* v. *Collins*, 506 U.S. 461(1993) (Thomas, J., concurring).
[8] *Tennard* v. *Dretke*, 542 U.S. 274 (2004) (Thomas, J., dissenting).
[9] *Ewing v. California*, 538 US 11 (2003) (Thomas, J., concurring).
[10] Campbell v. Louisiana, 523 U.S. 392, 404 (1998) (Thomas, J., dissenting).
[11] *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 443 (2001) (Thomas, J., dissenting).
[12] *Clark v. Martinez*, 543 U.S. 371 (2005) (Thomas, J., dissenting).

30+ Precedents Justice Thomas Has Called for Unraveling

11. *Austin* v. *Michigan* (1990): "I would overrule [*Austin*] and return our campaign finance jurisprudence to principles consistent with the First Amendment."[13]

12. *Calder* v. *Bull* (1789): "I would be willing to reconsider *Calder* and its progeny. . . ."[14]

13. *Berman* v. *Parker* (1954) and *Hawaii Housing Authority* v. *Midkiff* (1984): "Our cases have strayed from the Clause's original meaning, and I would reconsider them."[15]

14. *Allen v. State Bd. of Elections* (1969) and *Thornburg v. Gingles* (1986): "a systematic reassessment of our interpretation of § 2 is required. . . . I cannot subscribe to the view that in our decisions under the Voting Rights Act it is more important that we have a settled rule than that we have the right rule."[16]

15. *Lemon* v. *Kurtzman* (1971), *County of Allegheny* v. *ACLU* (1989), and *Lee* v. *Weisman* (1992): "I would take this opportunity to begin the process of rethinking the Establishment Clause. I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation."[17]

16. *Estelle* v. *Gamble* (1976): "I remain hopeful that . . . the Court will reconsider *Estelle* in light of the constitutional text and history."[18]

17. *Central Hudson* v. *Public Service Commission of N.Y.* (1980): "Rather than continuing to apply [*Central Hudson*] a test that makes no sense to me. . . I would return to the reasoning and holding of *Virginia Pharmacy Bd.*"[19]

[13] *McConnell* v. *FEC*, 540 U.S. 93, 323 (2003) (Kennedy, J., dissenting) (joined by Thomas).
[14] *Eastern Enterprises v. Apfel*, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring).
[15] *Kelo* v. *City of New London*, 125 S. Ct. 2655, 2678 (2005) (Thomas, J., dissenting).
[16] *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring).
[17] *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1 (2004) (Thomas, J., concurring).
[18] *Farmer* v. *Brennan*, 511 U.S. 825 (1994) (Thomas, J., concurring).
[19] *44 Liquormart, Inc., et al. v. Rhode Island et al.*, 517 U.S. 484 (1996) (Thomas, J., concurring).

30+ Precedents Justice Thomas Has Called for Unraveling

18. *United States v. Wheeler* (1978): "As this case should make clear, the time has come to reexamine the premises and logic of our tribal sovereignty cases."[20]

19. *J. W. Hampton, Jr., & Co. v. United States* (1928): "I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[21]

20. More than 8 separate cases regarding the "negative Commerce Clause," including but not limited to *Welton v. Missouri* (1876); *Robbins v. Shelby County Taxing Dist.* (1887); *Philadelphia v. New Jersey* (1978); *Hughes v. Oklahoma* (1979); *Moorman Mfg. Co. v. Bair* (1978); *Complete Auto Transit, Inc. v. Brady* (1977); *Quill Corp. v. North Dakota* (1992); *Pike v. Bruce Church, Inc.* (1970): "The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application. . . . I think it worth revisiting the underlying justifications for our involvement in the negative aspects of the Commerce Clause, and the compelling arguments demonstrating why those justifications are illusory."[22]

[20] *United States* v. *Lara*, 541 U.S. 193 (2004) (Thomas, J., concurring).
[21] *American Trucking Assc* v. *Whitman*, 531 U.S. 457 (2001) (Thomas, J., concurring) (arguing for a reconsideration of the Court's non-delegation jurisprudence, beginning with *Hampton*).

[22] *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U. S. 564, 610 (1997) (Thomas, J., dissenting).

The Princeton Packet February 12, 1985

A conservative voice targets the university

by Charles Stile
Staff Writer

Dinesh D'Souza doesn't mind being called a "hired gun."

"I don't mind that at all," said the 23-year-old editor of Prospect Magazine from his 20 Nassau St. office. "That implies that I shoot straight."

The candid 1983 Dartmouth graduate's main target is Princeton University and his ammunition is a hard-line conservative ideology that he feels has been neglected in the past 15 years.

"I've issued my challenge for Princeton to name one outspoken conservative on the faculty," said the native of India who has permanent citizen status. "They cannot do that. This is unbelievable. I can think of 10 off the top of my head at Harvard and I think Harvard is a left-wing institution."

"Prospect" is the monthly publication of the Concerned Alumni of Princeton (CAP), a conservative alumni organization of an estimated 4,000 members. It was formed in 1972 because a "great institution was being mindlessly transformed" by liberal administrative policies, according to Mr. D'Souza.

CAP — A non-profit organization funded entirely by alumni donations — keeps a conservative eye on changes that occur at the university and lets its subscribers know about it.

"Our goal is to influence the university in what we consider a sensible direction," he said.

They would like to see the faculty beefed up with more noted conservatives. They would like to do away with the Women's Studies and have them "mainstreamed" into the general curriculum. They are opposed to what they see as the university of special interest groups.

Mr. D'Souza added that CAP is "concerned" about the formation of a Third World Center, a campaign to eliminate the Army ROTC program, and what it perceives as the decline of Princeton athletics.

"It is just a constellation of student concerns," he said.

An example of how the group tries to exert its influence was in one of the group's recent conservative jobs that landed close to Nassau Hall.

The Conservative Alumni of Princeton was formed in 1972 because a "great institution was being mindlessly transformed" by liberal administrative policies, according to Dinesh D'Souza, editor of the group's magazine.

Its shock waves caught the attention of Princeton University President William Bowen. And the battle that followed became the subject of a Wall Street Journal editorial.

IN A fund-raising letter, CAP Chairman David P. Condit, said "it is no longer safe for alumni to make unrestricted gifts to Princeton. You may be supporting Third World junkets or the teaching of Marxism in the classroom..." the letter said.

The letter — about which more than 12 Princeton alumni wrote letters to the university asking for an explanation — also claimed that Louis Pyle, director of Princeton's Health Services, celebrated the fact that 31 out of 33 pregnant students had abortions after receiving counseling from Princeton's Sexuality, Education, Counseling and Health clinic. Parents were not informed, the letter said.

For the first time, President Bowen responded. In a four-page letter, he called the CAP remarks a "callous discussion," and "outrageous — to portray Dr. Pyle as viewing abortions or statistics on abortions as cause for celebration."

President Bowen also said the number of pregnant undergraduate women who consult the Health Services each year averages about 2 percent of Princeton female undergrads — significantly lower than the national norm for college women, he said.

But Mr. D'Souza said Dr. Pyle failed to note a 93 percent rate of students who chose to have abortions after receiving counseling.

"How can anybody be pleased with these statistics without taking note of the proportion of abortions?" he said. "It is like talking about South Africa and failing to talk about apartheid."

DR. PYLE did not dispute the figures but he said the letter left an inaccurate impression of how his department handles questions of pregnancy.

"They seemed to imply that we are counseling women to have abortions," he said. "But that is simply not the case. We try to encourage the person not to make any decisions right away. We encourage them to consider all the alternatives and to talk to their family, talk to their spiritual counselor. Eventually they make their own decisions."

The CAP letter also said that Frederick Borsch, dean of the university chapel, condones homosexuality as acceptable Christian behavior, and invited singer Holly Near, a lesbian, to sing in the university chapel. Princeton Gay Alliance receives university funding, it said.

After talking to Dean Borsch about the incident, President Bowen said the concert never took place. Also, the university recognizes 150 campus organizations but "recognition does not connote endorsement."

Another section of the CAP letter cited a comment from Princeton history Professor Lawrence Stone which said "Princeton admits less alumni children each year. Currently alumni children comprise 14 percent of each entering class, compared with an 11 percent quota for Blacks and Hispanics."

But Mr. Bowen said the percentage of alumni children admitted has remained fairly the same over the years. This year, alumni children comprise 16.7 percent of the freshman class.

The admissions process is one area CAP monitors closely. Mr. D'Souza said he does not oppose the admission of minority students as long as the university does not "abridge its standards."

"Black people and other minorities can become part of the very distinctive Princeton tradition," he said. "But if a group is admitted on lower standards,



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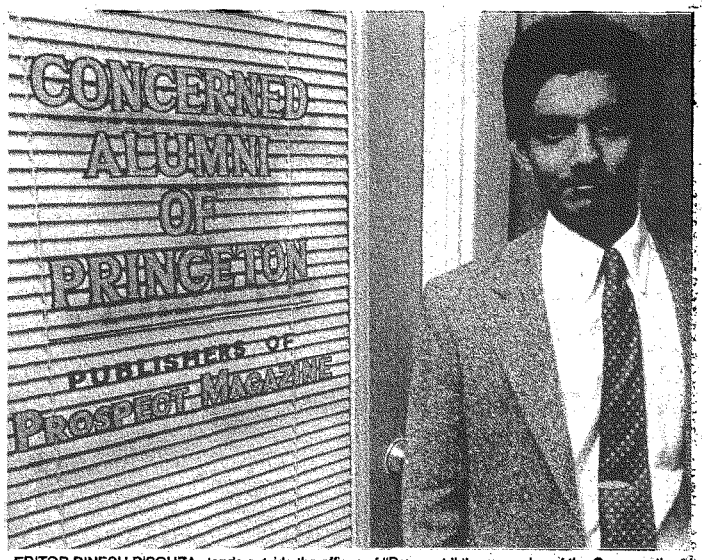
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EDITOR DINESH D'SOUZA stands outside the offices of "Prospect," the magazine of the Conservative Alumni of Princeton. Recently, university President William Bowen criticized remarks made by the group's chairman in a fund-raising letter.

(Paul Savage photo)

they are going to suffer the perpetual stigma of everyone knowing that."

A UNIVERSITY official said the letter shows CAP's typical strategy.

The CAP letter reflects the organization's approach of "latching onto something to advance their cause," according to Robert Durkee, university vice president for public affairs.

"The organization is far less visible now than it has been," Mr. Durkee said. "We get far fewer inquiries about it than we used. In this particular case, we received 12 letters and the president responded to them like he always does. The only difference this time was that it was written on the editorial page of the Wall Street Journal."

The Jan. 17 editorial titled "Doing it Right," praised President Bowen "in his willingness to engage his critics."

But Mr. D'Souza said that "Bowen has finally gotten out the fly swatter alone."

He contended that Prospect subscribers represent one-third of Princeton's active alumni.

As a result, the university is now aware of that there is a larger conservative alumni population to be heard, Mr. D'Souza said.

"You would think that with that kind of clout, Bowen would want to sit down with these guys and see what they are upset about," Mr. D'Souza said. "Maybe they have a point. 'I can't agree with them on everything but maybe I can listen to them and maybe I can agree with them on at least three of the 10 things they are worried about.' But he has never done this. In a sense it seems like such a politically obtuse thing to do."

Mr. Durkee disagrees with his alumni figures.

"I assume he has his numerator correct, but I don't know where he gets his denominator," Mr. Durkee said. There are 40,000 Princeton undergraduate and 12,000 graduate alumni, he said.

Statement of Katherine L. Pringle
Partner, Friedman Kaplan Seiler & Adelman LLP
before the Senate Committee on the Judiciary

Hearing on the Nomination of Samuel A. Alito, Jr.
January 12, 2006

Mr. Chairman, Senator Leahy and Members of the Committee. I want to thank you for the opportunity to speak with you today. My name is Katherine Pringle. I am a partner of the law firm Friedman Kaplan Seiler & Adelman LLP. I was a law clerk for Judge Alito from 1993 to 1994, and he has remained a mentor since that time. I greatly appreciate the opportunity to share my experiences with and personal observations of Judge Alito, and my support for his nomination as Associate Justice of the Supreme Court.

I began a clerkship for Judge Alito upon my graduation from Georgetown Law School. I was then – as I am now – a committed and active Democrat. I had heard from some of my professors that Judge Alito had a reputation as a conservative, and I therefore expected his to be an ideologically charged chambers, in which I would battle to defend my liberal ideals against his conservative ones.

But what I found was very different than what I had expected. I learned in my year with Judge Alito that his approach to judging is not about personal ideology or ambition, but about hard work and devotion to law and justice.

I would like to share several things that I learned about Judge Alito during the time in which I worked for him.

First, I learned that Judge Alito reaches his decisions by working through cases from the bottom up, not the top down. He taught me to try to ignore any personal predispositions and come at the case with an open mind. He taught me to work carefully

through an analysis of the facts of the case and the legal precedents, and to try to find the resolution that flowed from that analysis.

The Judge consistently applied this bottom-up approach. He approached every case without a personal agenda, and with a commitment to careful and methodical review. His approach was demanding. He read and re-read the record of each case, the decisions cited, and relevant decisions that the parties had failed to cite. I remember him building a model from string and paper to try to figure out the events of one case, and I remember him physically acting out the circumstances of another, all in an attempt to truly understand the facts. He worked hard on every case, large or small. He sought to find the result that flowed from the facts and the law, divorced from any personal bias or interest.

Second, I learned that Judge Alito is interested in, and respectful of, differing points of view. The law clerks with whom I worked spanned the ideological spectrum. I later learned that this is typical, and that Judge Alito selects law clerks with widely varying backgrounds, political outlooks, and personal views. This led to lively debates amongst the law clerks. In my experience, Judge Alito was never dismissive of any point of view. He encouraged our input, challenged each of us to substantiate our views, and listened carefully to the points that we made.

Judge Alito treated advocates before him with the same respect. He asked probing questions, which he refused to let the advocates sidestep. But he was never caustic or rude, and he always appreciated the honest efforts of an advocate.

Judge Alito was similarly respectful of the differing opinions of his fellow Judges on the Third Circuit. He sought to forge consensus where consensus could be reached.

When he dissented from their views, he did so in a respectful and intellectually honest way. The appreciation that Judge Alito's colleagues have for him is reflected in the outpouring of support at these hearings from both active and retired Judges of the Third Circuit.

Finally, I learned that Judge Alito approaches his job with personal humility and a great respect for the institution of the courts. What I saw was a person cognizant of the limited role assigned to him by the Constitution to interpret and enforce the law as established by written law and prior precedent. Judge Alito did not, in my experience, ever treat a case as a platform for a personal agenda or ambition. Rather, his decisions are limited to the issue at hand. They demonstrate an effort to interpret honestly, and faithfully apply, the law to the parties that seek justice before him.

Apart from his judicial approach, Judge Alito was a thoughtful and generous boss. He took the time to get to know his clerks, and to learn about us and our families. He never made demands on us that he did not make on himself. He had none of the personal arrogance that sometimes attends power. In fact, I remember Judge Alito insisting on carrying *my* bags into court when I was recovering from a slight hand injury – a reversal of ordinary roles that left me ill prepared for my next job as a junior law-firm associate! He shared with us his love of Phillies baseball and his pride in his family. Judge Alito has also remained a mentor in the years since I moved on from my clerkship, and he has been generous with his time when I have sought his advice.

It was my great privilege to work with and learn from Judge Alito at the outset of my professional career. I believe that he will be an outstanding Justice of the United States Supreme Court.



Reach Out America

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Memo: Patrick J. Leahy
Re: Confirmation Hearings for Samuel Alito, Jr.
Fax# 202 224 3479
12.15. 2005

Dear Senator Leahy:
As a U.S. Senator you know that the President has the right to nominate a person of his choice for a vacancy on the Supreme Court. The same Constitution gives to the Senate the duty to examine that person as completely as possible, in order to approve or reject the nomination.

It is incumbent on you to protect the Supreme Court from the extreme legal and judicial philosophy of Judge Samuel Alito as demonstrated by his writings and decisions. The President has clearly appointed him to pacify his right wing base.

Reach Out America is convinced that the Senate must vote against Alito's confirmation in order to fulfill its obligation under the Constitution.

Judge Alito, as shown by his own record, is determined to bring about the radical reshaping of our basic rights.

He is against women's rights, the rights of minorities, and the rights of victims of sex and race discrimination.

He voted to approve the strip-search of a ten-year-old girl, and argued that the police should be able to shoot in the back and kill a fleeing, unarmed 15-year-old boy who had stolen $10 after breaking into a house.

In his own words (in his 1985 application for the position of deputy assistant attorney general) Alito emphasized his "disagreement with Warren Court decisions" regarding religious liberty and church-state separation.

Judge Alito's dissents to be on the wrong side of the rights most Americans hold dear. And we have not even mentioned his avowed desire to overturn Roe v. Wade.

Reach Out America urges you to protect us from this potentially disastrous appointment.

Dorothy Puryear
Sybil Bank

The mission of this organization is to work with others in social and political action in order to safeguard our Constitutional rights. We will work to help America find peaceable solutions to world problems while strengthening democracy at home.



Religious Action Center
of Reform Judaism

The Religious Action Center pursues social justice and religious liberty by mobilizing the American Jewish community and serving as its advocate in the nation's capital.

Rabbi David Saperstein
Director and Counsel

Mark J. Pelavin
Associate Director

Jane Wishner
Chair
Commission on Social Action
of Reform Judaism

Rabbi Marla J. Feldman
Director
Commission on Social Action
of Reform Judaism

The Religious Action Center operates under the auspicies of the Commission on Social Action of Reform Judaism, a joint instrumentality of the ntral Conference of rican Rabbis and the ion for Reform Judaism with its affiliates:

American Conference of Cantors

Association of Reform Zionists of America

Canadian Association of Reform Zionists

Early Childhood Educators of Reform Judaism

National Association of Temple Administrators

National Association of Temple Educators

North American Federation of Temple Brotherhoods

North American Federation of Temple Youth

Program Directors of Reform Judaism

Women of Reform Judaism

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January 11, 2006

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

The Honorable Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510-4502

Dear Senators Specter and Leahy,

As you consider the nomination of Judge Samuel Alito Jr. to the Supreme Court of the United States, we write on behalf of the Union for Reform Judaism, encompassing 1.5 million Reform Jews in 900 congregations across North America, to express our opposition to Judge Alito's nomination.

Our decision to oppose Judge Alito's nomination was not taken lightly. During the debate on the nomination at our recent Biennial General Assembly Reform Jews old enough to remember the significant role the Supreme Court played in extending basic human and civil rights to all Americans cautioned the delegates about the danger of a Court whose members have records in opposition to defending those rights. Our Movement's youth spoke of cherished constitutional rights that, with but one Supreme Court justice's vote changing the balance of the court, could be undone, altering their lives and those of the generations to follow. The older members did not want to leave this legacy, and the youth did not want to inherit it.

In 2002, the Union for Reform Judaism adopted a resolution that established our criteria for considering nominees to the federal courts. Under these criteria, which are not limited to issues of character or professional competence, we will oppose a nominee in those rare cases in which after consideration of what the nominee has said and written, and his or her record, a compelling case can be made that the appointment would threaten protection of the most fundamental rights which our Movement supports. Based on these criteria, in November of 2005 we resolved to oppose the nomination of Judge Samuel Alito Jr. to the Supreme Court of the United States[1] believing that:

[1] Our resolution provides that we will "oppose Judge Alito's nomination as Associate Justice of the Supreme Court of the United States now, based on his extensive record, but will have the Union review that decision at the end of the hearings, with the understanding that if disclosures in the hearings do not reflect substantial changes, the Union will remain in opposition to his nomination." A special leadership committee will be meeting at the conclusion of the hearings to implement the resolution.

•Judge Alito's elevation to the Supreme Court would threaten protection of the most fundamental rights which our Movement supports including, but not limited to, reproductive freedom, the separation between church and state, protection of civil rights and civil liberties, and protection of the environment;

•On choice, women's rights, civil rights, and the scope of federal power (particularly as it relates to civil rights and environmental protection), Judge Alito's nomination has sparked a national debate on one or more issues of core concern to the Reform Movement so that the outcome of the nomination is likely to be perceived as a referendum on that issue and will have significant implications beyond the individual nomination;

•Many of his rulings have been contrary to our core values and differed from the views of Justice Sandra Day O'Connor (who was so often the moderate "swing vote" on a closely divided Supreme Court), and, consequently, Judge Alito's elevation would shift the ideological balance of the Supreme Court on matters of paramount concern to the Reform Movement; and

•Judge Alito's elevation to the Supreme Court would likely contribute significantly to reshaping American jurisprudence in a direction that would jeopardize our core values.

Judge Alito's government service, and especially his fifteen-year record on the 3rd Circuit Court of Appeals, provide clear insight into his judicial philosophy and understanding of the Constitution. His rulings from the bench in many areas of great import to the Reform Movement, and the views he expressed while working at the Department of Justice, demonstrate to us that he should not be confirmed.

As a religious minority, our community has historically been committed to maintaining a strong wall of **separation between church and state**. We see nothing in Judge Alito's background to suggest he shares our commitment. In fact, in his 1985 job application to the Reagan Justice Department, Judge Alito wrote that one of the very reasons he became interested in constitutional law was his "disagreement" with the Warren Court's decisions regarding the Establishment Clause. His opinions as a sitting judge have been consistent with this claim. In *ACLU-NJ v. Schundler*, Judge Alito said it was constitutional to have a holiday display consisting of a crèche (a representation of the infant Jesus in the manger), a menorah, a Christmas tree, and other "secular holiday" displays in front of the entrance to the main city government building. Again evidencing his lack of commitment to Establishment Clause values, in *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, Judge Alito's dissenting opinion argued that it was constitutional for a public school district to allow prayer at graduation ceremonies. Later, in a similar case involving school prayer the Supreme Court disagreed. The statements in Judge Alito's 1985 job application and the aforementioned cases illustrate his indifference (at best) to the constitutional protections separating church and state; safeguards that have been the linchpin protecting religious liberty for all Americans.

A longtime advocate for women's rights and reproductive choice, the Reform Movement is also deeply concerned by Judge Alito's views on **reproductive rights**. During his time as an attorney in the Solicitor General's office, Judge Alito helped author the Reagan Administration's *amicus* brief in *Thornburgh v. American College of Obstetricians and Gynecologists* which argued for overturning the *Roe v.*

Wade decision. Judge Alito also authored a 17-page memo to the Solicitor General on how to "advance the goals of bringing about the eventual overturning of *Roe v. Wade*..." Further, in his 1985 job application to the Reagan Justice Department he wrote of his work in the Solicitor General's office saying, "it has been a source of personal satisfaction or me ... to help advance legal positions in which I personally believe very strongly. I am particularly proud of my contributions to recent cases in which the government has argued in the Supreme Court that ... the Constitution does not protect a right to an abortion." This dedication to the "advancement" of reversing *Roe* is also clearly illustrated by his dissenting opinion in *Casey v. Planned Parenthood* (1991). Judge Alito would have upheld a provision of Pennsylvania's restrictive anti-abortion law requiring a woman to notify her husband before obtaining an abortion. His colleagues on the Third Circuit disagreed and the Supreme Court overturned the Pennsylvania provision (with Justice O'Connor casting the deciding vote). The Court's majority opinion found that the provision Judge Alito would have upheld reverted back to the days when "a woman had no legal existence separate from her husband."

So often our nation's courts ensure civil rights and civil liberties that are otherwise unprotected by flawed systems and discriminatory actions. In order to continue administering justice and equality for all, individuals with grievances must have **access to the courtroom**. Here, too, the record suggests that Judge Alito does not share our commitment to this fundamental principle. In split decisions on the merits of claims alleging violations of the civil rights of racial minorities, women, seniors, and people with disabilities, Judge Alito has consistently ruled with the defendants. In 16 of 24 such cases, Judge Alito has voted to deny litigants the right to even bring their suit before the court. For example, in *Bray v. Marriott Hotels*, involving claims of race discrimination, the Court majority sharply criticized Judge Alito's dissent, stating that his "position would immunize an employer from the reach of Title VII" in certain circumstances. In *Public Interest Research Group v. Magnesium Elektron*, another case involving access to the courtroom, Judge Alito again voted to make it harder for citizens to establish standing to sue, this time concerning toxic emissions that violate the Clean Water Act.

Judges, especially those selected to serve on the highest court in our land, must be committed to upholding our foundational principles of liberty and equality. Judge Alito's record leaves us with serious doubts as to his ability to safeguard these rights that we as a Movement, and a nation, hold so dear. Here, with the stakes so high – a lifetime appointment to the nation's highest court, replacing a pivotal Justice who was often the "swing vote" in key areas – we cannot afford such doubts.

We, therefore, urge you to oppose the nomination of Judge Samuel Alito Jr. to the Supreme Court of the United States, and we stand ready to discuss our concerns with you or your staff in greater detail.

Respectfully,

Rabbi David Saperstein
Director, Religious Action Center
Of Reform Judaism

Jane Wishner
Chair, Commission on Social Action
Of Reform Judaism

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The Honorable Arlen Specter, Chairman
The Honorable Patrick Leahy, Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

January 12, 2006

Dear Chairman Specter and Senator Leahy:

On behalf of the Religious Coalition for Reproductive Choice (RCRC) Board of Directors, I write to express our opposition to the confirmation of Judge Samuel Alito as an associate justice of the Supreme Court of the United States. The Religious Coalition for Reproductive Choice is a national non-profit educational and advocacy organization, whose members are religious and religiously affiliated organizations from 15 denominations and traditions. While most do not take positions on judicial nominations, all firmly support a woman's moral right to make decisions about pregnancy, and all share the conviction that this right is grounded in religious liberty.

Since our founding in 1973, the Religious Coalition for Reproductive Choice has been a vigorous advocate for women as moral decision-makers and it is in that capacity that we oppose confirming Judge Alito. For more than 30 years, our national consensus on abortion has centered on respect for women's decisions. Women now rely on the fact that they may make decisions about pregnancy and childbearing legally and safely.

Judge Alito's troubling record on reproductive rights has been well- documented. In a 1985 memo when he was an attorney in the Solicitor's General office, Alito recommended upholding numerous restrictions as the surest way to undermine a woman's access to abortion services, until the time when *Roe v. Wade* would be reversed. Among the restrictions he named were state regulations requiring doctors to provide women seeking abortions with information about fetal development, the risks and "unforeseeable detrimental effects" of the procedure, and the availability of adoption services and paternal child support. Later that year, Judge Alito submitted a job application to the Reagan Administration stating, "I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court … that the Constitution does not protect a right to an abortion."

Twenty years later, it is reasonable to ask if Judge Alito still holds those views. On Tuesday, the second day of the confirmation hearing for Judge Alito, Senator Dianne Feinstein asked Judge Alito if he agrees that abortion laws must protect a woman's health. Alito avoided answering and simply said that past cases have held this. He also would not

respond to other Senators' direct questions about the Constitution providing a basis for a woman's right to abortion. If Judge Alito cannot state that protecting women's health should be the law of the land, the Senate should not vote to confirm him.

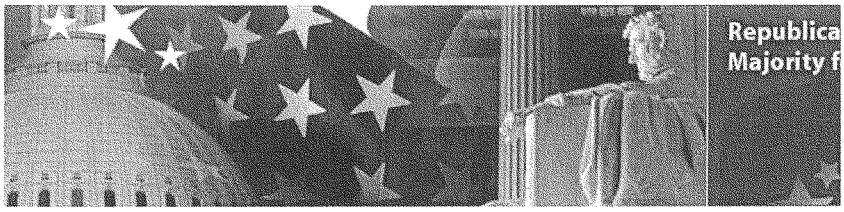
Judge Alito's decision in the 1991 Third Circuit Court of Appeals case, *Casey v. Planned Parenthood of Southeastern Pennsylvania*, provides further evidence that he will not safeguard women's health and safety if abortion is involved. In that decision, Judge Alito disregarded expert evidence about spousal abuse of pregnant women and concluded that a law requiring married women to notify their husbands prior to an abortion would not unduly burden women's access to abortion. In his opinion, Alito wrote that "time delay, higher cost, reduced availability, and forcing the woman to receive information she has not sought," although admittedly "potential burdens," could not "be characterized as an undue burden," This opinion indicates that he lacks understanding of the reality of many women's lives, and yet he would be in a position, as a Supreme Court justice, to make decisions that would have enormous consequences for women. When *Casey* reached the Supreme Court in 1992, the majority properly voted to strike down that provision.

Judge Alito's writings, rulings and sworn testimony, coupled with his reluctance in the confirmation hearings to answer direct questions about Roe v. Wade, are a clear indication that he will seek to limit, restrict, and possibly reverse a right that is basic to women's equality, health, and moral decision-making. It would be a betrayal of women and of families to undermine the national consensus on the constitutionality of abortion. Accordingly, we oppose the confirmation of Judge Alito.

Sincerely,



Reverend Carlton W. Veazey
President and CEO
Religious Coalition for Reproductive Choice



Republican Majority for Choice

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Headline News

Republican Majority for Choice

FOR IMMEDIATE RELEASE
Contact: Alex Dudley
212--685-4300
January 11, 2006

RMC Opposes Judge Alito for Supreme Court

The Republican Majority for Choice (RMC) regrettably announces its opposition to the nomination of Judge Samuel Alito to the Supreme Court.

RMC is an organization whose core mission is to protect the right to choose as outlined in Roe v. Wade and to represent the millions of Republicans who strongly support this right. After much research and analysis of Mr. Alito's own record and statements on this issue of individual freedom it is clear that he is an advocate for further restricting this right.

Judge Alito seems by all measures to be an experienced and capable jurist, but one who is out of step with mainstream Americans on the issue of abortion and maintaining the legal right to choose.

There is no crystal ball to predict how a Justice Alito would rule in future cases; therefore we have closely monitored the confirmation hearings with the hope that Judge Alito would offer some clarifying statements that would allay our concerns about his record. Instead, he side-stepped the issue of whether or not the right to privacy in the Constitution extends to reproductive choice. He avoided answering whether Roe was settled law and existing precedent required a health exception to statutes limiting a woman's access to abortion.

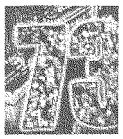
Without such assurances, we can only calculate his judicial philosophy on reproductive rights through the prism of his past actions and statements. As the replacement for the architect of the "undue burden" standard, the stakes are too high for RMC to support an appointee who outlined a blueprint to dismantle that very standard.

The reality is that Judge Alito would not have to vote to overrule Roe in order to be the architect of the denial of a woman's right to choose. He could give lip service to respecting Roe while upholding the numerous legislative efforts to chip away at reproductive freedom. The

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cumulative result is that Roe v. Wade and its progeny are rendered meaningless.

But Judge Alito's position on choice, however, is not the only disappointment surrounding his nomination. The selection of Judge Alito sends a very clear message from the Bush Administration and the Republican leadership in Congress that they are willing to continue steering the party into a marginalized corner that puts it at odds with most voters.

Sadly, we have come to a point at which average Republicans are beginning to abandon the GOP policy and candidates. We have seen this in the public outcry concerning President Bush's opposition to stem cell research; we saw it last November in the Virginia gubernatorial race, and we will see it again this year if Republican candidates continue to promote extremist views. We pledge to continue our mission to promote common sense solutions to help lessen the incidence of abortion while ensuring that women and families maintain the safe and legal right to choose. We will no longer stand by while women's rights are used as a political soapbox for either party.

##

Republican Majority for Choice

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4 November 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: PROPRIETY OF JUDGE ALITO'S FAILURE TO RECUSE IN CASE INVOLVING VANGUARD

Dear Chairman Specter:

Introduction and Summary

You have asked me about the propriety, under federal law, 28 U.S.C. §445, federal rules,[1] and related provisions of the ABA Model Code of Judicial Conduct, of Judge Alito's failure to recuse himself (and his later recusal when a litigant asked for recusal) in a case he heard in 2002.[2]

I have evaluated the situation and conclude, for the reasons discussed below, that neither federal statutes, nor federal rules, nor the Model Code of Judicial Conduct of the American Bar Association provide that a judge should disqualify himself in any case involving a mutual fund company (e.g., Vanguard, Fidelity, T. Rowe Price) simply because the judge owns mutual funds that the company manages and holds in trust for the judge. **The ethics rules treat all mutual fund companies alike and do not**

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[1] *E.g.*, Code of Conduct for United States Judges, Canon 3(C)(3)(3)(i), http://www.uscourts.gov/guide/vol2/ch1.html#N_1 .

[2] For your information, I am attaching, at the end of this letter, a copy of my up-to-date *curriculum vitae*. Or, you may check my webpage, http://mason.gmu.edu/~rrotunda .

discriminate against Vanguard and in favor of, e.g., T. Rowe Price, because the ethics rules focus on substance, not labels.

The judge's ownership of shares in a mutual fund (e.g., the Vanguard Index Fund) is not an ownership interest in the Vanguard Company itself anymore than my ownership of a saving account makes me an equity owner of the Saving Bank.

In other words, the ethics rules make clear that a "depositor in a mutual savings association, or *a similar proprietary interest* [e.g., Vanguard], is a 'financial interest' in the organization *only if* the outcome of the proceeding could substantially affect the value of the interest."[3] Judge Alito's decision in a case that a pro se litigant filed and lost at every level, was not a case where the outcome of the proceeding could "substantially affect" the value of his Vanguard mutual funds. Indeed, the judge simply had no financial stake in this case.[4]

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[3] Committee On Codes Of Conduct Advisory Opinion No. 49, revised July 10, 1998, http://www.uscourts.gov/guide/vol2/49.html (emphasis added).

[4] Ottenberg claimed that certain Individual Retirement Accounts (IRAs) should be available to pay creditors because the IRAs were the product of fraud, and the Massachusetts court agreed. Some of the IRAs were invested in Vanguard mutual funds. While this case was going on, Monga filed collateral proceedings in Philadelphia to enjoin the mutual fund companies from paying the accounts over to Ottenberg. That court dismissed the case in 1996, shortly before Mr. Monga's death. In 1998, the Massachusetts state court enjoined Monga's widow, Ms. Maharaj, from filing further actions in any state or federal court. But the law suits continued.

Judge Alito sat on an appeal from the decision of Federal District Judge Hutton granting the motions of Vanguard and Founders Funds to dismiss yet another collateral federal action and to allow the companies to comply with the Massachusetts order. The Third Circuit panel of Judges Alito, Fuentes and Roth unanimously affirmed Judge Hutton without published opinion. The Supreme Court denied certiorari, but Maharaj was undaunted. She sought to reopen the case by making various claims, including the one at issue here: the argument is that because Judge Alito owned some mutual funds that Vanguard managed, he had to disqualify himself. To avoid further litigation, the judge recused himself and a different panel of the Third Circuit reheard the case and unanimously reached the same result, also in an unpublished opinion. The Supreme Court again denied certiorari.

The law is also clear that "ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund."[5]

In the case in question, after the pro se litigant lost her case, she asked Judge Alito to recuse himself. The pro se litigant alleged that Judge Alito had a financial interest in a party; that he owned shares in a party; and *even that he was a party himself!*[6] All those allegations were false, but he promptly recused himself anyway because it was his personal practice to recuse himself when a party raised an issue and "any possible question might arise."[7] The case was sent to a new panel and it came out the same way.[8]

The Basis Ethics Rules Regarding Recusal When the Judge Owns Stock In a Party

In 1990, when Judicial Nominee Samuel Alito was responding to a Judiciary Committee question regarding conflicts, he said:

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[5] *E.g.*, Code of Conduct for United States Judges, Canon 3(C)(3)(3)(i), http://www.uscourts.gov/guide/vol2/ch1.html#N_1 .

[6] Letter of Judge Alito to Chief Judge Anthony J. Scirica of 2 December 2003, regarding Monga v. Ottenberg, No. 01-1827.

[7] Id.

[8] *Monga v. Ottenberg*, (3d Cir. July 2004) (unpublished), 95 Fed. Appx. 463 (3d Cir. 2004), 125 S.Ct. 1328, 161 L.Ed.2d 135 (2005). This individual is very litigious. A list of cases related to this case is extensive. A Westlaw search shows that this case is one of 22 cases all part of this history of this one litigation. See note 4, *supra*.

Even if Judge Alito, in this case, were required to recuse himself sua sponte (on his own motion) *before* the litigant asked for recusal, there should be no ethical violation as long as the judge acted reasonably. Reasonable people are allowed to make reasonable mistakes. *See, e.g.* Richard Carelli, AP, *Justice Took Part In Cases Involving Husband's Stocks*, July 10, 1997, Westlaw, 7/10/97 AP Online 00:00:00: "Supreme Court Justice Ruth Bader Ginsburg may have violated a federal law 21 times since 1995 by participating in cases involving companies in which her husband owned stock. . . . Responding to queries by The Associated Press, Martin D. Ginsburg said he has ordered his broker to sell all his stock in the eight companies."

> I do not believe that conflicts of interest relating to my financial interests are likely to arise. I would, however, disqualify myself from any cases involving the Vanguard companies, the brokerage firm of Smith Barney, or the First Federal Savings & Loan of Rochester, New York.
>
> I would disqualify myself from any case involving my sister's law firm, Carpenter, Bennett & Morrissey, of Newark, New Jersey.

I do not know why Judge Alito said[9] that he would not hear any cases involving Vanguard, Smith Barney, or First Federal. It appears as if he acted out of an over-abundance of caution. However, the law is clear now — even if it were less clear 15 years ago — that *mutual fund companies (whether organized like a mutual insurance company or a publicly traded company) are now treated the same for recusal purposes.*

It is easiest to examine this issue by looking at a few examples. First, assume that Judge Alito owns 100 shares of IBM and that the brokerage firm Smith Barney holds those shares for him.

If he owned even one share of IBM, he must disqualify himself in any case where IBM is a party.[10] However, the rules do not contemplate that he should disqualify himself simply because Smith Barney is a party because he did not own shares in Smith Barney; that brokerage firm simply held those shares in trust for him.

Did Judge Alito Own Stock in Vanguard?

The Vanguard Company manages several of the Judge's mutual funds. Vanguard manages those funds in trust for the judge. But that fact does not make the Judge an

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[9] It is not reasonable to argue that, in 1990, Judicial Nominee Alito was "promising" never to hear a case involving Carpenter, Bennett & Morrissey, or Vanguard, no matter what was the state of the law or the facts in the ensuing years. His 1990 statement, in context, can only mean that based on the law and the facts at the time as he understood them, he would — out of an overabundance of caution — not hear cases involving Smith Barney, Vanguard, or the law firm of Carpenter, Bennett & Morrissey. If the facts or the law would change, then the result would change. For example, if his sister no longer was working at Carpenter, Bennett & Morrissey, then he would no longer disqualify himself from hearing cases from that firm.

[10] *E.g.*, Federal Committee on Codes of Conduct, Advisory Opinion No. 20 (as revised on July 10, 1998), http://www.uscourts.gov/guide/vol2/20.html .

owner of Vanguard in the same way that the Judge would be an owner of IBM if he owned even one share of IBM.

Consider a famous mutual fund company, T. Rowe Price, which is publicly traded.[11] If a judge invests in one of the mutual funds that T. Rowe Price manages, that does not make him an owner of T. Rowe Price, and so the ethics rule is quite clear that that it does not contemplate the judge disqualifying himself just because he owns shares in a mutual fund that T. Rowe Price manages. He would own T. Rowe Price *only* if he bought shares of T. Rowe Price on the stock exchange.

That should end the matter but the argument is made that Vanguard is "different" because it is organized like a mutual insurance company, where the policy holders are like the owners. Indeed, Vanguard advertises on its website that it is "owned" by its clients, the people who buy its mutual funds. [12] My bank, by the way, may advertise on its webpage that its customers are like family, but the bank president does not invite me to his home for Thanksgiving.

Vanguard is more precise when it describes its status in its prospectuses. There it says that the funds (not the shareholders) own Vanguard. A typical Vanguard Fund prospectus explains that it "is *owned* jointly *by the funds* it oversees and thus *indirectly* by the shareholders in those funds."[13]

Does this organizational set-up — whether the fund holders "own" Vanguard indirectly or not — require different ethics rules? Do the ethics rules discriminate against Vanguard because the funds that it oversees own Vanguard and clients invest in these funds, which Vanguard holds in trust for its clients?

The ethics opinions agree that the answer is no.

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[11] T. Rowe Price Group, Inc.'s common stock trades on The NASDAQ Stock Market® in the United States under the symbol TROW.

[12] "Vanguard is different: We're client-owned. Helping our investors achieve their goals is literally our sole reason for existence. With no other parties to answer to and therefore no conflicting loyalties, we make every decision—like keeping investing costs as low as possible—with only your needs in mind."
http://flagship3.vanguard.com/VGApp/hnw/content/Home/WhyVanguard/AboutVanguardWhyInvestContent.jsp .

[13] E.g., Vanguard Morgan Growth Fund, Prospectus at p. 9 (emphasis added) (under heading, "Plain Talk about Vanguard's Unique Corporate Structure").

Vanguard's organizational set-up is like a mutual insurance company or a mutual savings and loan. Hoover's, a company specializing in providing business information and company profiles, explains: "Unlike other funds, Vanguard is set up like a mutual insurance company."[14]

The ethics opinions uniformly hold that a "shareholder" in a mutual insurance company (State Farm) or in Vanguard is not like a shareholder in IBM. If I own $100 of the Vanguard Index Fund, I do not "own" Vanguard in the same way that I "own" IBM. Instead, I am just like someone who owns $100 of Fidelity Magellan Fund. I cannot get a stock certificate for Vanguard and sell my interest in Vanguard to another person; I can only sell my interest in the Vanguard Index Fund. That fund will pay me dividends, but I get no dividends from the Vanguard Company; I get no capital gains from the Vanguard Company if that company is worth more tomorrow than it is worth today. The only way I can secure a "share" in Vanguard is by buying a mutual fund, and when I sell that mutual fund I lose my "share" in Vanguard. I am like a depositor in a Savings & Loan. The bank may call me an "owner," and it may say in its various prospectuses that I own Vanguard "indirectly," but I am not like any owner of even one share of Citibank and BankAmerica.

What has happened is that some companies (such as Vanguard and State Farm Insurance) have set themselves up in a particular corporate structure for marketing purposes. But neither that corporate structure, nor any statement in a prospectus that speaks of "indirect owners," changes the law of ethics, because ethics is concerned about substance, not labels. An investor in Vanguard mutual funds is not an equity owner of Vanguard in the sense that a shareholder of BankAmerica is an owner of BankAmerica.

An owner of a Vanguard mutual fund is like a depositor in a mutual savings bank. To see what the rules are for Vanguard holders, we should look at the ethics rules for depositors in a mutual savings bank. After all, an ethics rule is supposed to focus on substance, not on form — on what is really going on, not on what label someone chooses to give.

Let me distill the law of ethics on this issue as follows:

> THE ETHICS RULES PROVIDE, IN SHORT, THAT A HOLDER OF A SAVINGS ACCOUNT IN A MUTUAL SAVINGS BANK IS JUST LIKE THE HOLDER OF A MUTUAL FUND IN VANGUARD. THAT VANGUARD HOLDER IS JUST LIKE THE HOLDER OF A MUTUAL FUND IN FIDELITY. THAT IS, HE DOES NOT OWN AN ECONOMIC INTEREST IN VANGUARD OR FIDELITY; HE ONLY OWNS AN

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[14] http://premium.hoovers.com .

INTEREST IN THE FUNDS THAT THE COMPANY MANAGES AND HOLDS IN TRUST FOR HIM. THE ETHICS RULES DO NOT PROVIDE THAT THE JUDGE MUST RECUSE HIMSELF SIMPLY BECAUSE HE INVESTS IN MUTUAL FUNDS THAT VANGUARD HOLDS, BECAUSE THE RULES FOCUS ON SUBSTANCE, NOT LABELS.

Let us now turn to the various ethics opinions that make this point quite clearly. Look at Canon 3C(3)(c)(iii), of the Code of Conduct for United States Judges.[15] This Code has been revised over the years, and I am referring to the versions that apply now and at the time that Judge Alito decided the case where Vanguard was a party. [16]

First, Canon 3C(3(c)(iii) provides that the judge must disqualify himself if he has **[1]** a financial interest in a party or **[2]** any other interest that could be affected "substantially" by the outcome of the proceeding. There is no doubt that he had no interest that could be affected "substantially" by the outcome of this proceeding. He owns interests in various mutual funds and none of them could be affected by the case that the pro se litigant brought.

However, did he have "a financial interest" in a party? Did he have a financial interest in Vanguard simply because Vanguard, like State Farm Insurance, is organized as a mutual insurance company? Canon 3C(3(c)(iii) says no:

> the proprietary interest of a policy holder in a *mutual insurance company*, or a depositor in a mutual savings association, *or a similar proprietary interest*, is a "financial interest" in the organization *only if* the outcome of the proceeding could substantially affect the value of the interest; . . .[17]

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[15] http://www.uscourts.gov/guide/vol2/ch1.html#3 .

[16] The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." At its March 1987 session, the Judicial Conference deleted the word "Judicial" from the name of the Code. Substantial revisions to the Code were adopted by the Judicial Conference at its September 1992 session. Section C. of the Compliance section, following the code, was revised at the March 1996 Judicial Conference. Canons 3C(3)(a) and 5C(4) were revised at the September 1996 Judicial Conference. Canon 3C(1)(c) was revised at the September 1999 Judicial Conference. The Compliance Section was clarified at the September 2000 Judicial Conference. http://www.uscourts.gov/guide/vol2/ch1.html#N_3_ , at note 1.

[17] http://www.uscourts.gov/guide/vol2/ch1.html#N_3_ (emphasis added).

The ethics opinions interpreting this clause are all consistent. They treat shares in mutual funds managed by Vanguard the same way that they treat shares in mutual funds managed by Fidelity or T. Rowe Price. *The ethics rules are concerned about substance, not labels, and they have no interest in preferring one mutual fund company to another.*

For example, the Federal Committee on Codes of Conduct, Advisory Opinion No. 49 (as revised on July 10, 1998)[18] concludes that the: "Code of Judicial Conduct does not require a judge to disqualify in a case where a trade association appears as a party because judge owns a small percentage of outstanding, publicly-traded shares of one or more members of trade association."

The reasoning of this opinion is right on point. It explains that it is following the ABA lead and then relies on Professor Thode, who prepared the Reporter's Notes to the ABA Model Judicial Canons. The opinion quotes Professor Thode who explained that "deposits in a mutual savings association or a policy in a *mutual insurance company* create a '*technical legal interest*,' Professor Thode states that 'these technical interests, and *other similar ones*' should not be a basis for disqualification." (emphasis added).

Arguing that one "owns" Vanguard emphasizes technicalities, not substance. As Professor Thode said (and as the opinion quoted) :

> "In Canon 3C(3)(c) the Committee endeavored to set a standard for economic disqualification for indirect and technical interests that assures impartiality and the appearance of impartiality but at the same time makes available to a judge some types of nondisqualifying investments."

The opinion then concludes that a judge's interest in a trade association is similar, technical, minor, and hence not disqualifying: "the Committee sees no impropriety in a judge serving in a proceeding where a trade association appears as a party, even though the judge owns a small percentage of the publicly-traded shares of one or more members of the association, subject, of course, to the general qualifications set forth in Canon 3C(1)(c) and 3C(3)(c) of the Code of Conduct."

Those general qualifications set out in Canon 3C(1)(c) and 3C(3)(c) also conclude that Judge Alito acted ethically. Canon 3C(1)(c) provides that the judge should disqualify himself if the judge has a financial interest in the party that could be "affected substantially by the outcome of the proceeding." For example, if the litigant asks the judge to rule that Vanguard was misleading the investors in charging fees in the

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[18] http://www.uscourts.gov/guide/vol2/49.html .

Vanguard XYZ Fund, and the judge has an interest in the XYZ Fund, he should disqualify himself.

Canon 3C(3)(c), the other referenced Canon, has a rule for "financial interest. However, as seen above, Canon 3C(3)(c)(iii) does *not* include ownership in mutual companies as a financial interest in the company itself. The second part of Canon 3C(3)(c) requires disqualification if the judge has "a relationship as director, advisor, or other active participant in the affairs of a party," which is simply not applicable here.

It is true that Vanguard's defense of this case must have cost it something in terms of lawyer's fees. But that burden on Vanguard does not impose any disqualification on the judge unless the litigation could "substantially" affect the value of his investment. Canon 3C(3)(c)(iii). For example, if the judge's interest in Vanguard Funds was so great that his investments totaled 25% of all of Vanguard's investments and the attorneys' fees in defending this case amounted to a substantial part of Vanguard's gross income that year, the judge should disqualify himself.[19]

Advisory Opinion No. 49 (as revised on July 10, 1998), discussed above, is no judicial orphan. Advisory Opinion No. 57 (as revised on July 10, 1998), also *reemphasizes* this point when it says that the judge's interest in mutual savings associations or mutual insurance companies are "technical" and *not disqualifying*, "even though the association or company is a party to a proceeding before him, *unless* the value of his interest could be substantially affected by the outcome of the proceeding or the broad test of Canon 3C(1) is applicable."[20]

It is quite clear that the judge's interests could not be "substantially" affected by this case. The broad test of Canon 3C(1) is that a "judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," a section that could not apply given that the subsection [3C(3)(c)(iii)] specifically approves of interests in a mutual insurance company or "a similar propriety interest" is not an ownership interest for purposes of disqualification.

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[19] Checklists for Financial and Other Conflicts of Interest, at note 3, http://www.uscourts.gov/guide/vol2/checklist.pdf , which provides:

> [3]Shares in mutual funds do not constitute a financial interest in the companies whose stock is held by the mutual fund, unless the judge participates in management of the fund. However, shares in some mutual funds may convey an ownership interest in the mutual fund management company (in which case that company should be included on the conflicts list).

[20] http://www.uscourts.gov/guide/vol2/57.html (emphasis added).

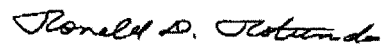
Conclusion

Let us say that a litigant brings a case before a judge in which the local water utility is a party. If the litigant wins, everyone's water rates will go down. The judge drinks water and hence benefits by the decision, but the ethics rules do not impose disqualification because the purpose of the ethics rules is to deal with substance and not to make silly distinctions. Hence, the judge's "mere status as a utility ratepayer, or as a taxpayer, is not in itself disqualifying. If the outcome of the proceeding could *uniquely affect* the amount to be paid by the judge to the utility, or in taxes, disqualification under Canon 3C(1)(c) would be required."[21]

Similarly, if the Judge owned shares in Vanguard Utility Fund, and a litigant sues the Vanguard Company because it complied with a court order to turn over the litigant's mutual funds to satisfy a court judgment, the judge is not disqualified. However, if the litigant is suing on the grounds that the fee structure of Vanguard Utility Fund violates a federal law, and the judge has a substantial interest in that particular fund, then there may be a proceeding pending or impending before the judge that could "substantially affect the value of the interest." But that is not what happened here.

The law for federal judges is now clear now after the Judicial Conference adopted substantial revisions to the Code a0t its September 1992 session. In this opinion, I have focused on the opinions of the Judicial Conference. However, the law is equally clear under the federal statutes and the ABA Model Judicial Code. That is why the federal Judicial Conference, in its opinions, frequently refers to the ABA Model Code and the Reporter's Notes. They all come to the same conclusion: a mutual insurance company, a mutual savings association, and a "mutual mutual" company (what Vanguard calls itself) are treated the same as their non-mutual cousins, i.e., an insurance company, a commercial bank, and a mutual company.

Sincerely



Ronald D. Rotunda

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[21] Advisory Opinion No. 68 (Reviewed July 10, 1998), http://www.uscourts.gov/guide/vol2/78.html (emphasis added).

CONFIRMATION HEARING OF SAMUEL A. ALITO, JR.

OPENING STATEMENT OF SENATOR CHARLES E. SCHUMER JANUARY 9, 2006

Judge Alito, welcome to you, Mrs. Alito and your two children. I join my colleagues in congratulating you on your nomination to the position of Associate Justice of the United States Supreme Court.

If confirmed, you will be one of nine people who collectively hold power over everyone who lives in this country. You will define our freedom; you will affect our security; you will shape our law.

You will determine, on some days, where we pray and how we vote; you will define, on other days, when life begins and what our schools may teach; and you will decide, from time to time, who shall live and who shall die.

The decisions are final, and appeals impossible.

That is the awesome responsibility and power of a Supreme Court Justice. It is, therefore, only appropriate that everyone who aspires to that office bear a heavy burden when they come before the Senate and the American people to prove that they are worthy.

But while every Supreme Court nominee has a great burden, yours, Judge Alito, is triply high.

First, because you have been named to replace Justice Sandra Day O'Connor, the pivotal swing vote on a divided Court; second, because you have been picked to placate the extreme right wing after the hasty withdrawal of Harriet Miers; and, finally, because your record of opinions and statements on a number of critical Constitutional questions seems quite extreme.

So, first, as this Committee takes up your nomination, we cannot forget recent history, because that history increases your burden and explains why the American people want us to examine every portion of your record with great care.

Harriet Miers's nomination was blocked by a cadre of conservative critics who undermined her at every turn. She did not get to explain her judicial philosophy; she did not get to testify at a hearing; and she did not get the up-or-down vote on the Senate Floor that her critics are now demanding that you receive.

Why? For the simple reason that those critics could not be sure that her judicial philosophy squared with their extreme political agenda. They seem to be very sure with you.

The same critics who called the President on the carpet for naming Harriet Miers have

rolled out the red carpet for you, Judge Alito. We would be remiss if we did not explore why.

And there is an additional significance to the Miers precedent, which is this: Everyone now seems to agree that nominees should explain their judicial philosophy and ideology.

After so many of my friends across the aisle spoke so loudly about the obligation of nominees to testify candidly about their legal views and their judicial philosophy when the nominee was Harriet Miers, I hope we will not see a flip-flop now that the nominee is Sam Alito.

The second reason your burden is higher, of course, is that you are filling the shoes of Sandra Day O'Connor. Those are big shoes, to be sure.

But hers are also special shoes – she was the first woman Justice in the history of the High Court, is the only sitting Justice with experience as a legislator, and has been the most frequent swing vote in a quarter century of service on the Court.

While Sandra Day O'Connor has been at the fulcrum of the Court, you appear poised to add weight to one side. That alone is not necessarily cause for alarm or surprise, but it is certainly a reason for pause.

Balance is an important feature on the Court, and your nomination must be viewed in the context of the seat you are seeking, in this case one occupied for 25 years by a pragmatic and mainstream Justice – conservative to be sure, but within the broad conservative mainstream.

Are you in Justice O'Connor's mold? Or, as the President has vowed, are you in the mold of Justices Scalia and Thomas?

Most importantly, though, your burden is high because of your record.

Although I have not made up my mind, I have serious concerns about that record. There are reasons to be troubled. You are the most prolific dissenter in the Third Circuit.

This morning President Bush said Judge Alito has the intellect and judicial temperament to be on the Court. But the President left out the most important qualification – a nominee's judicial philosophy.

Judge Alito, in case after case after case, you give the impression of applying careful legal reasoning, but too many times you happen to reach most conservative result.

Judge Alito, you give the impression of being a meticulous legal navigator, but, in the end, you always seem to chart a rightward course.

Some wrongly suggest that we are being results-oriented when we question the results

you have reached. But just the opposite is true. We are trying to make sure that you are capable of being fair no matter the identity of the party before you.

Sometimes you give the Government a free pass, but refuse to give plaintiffs a fair shake.

We need to know that Presidents and paupers will receive equal justice in your courtroom.

We need to know that you will not bypass precedent when it is convenient. Or that you will apply strict rules of construction in some cases, but not in others because of the issues or parties involved.

If the record showed that an umpire repeatedly called 95 percent of pitches strikes when one team's players were up and repeatedly called 95 percent of pitches balls when the other team's players were up, one would naturally ask whether the umpire was really being impartial and fair.

In many areas, we will expect clear and straightforward answers because you have a record on these issues – for example, executive power, Congressional power, and personal autonomy, just to name a few.

The President is not a king – free to take any action he chooses, without limitation by law; the Court is not a legislature – free to substitute its own judgment for that of the elected bodies; and the people are not subjects – powerless to control their own most intimate decisions.

Will your judicial philosophy preserve these principles? Or erode them?

In each of these areas, there is cause for concern. In the area of executive power, Judge Alito, you have embraced and endorsed the theory of the "unitary executive."

You have thus endorsed, in writing, a truly vast power for the President. Under this view of separation of powers, the Independent Counsel Act was unconstitutional, and the FTC, the SEC, and all of the regulatory agencies are unconstitutional. Even the 9/11 Commission may have been an unconstitutional encroachment upon the "unitary executive."

Your deferential and absolutist view of separation of powers raises other questions. Under your view, the President would, for instance, also seem to have inherent authority to wiretap

American citizens without a warrant, to ignore Congressional acts at will, or to take any other action he saw fit under his inherent powers.

We need to know: When a President goes too far, will you be a check on his power, or will you issue him a blank check to exercise whatever power he alone thinks appropriate?

Right now, that is an open question given your stated views.

Similarly, on the issue of federalism, you seem to have taken an extreme view, substituting your own judgment for that of the legislature. Certainly, in one important case, you wrote in U.S. v. Rybar that Congress had exceeded its power by prohibiting the possession of fully automatic machine guns.

The other judges on your court all disagreed with you. And all five other circuits that had considered the issue up to that point also disagreed with you.

Do you still hold these cramped views of Congressional power? Will you engage in judicial activism to find ways to strike down laws that the American people want their elected representatives to pass and that the Constitution authorizes? Because of your stated views, right now, these are also open questions.

And, of course, you have made strident statements expressing your view that the "Constitution does not protect a right to an abortion." In fact you said in 1985, that you "personally believe very strongly" this is true.

You also spoke, while in the Justice Department, of the "opportunity to advance the goals of bringing about the eventual overruling of Roe v. Wade."

It should not be surprising that these statements will bring a searching inquiry – as many of my colleagues have already suggested.

So we will ask you: Do you still "personally believe very strongly. . . that the Constitution does not protect a right to an abortion"?

We will ask: Do you view elevation to the Supreme Court – where you will no longer be bound by High Court precedent – as the long-sought "opportunity to advance the goals of bringing about the eventual overruling of Roe v. Wade," as you stated in 1985?

And there are other areas that we will have to explore. From the neutral application of the civil rights laws to the wisdom of the one-man-one-vote rule, your record has given us reason to ask questions.

I sincerely hope that you will answer our questions, Judge Alito. Most of the familiar arguments for ducking direct questions no longer apply and certainly do not apply in your case.

For example, the logic of the mantra – repeated by John Roberts at his hearing – that one could not speak on a subject because the issue was likely to come before him quickly vanishes when the nominee has a written record, as you do on so many subjects.

Even under the so-called "Ginsburg precedent" – which was endorsed by Judge Roberts, Republican Senators, and the White House – you have an obligation to answer questions

on topics that you have written about.

On the issue of choice, for example, because you have already made blanket statements about your view of the Constitution and your support for the overruling of Roe, you have already given the appearance of bias; you have already given the suggestion of pre-judgment on a question that will likely come before the Supreme Court. So, I respectfully submit, you cannot use that as a basis for not answering.

So, I hope, Judge Alito, that when we ask you about prior statements you have made about the law – some strong, some even strident – you will not simply answer, "No comment"; that you will not dismiss prior expressions of decidedly legal opinions as merely "personal beliefs."

That will enhance neither your credibility nor your reputation for careful legal reasoning.

In the end, Judge, it is more important that you answer than what you answer. We can have a respectful disagreement on the law, after an open and honest discussion, but we will serve neither the American people nor the democratic process if we learn little about those views.

I look forward to a full and fair hearing. And I look forward to learning a good deal more about you, Judge Alito.

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December 5, 2005

The Honorable Arlen Specter
Chairman,
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member,
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Leahy:

As the President of the Sergeants Benevolent Association of New York City, which represents 10,000 active and retired Sergeants of the NYPD, I am writing to express my organization's support for the confirmation of Judge Samuel A. Alito, Jr. to the United States Supreme Court. My members have a great interest in the United States Supreme Court because the jobs they do every day entail interacting with their fellow citizens in often difficult circumstances, and the pronouncements of the High Court can dramatically alter and re-define these interactions. As the challenges of the post 9/11 world present new and difficult legal issues, today, more than ever, we need the most capable and balanced legal minds, like Samuel Alito, on the Supreme Court.

Throughout his nearly thirty years of public service, Samuel Alito has demonstrated a strong commitment to the rule of law and has earned the respect of the law enforcement community of which he has been an important part. As a U.S. Attorney for the District of New Jersey, Alito was well known for prosecuting white collar and environmental crimes, drug trafficking, organized crime and violations of civil rights. Since being confirmed to the U.S. Court of Appeals for the Third Circuit in 1990, Judge Alito has earned a reputation as being both tough and fair, and his opinions in cases like *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark* prove that he will be an outstanding addition to the U.S. Supreme Court.

On behalf of the Sergeants Benevolent Association, I again offer our strong support for the nomination of Judge Samuel Alito. The nation will benefit from the balanced and well-informed legal ability he will add to the Supreme Court, and I hope that the Judiciary Committee will expeditiously approve his nomination. Please do not hesitate to contact me at 212-343-5668 if you have any questions or wish to discuss this matter further.

Sincerely,

Ed Mullins

Ed Mullins
President





December 20, 2005

The Honorable Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

RE: Nomination of Samuel A. Alito to be Associate Justice of the United States Supreme Court

Dear Senator Leahy:

The nomination of Samuel Alito to the Supreme Court presents the country with a stark choice between competing visions of justice. In one vision, courts are institutions that protect rights and breathe life into our laws and our constitution. But the other vision takes us back to an earlier and darker period in our history as a nation - a period when courts constrained government's ability to protect working people and restricted ordinary American's access to the law's protection.

I write on behalf of the 1.8 million members of the Service Employees International Union (SEIU). Having reviewed Samuel Alito's record, we are left with no doubt as to his values and his vision of justice: In many areas of importance to our members, Judge Alito has acted to deprive working men and women of their rights.

We do not share Judge Alito's values or his views on the role of the federal judiciary. We believe that courts exist to ensure that ordinary people can secure statutory and constitutional protections. And so, I write to express SEIU's opposition to the nomination of Samuel Alito to be an Associate Justice of the Supreme Court.

I. A THREAT TO WORKERS' RIGHTS: JUDGE ALITO'S CONSTITUTIONAL IDEOLOGY

Of primary concern to SEIU members, and to all working Americans, is Judge Alito's radically constrictive view of Congress's ability to pass legislation that protects workers' rights.

In a personal statement that Alito submitted when applying for a high-ranking job in the Reagan justice department at age 35, he stated in explicit terms the ideological nature of his approach to law. "I am and always have been a conservative," Alito wrote. "I believe very strongly in limited government, federalism, free enterprise . . . and the legitimacy of a government role in protecting traditional values." These deeply held ideological beliefs have

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informed Alito's judicial decision making, and are quite clearly expressed in his opinions regarding government's ability to act on behalf of working families.

Judge Alito's tenure on the U.S. Court of Appeals for the Third Circuit has borne out this ideological bias. The most drastic example came in his opinion in *Chittister v. Department of Community and Economic Development*, which involved the Family and Medical Leave Act. As working families well know, this law allows workers to care for a newborn or newly adopted child or a seriously ill family member, or to take leave when they are themselves ill, without having to risk losing their jobs. But in *Chittister*, Judge Alito held that Congress lacked the authority to extend these critical protections to state employees. *Chittister*'s reasoning was rejected by the United States Supreme Court, in an opinion authored by former Chief Justice Rehnquist.

SEIU represents hardworking state employees across the nation. Our members' interests are directly threatened by a judge who believes that Congress cannot protect the rights of state workers.

Perhaps even more alarming, in terms of what it suggests about Judge Alito's understanding of Congressional power, is Alito's dissenting opinion in the *United States v. Rybar* case. There, the third circuit held that Congress had the power under the Commerce Clause to regulate the transfer and possession of machine guns. Alito disagreed. He argued that the Commerce Clause isn't broad enough to give Congress the authority to ban the possession of machine guns. The reasoning that Alito employed in *Rybar* was rejected by Justice Scalia in last year's medical marijuana decision.

The *Chittister* and *Rybar* decisions by Judge Alito are part of the broader "federalism" ideology that judges in recent years have employed in overturning an unprecedented number of federal statutes meant to protect Americans' rights and safety. But, as demonstrated by the contrary viewpoints of former Chief Judge William Rehnquist and Judge Scalia, Judge Alito's analysis in *Chittister* and *Rybar* actually go beyond what most proponents of this ideology would hold.

A radically constrictive vision of Congressional power, like Judge Alito's, puts at risk the core federal statutes of greatest concern to our members and to all working families. Our civil rights laws – including Title VII, the Fair Labor Standards Act, the National Labor Relations Act, the Occupational Safety and Health Act, the Migrant Seasonal Agricultural Protection Act, and many other federal labor laws would be threatened by Judge Alito's constitutional ideology.

II. A THREAT TO WORKERS' RIGHTS: JUDGE ALITO'S HOSTILITY TO THE RIGHTS OF INDIVIDUALS

SEIU is the nation's most diverse union. Over sixty percent of SEIU members are women and approximately forty percent are people of color. SEIU represents more immigrant workers than any other union in the U.S. Our members rely on the Constitution and on laws that protect individual rights.

Alito's record on individual rights bespeaks an unacceptably narrow approach to interpreting important Constitutional and statutory protections, an approach that consistently results in depriving workers of their rights.

A. Limited Constitutional Rights available to Immigrant Workers

While working as a senior attorney in the Reagan Justice Department in 1986, Judge Alito authored a memorandum suggesting that undocumented immigrants in the United States have limited constitutional rights. As the *Washington Post* has reported, even conservative constitutional scholars are surprised by the views expressed by Alito in this memorandum. Bruce Fein, who worked with Alito in the Reagan administration, had this to say about Alito's views on constitutional protections for immigrants: "[Alito] seems to be saying that there are no constitutional constraints placed on U.S. officials in their treatment of nonresident aliens or illegal aliens. Could you shoot them? Could you torture them?"

Clearly, Alito's views of the constitutional protections available to hardworking immigrants are cause for enormous concern. The Supreme Court has a responsibility to protect all of our rights, and SEIU is committed to ensuring that all working people in this country enjoy full protection under the law. A Justice who would deprive immigrants of these protections is a threat to our core value of equality before the law.

B. Restricted Access to Justice for Victims of Workplace Discrimination

Sheridan v. E.I. DuPont de Nemours, for example, involved a female employee's suit for sex discrimination based on her employer's promotion decisions. The question for the court of appeals was how much evidence such a plaintiff has to show in order to get her case to trial. The full third circuit court endorsed a standard that facilitates a worker's ability to have her meritorious claim presented to a jury. **Judge Alito was the sole dissenter in this *12-1 decision*. He argued for a more stringent evidentiary standard – a standard that would deprive employees of their day in court.**

Judge Alito has pressed for similarly restrictive evidentiary standards in employment cases involving race discrimination. Thus, in *Bray v. Marriott Hotels*, an African-American worker sued when she was denied a promotion and a white woman got the job instead. Again, the third circuit ruled that the plaintiff should be able to pursue her claim, and again Alito dissented from the court's ruling. **Alito pushed for a more stringent evidentiary burden in this discrimination case, and in doing so expressed his lack of sensitivity to employees' claims.**

And, true to form, **Judge Alito has advocated a stringent evidentiary burden in disability discrimination cases, a standard that would deprive disabled plaintiffs full access to justice.** In *Nathanson v. Medical College of Pennsylvania*, for example, the plaintiff needed an accommodation in order to attend medical school. The court of appeals ruled that the plaintiff was entitled to pursue her Rehabilitation Act claim, but Judge Alito again dissented. He pushed for a standard of proof that led the majority to write that "few in any Rehabilitation Act cases would survive summary judgment if such an analysis were applied to each handicapped individual's request for accommodations."

C. Restricting Access to Justice for Immigrants

In immigration cases, Judge Alito has exhibited a hostility to the federal courts' critical role of protecting the rights of vulnerable individuals. In *Chang v. INS*, for example, the third circuit ruled in favor of extending protections to a Chinese immigrant who told the FBI that he needed asylum in the United States and faced danger if returned home. Despite evidence that Chang's family had already faced persecution in China, and despite the fact that Chang's photograph had been posted in a local security office, Alito dissented and would not have prevented Chang's deportation. Similarly, *Dia v. Ashcroft* involved an immigrant from Guinea who fled to the United States after his wife was raped and his house destroyed by the military in retaliation for his political opposition work. After Dia was ordered removed from the U.S., the third circuit, sitting en banc, refused to enforce the removal, ordering the case back to the immigration court for further review. Alito dissented and argued that the appeals court should not have offered any recourse to Dia. And in *Lee v. Ashcroft*, Alito dissented from the majority's holding and argued that filing a false tax return was an "aggravated felony" for which 20-year residents of the United States could be deported.

D. Curtailing Protections for the Dignity of Individuals

Judge Alito's disdain for individual rights is also clear from his record in criminal and search and seizure cases. As a third circuit judge, for example, Alito filed numerous dissents in criminal cases and search and seizure cases, and in not one of those dissents did he advocate a position more protective of individual rights than the majority. **In one alarming case, Alito dissented from the court's decision (authored by then-judge, now Secretary of Homeland Security Michael Chertoff), and argued that a woman and her 10-year-old child, who were strip-searched by police officers, should not be able to pursue a claim against the officers.**

III. A THREAT TO THE RIGHTS OF LOW-WAGE WORKERS

SEIU represents approximately 250,000 janitors, and more than 500,000 nursing home and home care workers. Non-union workers in these low-wage sectors of the economy must depend on the protection of our federal wage and hour laws. Judge Alito's narrow interpretation of the Fair Labor Standards Act is hostile to the interests of these working Americans.

In *Reich v. Gateway Press*, the majority of the third circuit construed the Fair Labor Standards Act as offering wage and hour protections to reporters working for community newspapers that were owned by a larger newspaper conglomerate. Judge Alito dissented. Despite the fact that Gateway owned nineteen newspapers with a total circulation of over 60,000, Alito would have ruled that the employees fell within the law's "small newspaper" exemption and, thus, **he would have deprived these workers of their federal minimum wage and overtime rights.**

IV. A THREAT TO WORKERS' SAFETY

SEIU members, and all workers, deserve a workplace that is safe and healthy. Rigorous enforcement of safety and health laws is critical to the wellbeing of America's working families. A judge, who interprets these laws in a narrow, begrudging way, threatens the health and safety of working men and women.

In the worker safety and health context, Judge Alito has applied the same judicial approach to deprive workers of the protections of federal law. In *RNS Services v. Secretary of Labor, MSHA*, the third circuit held that the Mine Safety administration could enforce federal safety regulations on behalf of employees who worked at RNS's refuse pile in Barr Township, Pennsylvania. Alito dissented. According to his reading of the statute, it wasn't sufficiently clear that the type of work performed at the RNS site entitled the workers there to federal protection.

V. HOSTILITY TO UNION RIGHTS

Judge Alito's record on cases involving unions is similarly troubling. In *Caterpillar v. UAW*, for example, the full third circuit entertained and rejected the employer's remarkable contention that allowing employees to do full-time union work, such as grievance representation, while remaining on the company's payroll was a federal crime. Alito again dissented. Despite the fact that these types of "no-docking" provisions are part and parcel of countless labor agreements, Alito argued that Congress intended to make them criminal. And in a show of remarkable hostility to union rights, Alito went out of his way to write that he would not even apply the "rule of lenity" in the case because he saw "no ambiguity" in the statute.

Judge Alito also dissented in *FLRA v. United States Dept. of the Navy*, a case in which the third circuit upheld the union's right to obtain information necessary to contact employees and extend the bargaining unit to include them. Alito would have prevented the union from obtaining the information.

And Judge Alito has indicated a lack of sensitivity to the importance of continuity in collective bargaining relationships, adopting a cramped reading of contract rights, and denying the union the right to arbitrate certain grievances, in his dissent from the majority's decision *Luden's v. Local Union No. 6*. The other courts of appeals that have considered the *Luden* question have followed the third circuit majority.

VI. FROM JUSTICE O'CONNOR TO JUDGE ALITO: A STEP DOWN FOR WORKING FAMILIES

Finally, as the Senate considers Judge Alito's nomination, it is worth observing the **vast differences between Alito and Justice O'Connor - the Justice he is nominated to replace.** No case highlights this difference more clearly than *Planned Parenthood v. Casey*. There Alito voted to uphold a Pennsylvania law that required women to notify their husbands before getting an abortion. When the case went before the Supreme Court, Justice O'Connor was the fifth vote in the Court's decision to strike down this law. O'Connor was also part of the Court majority that, rejecting Alito's arguments to

the contrary in *Chittister*, voted to extend Family and Medical Leave Act protections to state employees. And in a case where Alito voted to uphold a death sentence in the face of claims that the defendant's lawyers had provided inadequate counsel, the Supreme Court reversed with Justice O'Connor again casting the fifth vote.

The Alito nomination calls on all of us to decide what kind of federal judiciary we want: one that acts to protect individuals and breathes life into our Constitution or one that stands in the way of working Americans who seek to vindicate their rights. Judge Alito's activist record shows quite clearly that he uses his power as a judge to constrict rights, restrict access to justice, and deprive American workers of critical legal and constitutional protections. A judge with this record is not an appropriate choice for the Supreme Court. I urge you to oppose the nomination of Samuel Alito.

Sincerely,

Andrew L. Stern
International President

Anna Burger
International Secretary-Treasurer

ALS:AR:gms

opeiu#2
afl-cio, clc

Testimony of Theodore M. Shaw, Director-Counsel and President of the NAACP Legal Defense & Educational Fund, Inc., on the Nomination of Judge Samuel Alito to the United States Supreme Court

Good afternoon, my name is Theodore M. Shaw, the Director-Counsel and President of the NAACP Legal Defense & Educational Fund, Inc. ("the Legal Defense Fund").

The Legal Defense Fund, whose first Director-Counsel was Thurgood Marshall, and which is no longer a part of the N.A.A.C.P., is the nation's oldest civil rights law firm and has served as legal counsel for African-American civil rights claimants in most of the major racial discrimination cases decided by the United States Supreme Court.

Through every step of the African American experience in this nation, the Supreme Court has – in ways both positive and otherwise – shaped the lives and opportunities of black Americans. *Dred Scott, Plessy v. Ferguson, Brown v. Board of Education, Grutter v. Bollinger*: these cases describe not only where we have stood as a nation, but in so many ways have circumscribed and defined the lives of African-American people. The Supreme Court is just as important today as it was in 1857 when *Dred Scott* was decided, or in 1954, when the late Justice Thurgood Marshall argued before the Court in *Brown*. From voting to education, criminal justice to employment, civil rights issues continue to affect the lives of African Americans every day. Who is on the Court – who decides – is thus a decision which merits the highest consideration.

As a lawyer, as a member of the Bar of the Supreme Court of the United States, as the head of an organization, the primary responsibility of which is to provide legal representation in cases involving racial discrimination, including in cases before the Supreme Court , and as a representative of the civil and human rights community that places so much trust and hope in our judiciary, I take no pleasure in the task that brings me here today. I am acutely aware that some people will dismiss all opposition to the nomination of Judge Alito to the Supreme Court as knee-jerk "liberalism." For us, however, this is not about "liberal" or "conservative", "right" or "left". We do not oppose nominees merely because they are conservative. Our concern is that judges are open minded, and that they decide cases based on the facts and the law.

Justice O'Connor's judicial philosophy has been conservative. In fact, in many race discrimination cases coming before the Supreme Court, the claimants did not win her vote. But, importantly, her vote was always in play. For a quarter of a century, the Supreme Court has decided most race discrimination cases by razor thin 5-4 margins. Justice O'Connor's vote was widely perceived to be the "swing vote"; the Court could go either way.

Unfortunately, Judge Alito's record does not reveal any of the pragmatism for which Justice O'Connor is well known. The overwhelming majority of African-American litigants whose claims Judge Alito have adjudicated has lost his vote. Judge Alito's confirmation to the Supreme Court will cause a substantial shift in the Court's civil rights jurisprudence in a manner that will make it significantly more difficult for civil rights plaintiffs to prevail. As a result, we and a number of other civil rights organizations oppose the nomination of Judge Samuel Alito to the United States Supreme Court as an Associate Justice.

We have prepared a detailed report discussing Judge Alito's record on various civil rights subject areas and detailing the reasons for our opposition, and I ask that the report be entered into the record. In my limited time today, I will highlight only a few issues.

First, for minority workers, women and others who depend on the nation's fair employment laws, Judge Alito's record is deeply troubling. In his fifteen years on the bench, Alito has almost never voted in favor of African-American plaintiffs in employment discrimination cases. Of the dozens of employment discrimination cases involving race in which Judge Alito has participated, he ruled for African Americans on the merits in only two instances. Further, he has never authored a majority opinion favoring African Americans in such cases. Moreover, in key cases, he has dissented from rulings of his colleagues for African-American plaintiffs and sought to impose upon plaintiffs claiming racial discrimination a higher burden of proof than Congress intended.

Judge Alito's comments regarding the Warren Court's decisions on "reapportionment" also are deeply troubling. Among other things, the Warren Court's reapportionment decisions are lauded for their role in barring state legislative schemes that dilute the voting strength of racial minorities by perpetuating inequitably drawn voting districts – districts in which the votes of citizens in one part of a state would be afforded, in some cases two times, five times or even ten times more weight than the votes of citizens in another part of a state. The Court

established the principle that every citizen has the right to an equally effective vote. In doing so, the Court set into motion a process that led to the dismantling of a political system infected both by prejudice and other forms of patent electoral manipulation. These decisions have resulted in more effective political participation in the political process for all voters. Nevertheless, Judge Alito has criticized them. Just as importantly, in his only voting rights decision on the bench, he voted to uphold at-large electoral districts, thereby tolerating the types of electoral abuses that the principle of one person, one vote as well as the Voting Rights Act of 1965 were intended to end.

In the area of criminal justice, Judge Alito twice has written separately to express troubling views on a defendant's right to have a jury selected free of racial discrimination. In one case, he trivialized the serious matter of race discrimination in the selection of jurors by comparing it to whether someone is left-handed or right-handed. In another, Judge Alito suggested that a standard different from that announced by the U.S. Supreme Court should prevail.

Finally, we are deeply troubled by Judge Alito's record on affirmative action. In a brief attacking affirmative action, Samuel Alito used the following analogy: "Henry Aaron would not be regarded as the all-time home run king, and he would not be a model for youth, if the fences had been moved in whenever he came to the plate." This statement reveals a fundamental misconception of what affirmative action is about. Civil rights and affirmative action advocates are not asking for fences to be moved in; they are seeking opportunities to take the field, to stand at the plate. Hank Aaron, like Jackie Robinson, would never have had the opportunity to play in the Major Leagues, if Branch Rickey of the Brooklyn Dodgers and others had not "affirmatively acted" to desegregate baseball.

Our review of Judge Alito's record reveals that he has been remarkably consistent over the years. His views expressed as an advocate do not differ from his jurisprudence during fifteen years as an appellate judge. He has demonstrated a strong deference to government actors and employers in race discrimination cases, a narrow and cramped interpretation of civil rights laws, and a skewed skepticism of the claims of minority, female and other civil rights plaintiffs. Simply put, the question before us is whether African-American and other civil rights claimants would be better off before or after Judge Alito's confirmation to the Supreme Court. The clear answer is that civil rights claimants would be harmed by this confirmation.

While we would like to believe that Judge Alito would approach civil rights cases with an entirely open mind if he were confirmed to the Supreme Court, his record as an appellate judge contradicts any such view. We therefore respectfully but vigorously oppose his confirmation as Associate Justice of the United States Supreme Court.



January 9, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
711 Hart Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate
433 Russell Office Building
Washington, D.C. 20510

Dear Senators:

Judge Samuel Alito has been nominated to fill the Supreme Court seat being vacated by Justice Sandra Day O'Connor, who has frequently been a swing vote in environmental cases. In recent years, the Supreme Court has limited many of the nation's most important environmental safeguards, and in those cases where environmental protections have withstood challenge, it has often been by one or two votes. Usually, one of those votes was Justice O'Connor. The environmental stakes for this nomination are extremely high.

After reviewing all of his opinions that bear directly or indirectly on environmental laws, we believe that, if confirmed, Judge Alito's judicial philosophy would pose a threat to the very existence of many federal environmental laws, and to the ability of citizens to obtain redress from the federal courts.

Our foremost concern over Judge Alito's jurisprudence is his view of Congress' authority under the Commerce Clause. Congress relies on the Commerce Clause to enact environmental laws that may apply to arguably intrastate conduct, *e.g.* pollution of non-navigable tributaries, or protection of an endangered species that exists as a single population within one state. **As discussed below, at the same time that the Senate addresses Judge Alito's nomination, the Supreme Court will be considering whether Congress had such authority to enact the most significant parts of the Clean Water Act.**

Judge Alito made clear his extremely conservative view of the Commerce Clause in his dissent in *U.S. v. Rybar*, 103 F.3d 273 (3rd Cir. 1996). Writing shortly after the Rehnquist court handed down *U.S. v. Lopez*, 514 U.S. 549 (1995), Judge Alito questioned Congress' power under the Commerce Clause to criminalize the possession of machine guns. Judge Alito's colleagues followed no fewer than five other federal appellate courts in deciding that *Lopez* did not invalidate this law. The majority found compelling evidence in the history of gun control laws that trafficking in such weapons posed a serious, national, *interstate* problem.

Judge Alito was not so persuaded, and began his *Rybar* dissent provocatively: "Was *United States v. Lopez* a constitutional freak? Or did it signify that the Commerce Clause still imposes some meaningful limits on congressional power?" *Id.* at 286. Judge Alito claimed that he was not asking for much:

> Moreover, the statute challenged here would satisfy the demands of the Commerce Clause if Congress simply added a jurisdictional element--a common feature of federal laws in this field and one that has not posed any noticeable problems for federal law enforcement. In addition, as I explain below, 18 U.S.C. § 922(o) might be sustainable in its current form if Congress made findings that the purely intrastate possession of machine guns has a substantial effect on interstate commerce or if Congress or the Executive assembled empirical evidence documenting such a link. If, as the government and the majority baldly insist, the purely intrastate possession of machine guns has such an effect, these steps are not too much to demand to protect our system of constitutional federalism. *Id.* at 287.

The problem with Judge Alito's purportedly modest requirement – that Congress just provide findings of interstate effects before enacting laws – is that it facilitates the kind of judicial activism that led the Rehnquist Court to follow *Lopez* with *United States v. Morrison*, 529 U.S. 598 (2000), in which it invalidated the Violence Against Women Act and set aside just such express Congressional findings because the Court did not think that they were good enough.

Judge Alito, an active Federalist Society member, appears unwilling to recognize that in the 21st century, "protecting our system of constitutional federalism" does not depend on judges divining case-by-case limits to Congress' Commerce Clause powers. As a nation we have been debating the appropriate balance of federal and state powers for more than 200 years and, prior to *Lopez*, no one believed that having the Supreme Court draw *ad hoc* boundaries around Commerce Clause authority was a useful way to achieve this balance.

Judge Alito's *Rybar* dissent is particularly worrisome to Sierra Club because of recent events at the Supreme Court. In the very first set of orders handed down after John Roberts was sworn in as the new Chief Justice, the Court granted certiorari in two cases – *Rapanos v. U.S.* and *Carabell v. U.S.* – both of which present the question of whether Congress has the Commerce Clause authority to regulate any waterway or

wetlands beyond "traditionally navigable waters." The Court is now in a position to draw the line of Congressional authority however far upstream from "traditionally navigable waters" it chooses. It is troubling that the Roberts' Court accepted these cases even though (1) it had previously declined to review *Rapanos*; (2) there is no split of authority in the lower courts warranting Supreme Court intervention; and (3) the Court agreed to decide the Constitutional question even though the Commerce Clause issue was neither raised nor decided in either appellate opinion (there was an accompanying, more limited statutory question in both cases).

If confirmed, Judge Alito and his skepticism about the extent of Congressional authority would hear the *Rapanos* and *Carabell* cases on February 21, 2006 and participate in the decision. After these decisions, he would be ruling on any number of similar Commerce Clause challenges to environmental laws, which have proliferated in the wake of *Lopez* and *Morrison*. (Indeed, Judge Roberts' infamous "hapless toad" remark came in just such an Endangered Species Act case.) The framework of federal environmental law that we rely on to protect our health and America's natural resources -- the Clean Water Act, the Safe Drinking Water Act, the Clean Air Act, and many others -- may then fall victim to such misguided ideology.

Other Issues of Concern

Turning to the issue of citizen access to the courts, Judge Alito's decisions in a series of cases bode ill for the future of citizen enforcement of environmental laws. In *PIRG v. Magnesium Elektron*, 123 F.3d 111 (3rd Cir. 1997), Sierra Club and other groups sued -- and proved -- that the defendant had routinely violated the limits of its Clean Water Act permit. However, on appeal Judge Alito joined Judge Roth's notorious decision holding that the plaintiffs lacked standing to sue because they had failed to establish scientific proof of harm to the aquatic ecosystem. As the Supreme Court later ruled in *Friends of the Earth v. Laidlaw* (2000), this kind of logic has the effect of making it harder to establish standing than to prove the case itself. *Laidlaw* rejected this concept and held that injury means interference with the plaintiff's interest, *e.g.* recreating in clean water, not scientific proof of biological harm to the environment.

Another example of Judge Alito's antipathy toward citizen access to courts appears in *Kleissler v. U.S. Forest Service*, 183 F.3d 196 (3rd Cir. 1999). Judge Alito joined an opinion holding that issues raised by citizens in administrative appeals of two logging projects lacked the "required correlation" to the subsequent National Forest Management Act and NEPA claims in the lawsuit, and dismissed the case. The opinion is a highly technical, strict application of the doctrine of "exhaustion of administrative remedies," that makes it much more difficult for citizens to have their day in court.

Other cases show Judge Alito's seeming insensitivity to the plight of environmental claimants. One example is *Cudjoe v. U.S. Dept. of Veterans Affairs*, 2005 U.S. App. LEXIS 22067, in which Judge Alito joined Judge Scirica's exceptionally cramped view of citizen redress under the Toxic Substances Control Act ("TSCA"). After Cudjoe's two-year old son tested positive for elevated blood lead concentration, and the Department of Health confirmed that there were "dangerous levels of lead paint

and dust throughout the premises," Cudjoe sued the Department of Veterans Affairs, allegedly the record title holder of the property.

TSCA provides that the federal government "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural * * * respecting lead-based paint, lead-based paint activities, and lead-based paint hazards * * * ." Ignoring both this broad waiver of sovereign immunity and the remedial nature of the statute, the *Cudjoe* court found that a claim for money damages (as authorized by another federal statute, the Residential Lead-Based Paint Hazard Reduction Act) did not constitute a "substantive and procedural requirement" that could be enforced against the federal government.

Judge Alito's preference for the narrowest possible readings of environmental statutes is also seen in *United States v. USX Corp.*, 68 F.3d 811 (3rd Cir. 1995), where he joined a decision that strained to create a higher standard for establishing corporate officer/shareholder liability in cases involving "arrangers" and "transporters" of hazardous waste than for facility "owners" and "operators." And in *Acceptance Insurance v. Sloan*, 263 F.3d 278 (3rd Cir. 2001), Judge Alito held that Pennsylvania regulations requiring coal mines to obtain a liability insurance rider requiring the insurer to notify the Department of Environmental Protection 30 days prior to policy termination did not actually impose any duty on the insurer to notify DEP of such termination.

To be fair, not every opinion rendered by Judge Alito has produced bad environmental results. He has enforced the requirements of environmental laws strictly against government and corporate defendants in a number of instances in which he perceived the law to be straightforward. However, the enforcement of straightforward laws is not the province of the Supreme Court. Rather, it is called upon to make nuanced judgment calls about the scope and meaning of constitutional provisions, such as the Commerce Clause and Article III's standing requirements. In these areas, if Judge Alito's "federalist" philosophy were to prevail, it could threaten to severely curtail the protections afforded by our federal environmental laws.

For these reasons cited above, we believe that Judge Samuel Alito should not be confirmed to a lifetime position on our nation's highest court. We respectfully urge you to vote against his confirmation.

Sincerely,

Patrick Gallagher
Director, Environmental Law Program

cc: Members, Senate Judiciary Committee

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TESTIMONY OF RONALD S. SULLIVAN JR.

PREPARED FOR THE

COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

HEARING: JUDICIAL NOMINATION

SAMUEL A. ALITO, JR. OF NEW JERSEY

TO BE

ASSOCIATE JUSTICE OF THE SUPREME COURT

OF THE UNITED STATES

Ronald S. Sullivan Jr.
Yale Law School
The Jamestown Project at Yale

INTRODUCTION

I am an Associate Clinical Professor of Law at the Yale Law School, and a Senior Fellow at the Jamestown Project at Yale. I teach and write in the areas of criminal law, criminal procedure, legal ethics, and race theory. Prior to joining the faculty at Yale, I served as Director of the nation's premier public defender office, the Public Defender Service for the District of Columbia, where I represented hundreds of indigent clients in thousands of matters as a staff attorney, General Counsel, and, then, as Director.

I am here pursuant to the Committee on the Judiciary's request that I discuss Judge Alito's Fourth Amendment jurisprudence. Toward that end, I have reviewed each of Judge Alito's published opinions that implicates Fourth Amendment values from his fifteen-year tenure on the federal bench.[1] In total, Judge Alito authored 17 opinions in which the Fourth Amendment figures prominently. He wrote the majority opinion in 15 of those cases, while writing the dissent in two.

Although the primary focus of my testimony is limited to Judge Alito's Fourth Amendment opinions, I have completed a comprehensive review of his constitutional criminal procedure decisions, as well, in order to better place his Fourth Amendment jurisprudence in context. Accordingly, I have read a total of 51 of Judge Alito's opinions that turn on either a Fourth, Fifth, Sixth Amendment analysis, or that regard his resolution of habeas appeals. Where appropriate, my testimony will reference these additional opinions to the degree they shed light on Judge Alito's judicial philosophy or his jurisprudential tendencies.

By way of summary, Judge Alito's Fourth Amendment opinions reveal a jurist who is a skilled legal writer with a sharp analytical mind. His opinions, generally

speaking, are careful, measured, and deferential to precedent and controlling legislation. He infrequently employs a moral vocabulary in his writing, making it difficult to speculate on his philosophical leanings on contested issues likely to come before the Supreme Court. But difficult does not imply impossible. Judge Alito's Fourth Amendment jurisprudence provides an adequate basis for a reasoned judgment. His opinions demonstrate a clear pattern of privileging government power when it comes in conflict with the liberty interests of citizens. Nothing in his decisions suggests that his judicial philosophy and his understanding of the history, structure, and purposes of the Fourth Amendment would change if he were to be confirmed.

In his more than fifteen years on the Circuit court, Judge Alito has ruled to suppress evidence on Fourth Amendment grounds once,[2] and he vacated a District Court judgment of forfeiture once.[3] Other than these two instances, in the 15 remaining Fourth Amendment cases in which Judge Alito wrote an opinion, he either found no constitutional violation, or reasoned that any violation was cured by an exception to the Fourth Amendment's exclusionary rule. Moreover, this tendency to side with government power is consistent with Judge Alito's criminal law jurisprudence, generally. In over 50 constitutional criminal procedure cases in which Judge Alito authored an opinion, he ruled in the government's favor over 90 percent of the time.[4] On the Third Circuit, where Judge Alito currently sits, he rules adverse to claims of violations of constitutional rights more often than his fellow judges.[5]

Of course, the fact that Judge Alito almost always rules for the government, without more, does not speak to the quality of his legal reasoning. One could argue that his consistently favorable government rulings are merely a function of cases and

controversies that qualitatively merited resolution in the way he decided. Judges are supposed to judge one case at a time, and are not in the business of ensuring statistical equipoise. But, I submit, more than a statistical pattern is at stake. Judge Alito's tendency to privilege government power represents a failing in his jurisprudence. His decisions manifest an inadequate concern for the constitutional value of individual liberty. Although Judge Alito's prose is temperate, considered, and not explicitly ideological, his Fourth Amendment corpus is striking in its consistency. With rare exception, he upholds the government's view in Fourth Amendment cases. This consistency forces one to query whether Judge Alito would, if confirmed, sufficiently question the awesome power of the government in accord with long-standing constitutional norms designed to guarantee enduring liberty in the United States.

To be sure, no single decision provides a blueprint to Judge Alito's Fourth Amendment jurisprudence. Read in isolation, almost none of his opinions appears to be a radical departure from accepted jurisprudential conventions. Rather, his constitutional criminal procedure opinions, read together, demonstrate a pattern that cannot be ignored. Judge Alito is a near-guaranteed vote for the government in criminal appeals. To the degree one conceives a central purpose of the Bill of Rights to shield the common citizen from the might of the government, Judge Alito's Fourth Amendment jurisprudence is overly deferential to governmental authority.

Fourth Amendment cases, more often than any substantive area of the law, expose the tension between individual liberty and government power that any free and open society experiences. As one scholar succinctly puts it, "Individual liberties entail social costs."[6] Freedom often finds itself at loggerheads with government power. But, that is

precisely the point of the Fourth Amendment. Law enforcement officials, as Justice Douglas has recognized, certainly "are honest and their aims worthy, [but] history shows they are not appropriate guardians of the privacy which the Fourth Amendment protects."[7] Put more bluntly, as Justice Jackson wrote, "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."[8] Thus, how jurists resolve Fourth Amendment questions speaks volumes about their conception of the importance they place on protecting individual liberty and privacy.

An ideal judge remains "watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[9] Properly conceived, the Bill of Rights – specifically, the Fourth, Fifth, and Sixth Amendments – embodies prophylactic protections that restrain police investigative practices. Judges who understand the Constitution in this way are protective of individual freedoms against government intrusion. They also tend to be sensitive to the ways in which race and class insinuate themselves into the criminal justice system. As Justice Brandeis admonished:

> The makers of our Constitution undertook . . . to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[10]

A jurist in this tradition understands that the Fourth Amendment serves to limit government power.

Judge Alito, quite clearly, does not subscribe to this view of the Fourth Amendment. Based on his published opinions in constitutional criminal procedure,

Judge Alito does not have a sufficiently robust conception of the Constitution and his role as judge under the Constitution as protecting liberty interests of citizens. His decisions demonstrate that he is less inclined to constrain the way in which government polices its citizens. Judge Alito is highly deferential to the government – prosecutors, law enforcement, legislatures, and administrative agencies, except perhaps in the area of religious freedoms.[11]

Judge Alito's judicial record is unassailable on the proposition that he rules, nearly without fail, for the government in Fourth Amendment matters. But *how* he arrives at his pro-government power conclusions is a separate question. And the answer to this question explains my conclusion that his consistently pro-government constitutional criminal procedure represents a failure of his jurisprudence. In view of his entire corpus of authored opinions in criminal procedure, a pattern in his decisions clearly is apparent. The following three propositions emerge from a review of Judge Alito's Fourth Amendment jurisprudence: (1) Judge Alito has an insufficient concern for the dignitary implications raised in Fourth Amendment cases; (2) even when Judge Alito finds violations of the Fourth Amendment, he broadly uses exceptions to the exclusionary rule to, in effect, cure the violation; and (3) Judge Alito is inconsistent in his deployment of certain interpretive principles depending on the government's interests in the matter before him.

The foregoing will serve as an explanatory framework to discuss Judge Alito's Fourth Amendment opinions. I will discuss each proposition, in turn, below, and analyze several of Judge Alito's opinion within this framework.

Fourth Amendment's Dignitary Implications

Judge Alito's jurisprudence manifests an insufficient concern for serious privacy and personal dignitary concerns protected by the Fourth Amendment. Indeed, in *United States v. Williams*,[12] Judge Alito wrote that "it is *sometimes* appropriate for a court to balance 'the public interest and the individual's right to personal security free from arbitrary interference by law officers.'"[13] A problem with Judge Alito's jurisprudence is that he rarely ever balances law enforcement interests with personal freedom. The Fourth Amendment "impose[s] a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions . . . .'"[14] Judge Alito's Fourth Amendment cases fail to show the requisite balance in decision-making. Or, put differently, the balance is too heavily weighted toward the government without appreciation for the protection of individual dignity and privacy that should underwrite any Fourth Amendment analysis.

Perhaps Judge Alito's most controversial criminal law opinion better illustrates my point. In his dissent in *Doe v. Groody*,[15] Judge Alito reasoned that the strip search of a ten-year-old girl and her mother – neither of whom were named on the face of the warrant – passed constitutional muster.[16] Chastising the majority opinion written by now-Secretary of the Department of Homeland Security, Michael Chertoff, for being overly "technical and legalistic," Judge Alito did not view the strip searches as offensive to any constitutional norm. At issue in *Groody* was a warrant that authorized the police to search a home for drugs. When the police arrived at the home to be searched, the ten-

year-old and her mother were present. Neither of the two was a target of the drug investigation. They, nevertheless, were forced to submit to a strip search.

Groody presents significant and obvious dignitary concerns. The mother and daughter were taken to a bathroom in the home and "instructed to … lift their shirts."[17] After lifting their shirts and being subjected to a pat down search, a female officer ordered the mother-daughter pair to "drop their pants and turn around."[18] The officer then completed a visual search and determined that neither mother nor the ten-year-old had contraband on her person.[19] Other than a tactile cavity search, the search here was the most invasive imaginable. Judge Chertoff held that "[s]earching [the mother and daughter] for evidence beyond the scope of the warrant and without probable cause violated their clearly established Fourth Amendment rights."[20]

Judge Alito's dissent spent a grand total of one clause – not even a full sentence – giving voice to the mother and daughter's Fourth Amendment right to be free of forced nudity under the probing eye of a government official.[21] Instead, Judge Alito focused nearly all his intellectual and analytical attention on readings of the warrant that would authorize the government to search the woman and young girl. Significantly, once Judge Alito reasoned that the officers had the right to search the occupants of the home, he never analyzed whether such authorization permitted a strip search, as opposed to an outer-body pat down search or a garment search.

Significantly, the only Fourth Amendment case in which Judge Alito considered the dignity concerns implicated by a search and seizure regarded a tax evasion case involving the wealthy owner of a veterinary hospital and his spouse. In *Leveto v. Lapina*,[22] an appeal from a dismissal of a *Bivens*[23] complaint based on the conduct of IRS

agents, Judge Alito ruled that the police violated the couple's Fourth and Fifth Amendment rights by, among other things, conducting a pat down search of the spouse while she was in a bathrobe and questioning the couple without advising them of their *Miranda* rights. With respect to the pat search, Judge Alito affirmed that, "Indeed, a pat down can be 'a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.'"[24] In addition to finding the search of Mrs. Leveto unconstitutional, Judge Alito found Dr. Leveto's seizure unconstitutional, as well. Judge Alito reasoned that "Dr. Leveto's freedom of movement was restricted, and he was even prevented from speaking with others or using a restroom without a chaperone. Dr. Leveto was thus subjected to an extended 'seizure' within the meaning of the Fourth Amendment."[25] Judge Alito continued, "Dr. Leveto's detention at his place of business . . . arguably increased the stigma imposed by the agents' search, for it allowed co-workers to see how Dr. Leveto was being treated by the authorities . . . ."[26] In the final analysis, however, and notwithstanding his dignitary concerns, Judge Alito sided with the government in *Leveto* and ruled that government actors were immune from civil liability per the qualified immunity doctrine.[27] Government power proved to be the dominant value in the end.

Leveto is important in its contrast to *Groody*. Judge Alito's concern with the "indignity" of a pat down search in *Leveto* was nowhere to be found in *Groody*. He was scarcely bothered by "indignity" or "stigma" in *Groody* where a ten-year-old girl was strip searched, but deeply concerned with the "indignity" of a wealthy business owner being "forced [to] ride with IRS agents to his home and back to his office."[28] Compared to the one clause Judge Alito committed to dignitary concerns with the strip search in

Groody, he devotes more than four pages of text to the content and scope of the Fourth Amendment violation in *Leveto*. In fact, in no other opinion authored by Judge Alito did he give even a modest fraction of attention to Fourth Amendment dignity concerns as he did in *Leveto*. All of his other Fourth Amendment opinions rather mechanically marshal decisional law, with no comment on the degree of invasiveness of the search. This contrast raises serious class concerns; that is, one is forced to wonder whether Judge Alito has a more robust appreciation for the dignity and autonomy of the wealthy, or the class of individuals typically charged with crimes like tax fraud, than for the rest of America.

Judge Alito's opinions dealing with video surveillance also demonstrate an inadequate concern for the dignity and privacy values embodied in the Fourth Amendment. Justice Joseph Story reminds us that the Fourth Amendment's "plain object is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion."[29] Judge Alito's opinion in *United States v. Lee*[30] provides an example of how he values privacy concerns. In *Lee*, the FBI, without a warrant, secreted a video camera in Mr. Lee's hotel room with the permission of an informant who rented the room for Mr. Lee's benefit. The camera was in place and operable twenty-four hours a day. Judge Alito rejected Fourth Amendment privacy arguments and discounted any potential for the government abusing the video surveillance by recording bedroom or bathroom activities, or any other private conduct outside the scope of the investigation.

Lawyers for Mr. Lee argued that the police conduct in this case ran afoul of Fourth Amendment norms because (1) Mr. Lee had a heightened expectation of privacy

in a hotel room; (2) the video equipment remained operable even when the cooperating witness was not present; and, (3) video is inherently more intrusive than audio and, thus, required greater justification. Mr. Lee primarily relied on a First Circuit precedent which recognized that by allowing the government to keep operable video equipment in a hotel room around the clock, courts created a perverse incentive for police to permanently bug a hotel room with the "hope that some usable conversations with agents would occur."[31] More generally, Mr. Lee maintained that the court should create a "prophylactic rule designed to stamp out a law enforcement technique" that presents an "unacceptable risk of abuse."[32]

As is typical with all of his Fourth Amendment opinions (with the exception of *Leveto*) Judge Alito expressed very little concern with the potential of the government recording the innocent, but intensely personal activities, of a suspect. He summarily dismissed such concerns, by saying: "Nor is it intuitively obvious that there is much risk of such abuse."[33] In his typical drafting style, Judge Alito, over a vigorous dissent, marshaled precedent and concluded that the risk of government abuse "is not great enough to justify" erecting a prophylactic safeguard.[34]

Other home search cases are similar in that Judge Alito, as a rule, appears not to give privacy concerns much consideration. In *Williams*, for instance, Judge Alito rejected arguments that video surveillance in a gambling case did not warrant "such an intrusive investigative technique."[35] In *United States v. Hodge*,[36] he reversed a district court's grant of a motion to suppress by finding that a search of an apartment was permissible despite no evidence of a nexus between the drug trade and Mr. Hodge's home.[37] Similarly, in *United States v. Zimmerman*,[38] Judge Alito dissented to the

majority's reversal of district court's denial of a motion to suppress with characteristically no discussion of the privacy issues at stake.[39] The point here, to reiterate, is not to suggest that any single one of Judge Alito's opinions falls radically outside accepted modes of legal reasoning. But, his corpus demonstrates a judicial philosophy that, in my view, improperly subordinates privacy, dignity, and autonomy concerns to the interests of the government.

Suppression of Evidence – Exceptions to the Exclusionary Rule

In Judge Alito's November 1985 Justice Department application, he commented on his "disagreement with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment."[40] Judge Alito's Fourth Amendment decisions clearly reflect a jurist who has held true to this view and is antagonistic to Warren Court decisions, preferring instead to allow illegally seized objects in evidence.

In the lone case where Judge Alito suppressed evidence, *United States v. Kithcart*,[41] he remanded the case to the district court with a virtual roadmap for it to salvage the conviction at the re-hearing. In short, Judge Alito held that the officers in *Kithcart* did not have probable cause to arrest and search the suspect.[42] Nearly in the same breath, however, Judge Alito suggested that the district court analyze the case on remand under the less rigorous "reasonable and articulable suspicion" standard.[43]

Significantly, in the only other Fourth Amendment opinion authored by Judge Alito in which he sided with a defendant, the matter involved the seizure of $92,422.57; dignity concerns of the type present in *Groody* were of no moment. In *United States v. $92,422.57*,[44] Judge Alito, writing for the majority, vacated the forfeiture order of the

district court, and remanded the matter for further proceedings concerning the propriety of the seizure.[45]

Despite Judge Alito's expressed disavowal of Warren court criminal procedure, he has not mounted a frontal assault on the basic constitutional norms that define the Warren court. That is to say, his opinions do not explicitly question, say, the right not to be interviewed by police once a critical stage of the prosecution has commenced. But rather, Judge Alito diminishes the force of such well-know constitutional norms by employing exceptions to the exclusionary rule.

This tendency – and its effects – may be better understood by examining the distinction between "conduct rules" and "decision rules."[46] Conduct rules protect basic constitutional norms – the right to be free from unreasonable searches and seizure, for instance. They describe the scope of permissible conduct for law enforcement officials. Decision rules, on the other hand, are designed to determine the consequences of violating conduct rules. Using this vocabulary, many of Judge Alito's decisions may be understood in the following way. Even when he finds that police violated a conduct rule – say, the warrant requirement under the Fourth Amendment, he employs a decision rule – say, good faith exception – the result of which is that the government experiences no consequence for its misbehavior.

Thus, Judge Alito tends to side with the government in several cases by reliance on either the good faith exception or the qualified immunity doctrine. He relied on the good faith exception to the warrant requirement in the following cases: *Hodge*[47] (finding that even if there were no substantial basis for finding probable cause, the good faith exception applied), *Zimmerman*[48] (reasoning that even if the warrant was not supported

by fresh probable cause, the good faith exception would apply and the evidence would be admissible), and *United States v. $92,422.57*[49] (relying on the good faith exception to defeat arguments that the warrant failed to meet the particularity requirement). Judge Alito relied on the qualified immunity doctrine in *Leveto*[50] (finding significant Fourth Amendment violations, but reasoning that government officials were protected by the qualified immunity doctrine) and *Groody*[51] (arguing that even if warrant did not support the strip search of the little girl and mother, the qualified immunity doctrine foreclosed any civil relief).[52]

Thus, in nearly a third of his Fourth Amendment decisions, Judge Alito either directly relied, or argued reliance in the alternative, on exceptions to the exclusionary rule. The distinction between what I refer to as conduct rules and decision rules also helps to explain the real world consequences of such exceptions. The lay public is well aware of conduct rules – the constitutional norms that define the substance of individual liberties vis-à-vis claims of necessary government incursions. Indeed, public polling by a variety of groups indicates that Americans overestimate the quantum of rights that criminal defendants receive.[53] And the popular media reinforces this overestimation with apocalyptic stories of criminals bursting out of jail cells due to "technicalities." Notwithstanding some degree of public cynicism regarding the (grossly incorrect) impression that law breakers are avoiding punishment, citizens nonetheless are heartened by the knowledge that courts still honor the long-standing national commitments to respect civil and individual liberties.

Conduct rules – rules that articulate the substance and content of rights – allow the public to remain steadfast in the belief that a host of substantive civil liberty

protections exist. This belief, however, often represents the elevation of form over substance. With the ever-expanding list of exceptions to the exclusionary rule, the substantive rights that the Fourth Amendment protects may fairly be described as illusory. The exceptions swallow the rule. In fact, one legal academic commentator refers to modern Fourth Amendment jurisprudence as a "mess," and I find that to be an accurate assessment.[54] Many of Judge Alito's opinions illustrate how messy Fourth Amendment cases can be when exceptions to the exclusionary rule come into play. Take *Leveto* for instance. For all the passionate rhetoric about the indignity and stigma attached to the IRS agents' conduct, Judge Alito foreclosed any remedy at law by interposing a decision rule – the qualified immunity doctrine.

The insidious effect of undermining constitutional norms with decision rules is that the public, generally speaking, does not know decision rules. They are quite familiar with conduct rules, but decision rules often are hyper-technical and reserved for institutional actors. One scholar describes this phenomenon as "acoustic separation."[55] That is, the public hears one set of rules (conduct rules), but police and judges hear another set of rules (decision rules). One effect of this acoustic separation is that police officers have admitted under oath to purposely violating the constitutional rights of a suspect, because they knew that the consequence of the violation would not be detrimental to the prosecution.[56] The other, rather obvious, effect is that constitutional violations by government actors will vary directly with the number of exceptions to the exclusionary rule. The more exceptions, the less scrupulous government actors will be in respecting the constitutional rights of citizens accused of crimes.

The strong version of this acoustic separation theory argues that judges who disagree with the Warren court's criminal procedure intentionally undermine the norms put in place by that court in an indirect manner. Such a judge would never overrule, say, *Mapp v. Ohio*,[57] but will find or create so many exceptions to the basic principle as to render the principle devoid of content. The reluctance to explicitly objecting to the principle itself is knowledge of broad public reliance on enduring constitutional norms – even if most of the public never has occasion to invoke the protection of the Fourth, Fifth, or Sixth Amendments.

A weak version of this theory simply maintains that judges apply the law to particular factual scenarios. Decisions to announce an exception to the exclusionary rule are not motivated by a desire to undermine Warren court norms, but rather any such decision is made pursuant to a neutral application of the existing law. On this account, so-called acoustic separation may bring a functionalist critique to bear, but it does not speak to the motivation of individual jurists.

On either the strong or weak version of this theory, Judge Alito's propensity toward finding exceptions to the exclusionary rule when he finds or suspects substantive violations of constitutional protections merits discussion. The strong version suggests duplicity – and I neither make nor imply any claim whatsoever about this nominee. But, the weak version is problematic as well. The space between conduct rules and decision rules in the Fourth Amendment context is vast. Decision rules in the form of exceptions to the exclusionary rule work to eviscerate the rule. Citizens should not labor under the impression that they have shelter in a set of substantive protections, when such protections are mere forms. As an Associate Justice of the Supreme Court of the United

States, Judge Alito would be in a position to either undermine or enforce the long-standing constitutional norms put in place by the Warren court.

A fair area of inquiry for this nominee certainly includes the scope of his admitted "disagreement with the Warren Court decisions . . . in the area[] of criminal procedure."[58] Further, this Committee might consider questioning the nominee on how he would have decided – in very precise terms – the Warren court decisions with which he disagrees.[59]

Inconsistent Interpretive Principles

In various media, Judge Alito has been described as deliberate, impartial, faithful to precedent, and conservative.[60] Distilled to its essence, Judge Alito's judicial temperament has been characterized by his supporters as bound by positive law, notwithstanding his personal views or moral sensibilities. On my read of his record, Judge Alito, for the most part, is a careful jurist in the sense that he is decidedly deferential to settled law. He tends not to stray too far from controlling statutes or doctrine. However, when government power comes into conflict with the civil liberties of the accused, Judge Alito has a tendency to deploy more "creative" interpretive principles in his resolution of the matter before him. The creativity of which I speak is subtle and nuanced, but evident upon reading his entire constitutional criminal procedure record. It suggests that his jurisprudence shifts from being unambiguously textually bound to interpolating facts and inferences outside of the record into a statute or a warrant.

The best way to illustrate the foregoing claim is by example. In a standard Alito opinion, he relies heavily on the plain and ordinary meaning of words and the formal structure of statutory schema. Where a question is resolvable within the four corners of a

controlling document, case, or statute, Judge Alito tends to eschew looking elsewhere to resolve matters before him. In *Sandoval v. Reno*,[61] for example, the majority held that district courts continue to have habeas jurisdiction on deportation orders for crimes listed under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[62] and that the Antiterrorism and Effective Death Penalty Act (AEDPA),[63] which was passed during the pendency of Mr. Sandoval's case, did not preclude the discretionary relief he sought.[64] The majority reached its conclusion in nearly twenty pages of text as it wrestled with complicated questions of jurisdiction and the doctrine of repeal by implication. More broadly, the majority, through various interpretive devices, sought to determine the intent of the Congress – whether it intended to divest the court of jurisdiction – in adopting IIRIRA and AEDPA. The specific arguments adduced are not necessary to my point. But, suffice it to say, the majority found the question presented to be sufficiently complicated to merit significant attention and analysis.

Judge Alito dissented. And his dissent in *Sandoval* is illustrative of his standard approach to judging. In a mere two pages of text, Judge Alito found the resolution of the AEDPA question to be quite simple. Three times, in all capital letters, and in bold font, Judge Alito points out that the relevant section of AEDPA is entitled, "**ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS**."[65] In the main, this was enough for Judge Alito to conclude that AEDPA revoked the district court's jurisdiction, even though courts generally require extremely clear evidence of congressional intent to strip the federal court of jurisdiction. There was no need, in his view, to probe inconsistencies in the legislative structure to infer intent. To be sure, my purpose in using *Sandoval* is not to address the merits. Rather, I put forward the *Sandoval* case as a way to

demonstrate the standard manner in which Judge Alito approaches cases. The majority of his opinions in the constitutional criminal procedure arena are analyzed in this sort of plain-meaning fashion, not dissimilar to *Sandoval*.

In criminal cases in which a standard Alito analysis might jeopardize a conviction or other government interest, however, the nominee applies a different set of interpretive principles. He reaches deeper into his interpretive toolkit to pull out interpretive principles that result in the government prevailing in any given appeal. *United States v. Lake*[66] provides a good example of Judge Alito's shifting jurisprudence that results in consistently anti-liberal decisions. *Lake* regarded an appeal from a conviction in a criminal case. Specifically, Lake was convicted of carrying a firearm during and in relation to a crime of violence, to wit, carjacking.[67] The jury returned the firearm conviction even though it acquitted Lake on the underlying carjacking count in the indictment. Thus, Lake was convicted of using a gun during a carjacking that the jury decided he did not commit.[68] The major contention on appeal was that Lake could not properly be convicted of carrying a firearm during the commission of a carjacking when he was acquitted on the predicate offense.

The relevant facts in *Lake* follow.[69] The complaining witness was sitting on a beach in Little Magen's Bay, St. Thomas, Virgin Islands, reading a newspaper. Lake, not known to the complaining witness, approached him several times and asked to borrow his car. Predictably, the complaining witness demurred. Lake approached once more, pointed a firearm at the complainant, and demanded the keys. When the complainant protested that he did not have his keys, Lake turned to the complainant's friend who had arrived on the beach. They struggled, but after she saw the gun, the friend surrendered

the keys. Lake left the beach, walked up a "steep path bordered by vegetation and rocks" to the road, which could not "be seen from the beach."[70]

Judge Alito, over a forceful dissent, ruled that one could be convicted of using a firearm during a carjacking when the carjacking itself was not proved at trial.[71] At issue was whether Lake's conduct constituted carjacking, given that the car was not on the beach, but in a parking lot, up a hill, and out of sight of the owners. As the dissent sardonically put it, Lake may have a committed a "keyjacking," but not a "carjacking."[72] To be sure, the dissent would have upheld convictions for robbery and grand larceny, but considered carjacking to be an expansive and incorrect read of the relevant statutory authority.[73]

Judge Alito analyzed the carjacking statute, 18 U.S.C. § 2119, in a remarkably broad fashion. For criminal liability to attach under 18 U.S.C. § 2119, the government must prove, among other things, that car must have been taken "from the person or presence of another." The focus of the dispute in *Lake* turned on whether Lake took the car (as opposed to the car keys) "from the person or presence" of someone. Clearly, the car was not taken from the "person" of the complainant, but what about the "presence"? The dissent decided this issue in a narrow, restrained way, insisting that some reasonable special proximity must define "presence." The car was "in city terms, a block away, up the hill, [and] out of sight."[74] Chief Judge Becker, writing the dissent, reasoned, "[a]t all events, my polestar is the plain meaning of words, and in my lexicon, [the] car cannot fairly be said to have been taken from her person or presence . . . ."[75]

Judge Alito, using a much more expansive lexicon, found that a car parked a block away from the complaining witnesses was in the complainant's presence. To arrive

at this conclusion, Judge Alito quotes from a Ninth Circuit car *robbery* opinion for the proposition that "property is in the presence of a person if it is 'so within his reach, inspection, observation or control, that he could if not overcome by violence or prevented by fear, retain his possession of it.'" On this basis, Judge Alito ruled that the victim was prevented from retaining possession of the car by following Lake up the hill to the parking area due to fear of the gun. This is a different form of argument than that which Judge Alito applied in *Sandoval*. There, he relied on ordinary meaning and plain language to construe the federal statute at issue. In *Lake*, he uses a Ninth Circuit opinion in a robbery – not even carjacking – case to construe an out-of-sight automobile as within the presence of the victim. A *Sandoval*-type jurisprudence would have led Judge Alito to agree with the dissent that Lake's crimes were grand larceny and robbery – *that* conclusion would have shown the sort of judicial restraint that Judge Alito's supporters tout. Instead, Judge Alito stretched the definition of "presence" beyond any rational and common sense understanding of the word. (And the irony of Judge Alito relying on a Ninth Circuit opinion to affirm a conviction should not be lost on this Committee.).

Other Fourth Amendment cases demonstrate what I have termed inconsistent interpretive principles. In *United States v. Hodge*,[76] a search warrant case, for example, Judge Alito had to pile inference upon inference to conclude that the facts made out probable cause. In *Stiver v. United States*,[77] Judge Alito – rather than restraining himself to the four corners of the warrant – cited two dictionaries for the proposition that a telephone could be defined as drug paraphernalia.[78] In *United States v. Bell*,[79] he made several, uncharacteristic inferential leaps to rule that federal criminal liability attached to what, on the face of the record, appeared to be a homicide motivated by a state court

prosecution. In *United States v. Zimmerman*,[80] Judge Alito, once again, uncharacteristically piled inference upon inference to salvage evidence collected in a child pornography case.

Judge Alito's jurisprudence is usually predictable in that he typically employs fairly limited principles of interpretation in deciding cases. This is true in the criminal context, except where the government's interests are in jeopardy. From his record, it appears that government power is a dominant norm in Judge Alito's thinking – so much so that he selectively applies interpretive principles in criminal cases. I do not mean to question the resolution in any particular decision that I cite (although I am in clear disagreement with some). My limited aim is to show that, when criminal convictions are threatened on appeal, this nominee engages in the very sort of expansive interpretive enterprise that he criticizes in other contexts. In his 1985 Justice Department application, Judge Alito praised "judicial restraint" in the mode of the Alexander Bickel, former Sterling Professor of Law at the Yale Law School. In criminal cases, the nominee proves not to be restrained when validating the exercise of government authority. This begins to look like a results-driven jurisprudence, which should give the committee cause for concern.

Conclusion

We are living in an historical moment where the Executive is making extraordinary claims of its authority to conduct investigations of U.S. citizens. The bourgeoning controversy around allegations of domestic spying without prior judicial authorization is only the most recent.[81] The Executive's claim that it can detain citizens without judicial process or assistance of counsel is another.[82] Finally, the ongoing debate

over whether and for how long to extend certain provisions of the Patriot Act[83] represents yet another significant claim of governmental investigatory authority.[84] The delicate balance between liberty and safety that the Framers fought so hard to erect and their successor generations fought so hard to maintain needs our continued vigilance to sustain.

In the United States, perhaps no right is regarded as more sacred – more worthy of vigilant protection – than the right of each and every individual to be free from government interference without the "unquestionable" authority of the law.[85] Judge Alito, on my read of his constitutional criminal procedure opinions, shows an inadequate consideration for the important values that underwrite these norms of individual liberty – the very norms upon which this constitutional democracy relies for its sustenance. This Committee and this Senate's decision on whether to consent to Judge Alito's nomination will profoundly impact how liberty is realized in the United States. The Constitution commits this task to your sound discretion.[86] Thank you for the opportunity to testify, and I look forward to answering any questions the Committee may have.

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[1] I include cases in which privacy interests, broadly construed, are implicated, even if the case is not, in a formal sense, resolved on Fourth Amendment grounds. This statement is limited to cases in which Judge Alito authored an opinion, not cases in which he joined. In my view, the former class of opinions better predicts how Judge Alito will analyze cases as an Associate Justice of the Supreme Court.

[2] *See United States v. Kithcart*, 134 F.3d 529 (1998).

[3] *See United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d 137 (3d Cir. 2002).

[4] *See The Alito Opinions: A Report of the Alito Project at the Yale Law School* 36 (2005), *available at* http://www.law.yale.edu/outside/html/Public_Affairs/685/YLS%20Alito%20Project%20Final%20Report.pdf.

[5] In each of the Fourth Amendment cases in which Judge Alito participated where judges of the Third Circuit disagreed about the scope of citizens' rights, Judge Alito sided with the government. *See* Robert Gordon, *Alito or Scalito? If You're a Liberal, You'd Prefer Scalia*, Slate, Nov. 1, 2005, www.slate.com/id/2129107.

[6] Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 820 (1994).

[7] *Jones v. United States*, 362 U.S. 257, 273 (1960) (Douglas, J., dissenting).

[8] *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

[9] *Byars v. United States*, 273 U.S. 28, 32 (1927) (citing *Boyd v. United States,* 116 U.S. 616, 635 (1886)).

[10] *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[11] *See The Alito Opinions*, *supra* note 4, at 2.

[12] *United States v. Williams*, 124 F.3d 411 (3d Cir. 1997).

[13] *Id.* at 417 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)) (emphasis added).

[14] *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979).

[15] *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004).

[16] For more detail regarding the warrant, see *id.* at 244 and *infra* text accompanying note 20.

[17] *Groody,* 361 F.3d at 237. The searches of the girl and her mother were conducted by a female officer. *Id.* at 236-37 (noting that the Task Force enlisted the help of a female traffic meter patrol officer).

[18] *Id.*

[19] *Id.*

[20] *Id.* at 244.

[21] *Id.* at 249 ("I share the majority's visceral dislike of the intrusive search of John Doe's young daughter, but it is a sad fact that drug dealers sometimes use children to carry out their business and to avoid prosecution.").

[22] 258 F.3d 156 (3d Cir. 2001).

[23] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[24] *Leveto*, 258 F.3d at 163 (quoting *Terry v. Ohio*, 392 U.S. 1, 17 (1968)).

[25] *Id.* at 167.

[26] *Id.* at 169.

[27] *Id.* at 175.

[28] *Id.*

[29] 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1893, at 747 (Fred B. Rothman Publications, 2d prtg. 1999) (1833).

[30] 359 F.3d 194 (3d Cir. 2004).

[31] *Id.* at 201 (quoting *United States v. Padilla*, 520 F.2d 526, 528 (1st Cir. 1975)). Judge Alito rejected this First Circuit decision in favor of Second and Eleventh Circuit opinions to the contrary. *Id.* (arguing that the Second and Eleventh Circuit opinions reflect a "well-established principle" that should govern the present case).

[32] *Id.* at 202.

[33] *Id.*

[34] *Id.* at 203.

[35] *United States v. Williams,* 124 F.3d 411, 416 (3d Cir. 1997).

[36] *United States v. Hodge*, 246 F.3d 301, 310 (3d Cir. 2001).

[37] I will have more to say about *Hodge* at notes 76-80, *infra*, and accompanying text.

[38] *United States v. Zimmerman,* 277 F.3d 426, 438-41 (3d Cir. 2002) (Alito, J. dissenting).

[39] For a more detailed analysis of *Zimmerman*, see text accompanying notes 48 and 85, *infra*.

[40] Application for Deputy Assistant Attorney General, to Mark Sullivan, PPO Associate Director, (Nov. 18, 1985), *available at* http://www.law.com/pdf/dc/alitoDOJ.pdf.

[41] *United States v. Kithcart,* 134 F.3d 529 (3d Cir. 1998).

[42] *Id.* at 531.

[43] *Id.* at 532.

[44] *See United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d 137 (3d Cir. 2002).

[45] *Id.* At issue was the seizure of all Chinese language documents during the execution of the warrant. The agents testified that they did not have a translator and, thus, needed to seize all the Chinese language documents in order to have them translated. Judge Alito ruled that "gaps" in the trial court record preclude the majority from determining whether the seizure was reasonable. *Id.* at 154-55.

[46] *See* Carol Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466 (1994). Professor Steiker adapts a vocabulary introduced by Professor Meir Dan-Cohen to constitutional criminal procedure. For Steiker, and different from Dan-Cohen, conduct rules define constitutional norms and decisions rules define the consequences of running afoul of such norms. *Id.* at 2469-70; *cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separaton in Criminal Law*, 97 Harv. L. Rev. 625, 626 (1984).

[47] *United States v. Hodge*, 246 F.3d 301 (3d Cir. 2001).

[48] *United States v. Zimmerman,* 277 F.3d 426, 438 (3d. Cir. 2002) (Alito, J., dissenting).

[49] *United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d 137 (3d Cir. 2002).

[50] *Leveto v. Lapina*, 258 F.3d 156 (3d Cir. 2001).

[51] *Doe v. Groody*, 361 F.3d 232, 244 (3d Cir. 2004) (Alito, J., dissenting).

[52] Judge Alito's criminal procedure jurisprudence outside of the Fourth Amendment context yields similar results. *See, e.g., Brosius v. Warden*, 278 F.3d 239 (3d Cir. 2002) (harmless error); *Elkin v. Fauver*, 969 F.2d 48 (3d Cir. 1992) (same).

[53] *See* Steiker, *supra* note 46, at 2549.

[54] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 759 (1994).

[55] *See* Steiker, *supra* note 46 at 2470-71. Here again, I use the term "acoustic separation" in the way Professor Steiker adapted it.

[56] *Id.* at 2546. A District of Columbia police officer testified at a motion on a hearing to suppress that he purposely violated the rule articulated in *Massiah v. United States*, 377 U.S. 201 (1964), because the officer knew that the prosecutor could use the illegally obtained statement for impeachment purposes. On the ground, this gambit had the effect of "locking in" the defendant, so that he could not later testify in a way that is consistent with the ensuing discovery. See *Simpson v. United States*, 632 A.2d 374 (D.C. 1993), for more detail on this case.

[57] 367 U.S. 643 (1961).

[58] Application for Deputy Assistant Attorney General, *supra* note 40.

[59] *See* Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, Yale L.J. (The Pocket Part), Jan. 2006, http://www.thepocketpart.org/2006/01/post_and_siegel.html. Professors Post and Siegel argue that Senators appropriately mediate between the competing norms of judicial independence and democratic legitimacy by asking nominees to describe how they would have decided cases that the Supreme Court has already decided.

[60] *See, e.g.*, Peter Baker, Alito Nomination Sets Stage for Ideological Battle, The Washington Post, November 1, 2005, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103100180.html.

[61] 166 F.3d 225 (3d Cir. 1999).

[62] Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[63] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[64] *Sandoval*, 166 F.3d at 231.

[65] *Id.* at 242-43 (Alito, J., dissenting).

[66] *United States v. Lake*, 150 F.3d 269 (3d Cir. 1998).

[67] *See* 18 U.S.C. § 924(c)(1) (2000).

[68] *Lake*, 150 F.3d at 271.

[69] See *id.* at 270-71 for a description of the facts.

[70] *Id.* at 270.

[71] *Id.* at 274-75.

[72] *Id.* at 275.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] 246 F.3d 301 (3d Cir. 2001).

[77] 9 F.3d 298 (3d Cir. 1993).

[78] *Id.* at 303.

[79] 113 F.3d 1345, 1348-50, 1352 (3d Cir. 1997).

[80] 277 F.3d 426, 438-41 (3d Cir. 2002) (Alito, J., dissenting).

[81] *See* Memorandum from Congressional Research Service on Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information (Jan. 5, 2006), *available at* http://www.fas.org/sgp/crs/intel/m010506.pdf; *see also* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

[82] *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004); *see also* Hanft v. Padilla, --- S. Ct. ----, 2006 WL 14310, 2006 U.S. LEXIS 1 (Jan. 4, 2006) (mem.).

[83] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[84] *See* Sheryl Gay Stolberg, *Postponing Debate, Congress Extends Terror Law 5 Weeks*, N.Y. Times, Dec. 23, 2005, at A1; Sheryl Gay Stolberg & Eric Lichtblau, *Senators Thwart Bush Bid to Renew Law on Terrorism*, N.Y. Times, Dec. 17, 2005, at A1.

[85] *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

[86] U.S. Const. art. II, § 2.

Abortion linked to mental problems

By Julie Robotham Medical Editor
January 3, 2006

HAVING an abortion as a young woman raises the risk of developing later mental health problems - including depression, anxiety and drug and alcohol abuse - according to the most detailed long-term study to date into the divisive question.

The results could undermine the legal basis for access to abortion in jurisdictions, including NSW, in which termination is legal only if continuing the pregnancy would threaten the woman's physical or mental health, said David Fergusson, the leader of the New Zealand study.

The findings tipped the balance of scientific evidence towards the conclusion that abortion increased psychological distress rather than alleviating it, said Professor Fergusson, who supports unrestricted access to abortion and describes himself as "an atheist, a rationalist and pro-choice". That could make it more difficult for doctors to claim they were performing an abortion on health grounds, he said.

"There'll be cheering for our results on the pro-life side and denouncing us angrily on the pro-choice side," said Professor Fergusson, a psychologist and epidemiologist at the Christchurch School of Medicine and Health Sciences. "Neither of those positions is sound."

He said the study was conducted to address the dearth of reliable evidence on the mental health effects of abortion. "The issue is not a trivial one," he said.

"Abortion is the most common medical or surgical procedure young women undergo by far [and] there are potential adverse reactions. The aim of our research was never political. It was to say, 'The science in this area is not good. Let's add to it'."

The findings come from the Christchurch Health and Development Study of 1265 children tracked since birth in the 1970s. The researchers found 41 per cent of the more than 500 women remaining in the cohort had become pregnant by age 25 and 14.6 per cent had sought an abortion. In total, 90 pregnancies were terminated.

At age 25, 42 per cent of those who had had an abortion had also experienced major depression at some stage during the previous four years - nearly double the rate of those who had never been pregnant and 35 per cent higher than those who had chosen to continue a pregnancy.

The risk of anxiety disorders was raised by a similar degree, while the women who had had at least one abortion were twice as likely to drink alcohol at dangerous levels compared with those who had not terminated their pregnancies, and three times as likely to be dependent on illicit drugs. The study was published this week in the *Journal of Child Psychiatry and Psychology*.

Professor Fergusson said the results had surprised him, but they were statistically strong. Separate analysis had confirmed the mental health problems followed abortion - not the other way round.

The study, funded mainly by the New Zealand Government, had assessed the young women's mental health regularly through adolescence, and had also considered their family and educational circumstances.

It was plausible that abortion might trigger mental illness, he said, because it could be a traumatic life event and involve loss - both of which are linked to increased psychological problems.

Edith Weisberg, the research director of FPA Health, formerly Family Planning NSW, said the research was disturbing and important, but it also had limitations. Some women might not have mentioned their abortions, the effects might be different for older women, and the study had not explored why the women had terminated their pregnancies or their attitudes to abortion, she said. "The reason they had the abortion may be more of a problem than the abortion itself," she said.

THE NUMBERS

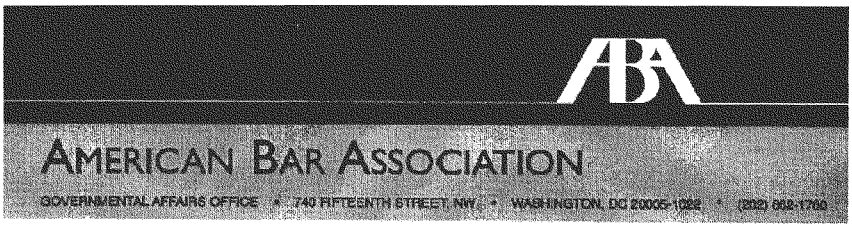
- Annual abortion rate - 80,000-90,000.

- 62 per cent of people surveyed by Southern Cross Bioethics Institute support abortion on demand; 87 per cent want abortion rate cut.

- The Federal Parliament will consider whether to remove a ban on abortion pill RU486.

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STATEMENT

OF

STEPHEN L. TOBER

STANDING COMMITTEE ON FEDERAL JUDICIARY
AMERICAN BAR ASSOCIATION

concerning the

NOMINATION OF

THE HONORABLE SAMUEL A. ALITO, JR.

to be an

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

JANUARY 12, 2005

Mr. Chairman and Members of the Committee:

My name is Stephen L. Tober of Portsmouth, NH, and it is my privilege to chair the American Bar Association Standing Committee on Federal Judiciary. I am joined by Marna S. Tucker of Washington, our DC Circuit representative, and by John Payton, also of Washington, our Federal Circuit representative.

For well over 50 years, the ABA Standing Committee has provided a unique and comprehensive examination of the professional qualifications of candidates for the Federal bench. In fact, we have performed that very service, and have provided our ratings to this Committee, since 1948. It is composed of fifteen distinguished lawyers who represent every judicial circuit in the United States. These individuals, who volunteer hundreds of hours of public service annually, conduct a thorough, non-partisan, non-ideological peer review, using long-established standards that measure a nominee's integrity, professional competence, and judicial temperament.

The Standing Committee's investigation of a nominee for the United States Supreme Court is based upon the premise that such an individual must possess exceptional professional qualifications. The significance, range, and complexity of issues that such a nominee will confront on that Court demands no less. As such, our investigation of a Supreme Court nominee is more extensive, and procedurally different in two principal ways.

First, all circuit members on the Standing Committee reach out to a wide range of individuals within their respective circuits, who are most likely to have information regarding the nominee's professional qualifications.

Second, reading groups of scholars and distinguished practitioners are formed, to review the nominee's legal writings and advise the Standing Committee. The reading groups are guided by the same standards that are applied by the Standing Committee, and assist in evaluating the nominee's analytical skills, knowledge of the law, application of the facts to the law, and the ability to communicate effectively.

In the case of Judge Alito, circuit members combined to contact well over 2000 individuals across the nation. These contacts cut across virtually every demographic consideration, and it included judges, lawyers, legal scholars, bar leaders, opposing counsel, co-counsel, colleagues, and members of the general community. Thereafter, circuit members interviewed more than 300 people who knew, had worked with, or had substantial knowledge of the nominee. All interviews regarding the nominee were, in conformity with long-established practice, fully confidential to assure the most candid of assessments.

Judge Alito has created a substantial written record over his years of public service. Three reading groups—two from academia and one from the profession—worked collaboratively to read and evaluate nearly 350 of his published opinions, several dozen unpublished opinions, a number of his Supreme Court oral argument transcripts and corresponding briefs, and other articles and legal memos. The academic reading groups were composed of distinguished faculty from the Syracuse University College of Law, and from the Georgetown University Law Center. The practitioners' group was composed of nationally recognized practicing lawyers intimately familiar with the demands of appellate practice at the highest level.

Further, as part of any investigation performed by the Standing Committee, a personal interview is also conducted with the nominee. Judge Alito met with the three of us present today on December 12th, and provided us with a full opportunity to review matters with him in detail.

After the comprehensive investigation is completed, the findings are assembled into a detailed, confidential report. Each member of the Standing Committee reviews that final report thoroughly and individually evaluates the nominee using three rating categories: "Well Qualified," "Qualified," and "Not Qualified." Needless to say, to merit an evaluation of "Well Qualified," the nominee must possess professional qualifications and achievements of the highest standing.

Questions were raised during our investigation regarding the nominee's recusal practices, and also concerning some aspects of his judicial temperament. We have carefully reviewed and resolved those concerns to our satisfaction, as detailed in our accompanying correspondence to your Committee, which we ask to be made part of this record. We are persuaded by what Judge Alito has demonstrated in the totality of fifteen years of public service on the Federal bench. He has, during that time, established a record of both proper judicial conduct and practical application in seeking to do what is fundamentally fair.

On the basis of its comprehensive investigation, and with one recusal by our Third Circuit representative,[1] the Standing Committee has unanimously concluded that Judge Alito is "Well Qualified" to serve as Associate Justice on the United States Supreme

[1] Roberta D. Liebenberg, the Third Circuit representative who would normally have been the lead investigator, recused herself from the outset of this nomination under established Standing Committee practice, since she is counsel in a matter previously heard by a panel that included Judge Alito. That matter

Court. His integrity, professional competence, and judicial temperament are indeed found to be of the highest standing.

Judge Alito is an individual who, we believe, sees majesty in the law, respects it, and remains a dedicated student of it to this day.

Mr. Chairman, let me say once again what we noted here back in September: the goal of the ABA Standing Committee has always been—and remains—in concert with the goal of your Committee: to assure a qualified and independent judiciary for the American people.

Thank you for the opportunity to present these remarks.

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was argued prior to the announcement of his nomination, and the decision is still pending. John Payton shared responsibility for the Third Circuit investigation with Marna Tucker.

PREPARED STATEMENT OF LAURENCE H. TRIBE
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF SAMUEL ALITO
TO BE AN ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT

January 12, 2006

My name is Laurence Tribe. I am the Carl M. Loeb University Professor and Professor of Constitutional Law at Harvard, where I have taught since completing my clerkship with Justice Potter Stewart in 1968. I have written a number of widely cited books and articles dealing with the U.S. Constitution and its interpretation, with the role of the U.S. Supreme Court, and with the Senate's role in the confirmation process. I have received a number of honorary degrees and teaching and other awards and have been elected a Fellow of the American Academy of Arts and Sciences.

I have tried to develop a practical as well as theoretical appreciation of the legal process through involvement in the work both of courts and of legislatures. On the judicial side, I have argued approximately 50 appellate cases in the state and federal courts, roughly six-tenths of them successfully (and more than half of them pro bono), including 33 cases in the United States Supreme Court. On the legislative side, I have been able to accept 42 of the approximately 90 invitations I have received from congressional committees, including this Committee, to testify as a constitutional expert.

I have agreed only twice to testify on the confirmation of a Supreme Court Justice,[1] and it is a great honor for me to do so again today.[2]

The fact that this Committee's rules require that my prepared statement be submitted by this evening, in all likelihood before the questioning of the nominee will have begun, of course requires most of what I say here to be tentative and accompanied with the usual caveats. That said, the nominee's testimony will have to be understood and its implications evaluated not as though it were burned onto a blank CD to be evaluated on its own, but against an extensive backdrop of information about the nominee's constitutional views — a backdrop of extraordinary depth and detail. In contrast to the situation with a "stealth" nominee who has a mostly blank public record with respect to the Constitution and its application, all of us have had an opportunity to learn a great deal about this nominee's approach to constitutional issues.

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[1] Just over 18 years ago (Dec. 12, 1997), I testified in favor of President Reagan's nomination of Anthony Kennedy to be a Supreme Court Justice, to the unconcealed consternation of many of my liberal friends. I was especially glad to be able to testify on then-Judge Kennedy's behalf because, several months earlier (Sept. 22, 1987), I had reached the reluctant conclusion that moving the Court's composite view of the law toward the judicial philosophy of Judge Robert Bork, who had been President Reagan's first choice for the seat vacated by Justice Lewis Powell, would jeopardize what I thought were profoundly important constitutional principles —principles neither "conservative" nor "liberal" in slant but genuinely constitutive of our character as a republic.

[2] Although I did not testify on either occasion, I did publicly support the nominations of Justice Sandra Day O'Connor by President Reagan and of Chief Justice John Roberts by President Bush. As evidence of open-mindedness toward Republican nominees, my support of Roberts may prove relatively little: he was a student in my introductory constitutional law course in the fall of 1977, and the pleasure of seeing one's former student rise so far can't be entirely ruled out as a contributing motive.

Little purpose would be served by my detailing, and describing the likely implications of, each one of the many illuminating documents we have all seen or at least heard discussed — including:

- briefs and legal memoranda that, either contemporaneously or within several years of their submission, the nominee boldly endorsed as not simply reflecting the views of a client or of a superior, but as expressing *long and deeply-held views of his own;*

- the transcript of remarks by the nominee in 1989 praising Justice Scalia's dissent in ***Morrison v. Olson***, the independent counsel case, in a speech delivered to the Federalist Society not long before the nominee became a judge on the Third Circuit, and the transcript of more extended remarks by the nominee in 2000 explaining the grounds of his agreement with the Scalia version of the "unitary executive" theory that the Court had rejected in ***Morrison***, in another speech to the Federalist Society, this one delivered when he was already a judge on the Third Circuit (ten days, as it happened, after George W. Bush had declared victory in the presidential election against Al Gore, and just under a month before the Supreme Court finally ruled 5-4 in favor of then Governor Bush); and

- a refreshingly candid set of answers to questions put to the nominee in a federal job application that closed with the reminder that deliberate misstatements are federal felonies (18 U.S.C. § 1001)

The implications of what we know on the basis of this material remain to be explored. But implications ***for what***? For the probability that, because it was the opportunity someday to dismantle the Warren Court's reapportionment and criminal justice revolutions that motivated Samuel Alito to go to law school, he will one day vote to overturn the principle of "one person, one vote"[3] or the holding that any criminal defendant too poor to afford an attorney must be assigned trial counsel at public expense?[4] Of course not. The professional and cultural constraints within which judges operate put some things altogether beyond the pale even if they had once been lively topics of discourse. But unless there is a credible account of some transformation the nominee underwent since the early 1970s that would give him a fundamentally different perspective, it would be a fair conclusion that a Justice Alito would react to the 21st century analogue of those 1960s precedents in a spirit parallel to the one that inspired him to enter the law. And any such account would have to recognize the nominee's decision in November 1985 to feature his disagreement with those Warren Court precedents, however deeply embedded by that time in the American culture, in his application to become Deputy Assistant Attorney General in the Meese Justice Department.

[3] See Reynolds v. Sims, 377 U.S. 533 (1964).
[4] See Gideon v. Wainwright, 372 U.S. 335 (1963).

Are we to pursue the implications of Samuel Alito's 1985 statement, in that job application when he was, after all, no callow youth but Assistant to the Solicitor General, that "the Constitution does not protect a right to an abortion" for the probability that he will at some point provide a fifth vote to overturn ***Roe v. Wade***[5]? Such a holding, which could well trigger a political firestorm, would in a single blow replace **Planned Parenthood of Pennsylvania v. Casey**[6], the current iteration of **Roe,** with a rule that, thenceforth, every state legislature as well as Congress, each acting within the bounds of its reserved or enumerated powers, would be free to decide for itself when, in the course of fetal development from conception to delivery, a fetus should be recognized by law as a ***human being*** whose interest in survival trumps the "liberty" of the woman to end her pregnancy.[7] I think we can say with confidence that that's *not* going to be the way a woman's reproductive freedom will be cut back and the interests of the unborn upgraded.

Realistically, the fearsome prospect for those who champion choice, and the hopeful prospect for those who would rule out the choice of abortion, is that ***Roe v. Wade*** will die not with a bang but a whimper, its essence eroded step by relatively inconspicuous step. And no-one who has read Judge Alito's statements on the subject can have any real doubt about the approach he would follow. There is no reason to anticipate that his approach would reflect anything other than his carefully considered 1985 statement that, in his view, the Constitution simply does not protect a woman's right

[5] 410 U.S. 113 (1973).
[6] 505 U.S. 833 (1992).
[7] If Roe and Casey were overruled on the basis that a woman's interest in determining for herself whether to carry a pregnancy to term may be overcome not only by a state interest in protecting a "person" but by *any* state interest that is not otherwise impermissible and that is rationally advanced by the state's challenged rule.

to terminate her pregnancy rather than giving birth to a child, but that the best way to achieve the long-term goal of permitting government to end abortion altogether[8] is to be patient and to proceed with lawyerly care, even when one's colleagues and superiors in the Justice Department insist on asking the Court to overturn ***Roe*** all at once.

If the only question each Senator had to decide was whether Judge Alito is, to quote an op-ed that my colleague Charles Fried wrote very recently, "not a lawless zealot but a careful lawyer with the professionalism to give legally sound but unwelcome advice,"[9] then *of course* Judge Alito would pass with flying colors. For of course Samuel Alito is no "lawless zealot," no results-driven ideologue who cares only about the outcome of a case and not at all about the legal path that gets him there or about what precedent he is helping to establish. In Samuel Alito's role as a circuit court judge, it is no surprise that he has proceeded conscientiously and judiciously, listening politely to both sides and to the other judges serving with him on the panel and winning the admiration of those colleagues, some of whom are testifying as witnesses for his character, even as his starting premises and his thought processes bring him, with remarkable frequency, to the conclusion closest to the right end of the spectrum within the constraints of binding Supreme Court precedent..

When those constraints are lifted, as they would be if Judge Alito were to become Justice Alito, there is every reason to expect that he would live up to the expectations that

[8] There is an even more radical possibility — namely, that government *must* outlaw abortion, at least if it outlaws infanticide.
[9] The New York Times, January 3, 2006, at A19.

the President and the President's ideological base have for him. But even if we were to suspend disbelief and allow ourselves to imagine that relaxing the constraint of binding higher court precedent and the discipline imposed by that higher court's constant presence might somehow move the nominee away from some of his long-held positions, the question for each Senator is not just how professionally and capably the nominee would discharge his functions, but how big a risk the Senator is prepared to take with the Constitution — and to impose on his or her constituents — that what you see is what you get, and that the picture the nominee painted of himself when seeking a job in Ed Meese's Justice Department is the portrait that would one day hang in the halls of the Supreme Court.

The situation is very different, then, if each Senator must decide not only whether the nominee is "qualified" and has the requisite character and integrity, but also whether that Senator is willing to help effectuate, not hypothetically but in real life, Judge Alito's approach to the gradual erosion of a long-recognized liberty — an approach that bypasses the fanfare and drama of repeatedly testing the strength of the pro-choice forces by running a battering ram ,against their leading precedent but that seems much more likely to succeed in the long run. And for any given Senator, the answer to this more profound question will necessarily depend on that Senator's views about what the constitutional status of the fetus should be; what weight to attach to the circumstance that compelling a woman to remain pregnant against her will, even if the fetus were deemed a person, entails an extraordinary (and, in American law, probably unique) bodily imposition — one that commandeers the woman's body only for the limited duration of her pregnancy

but her mental and emotional life permanently; how to deal with the father's interest in the unborn life he played a crucial role in creating; what to make of arguments, like many that are sprinkled throughout Judge Alito's judicial and other writings, that would freeze the scope and shape of constitutionally protected liberty into the mold defined by their historical status; whether it is enough to protect that earlier version of liberty from new and previously unimagined technological or other threats, or whether the Constitution's very *notions* of "liberty" and "equal protection" should be understood to evolve as well when global experience with assaults on human dignity is absorbed into the culture, and when social and political movements both here and abroad., and other bottom-up rather than top-down sources of change in what words mean and how they may be used, open our eyes to previously overlooked possibilities; whether the constitutional calculus affecting who has power to decide should take into account the religious character of many of the arguments advanced; and probably a lot else.

And the question is broader than the nominee's views of this *particular* constitutional right, important though that right is, and broader than the nominee's stepwise strategy for chipping away at that right. For Judge Alito's reasoning extends not only to reproductive liberty and equality but to the ideal of equal liberty against government incursion whenever the particular facet of liberty at issue is not specifically addressed in the Bill of Rights — unlike, for instance, the specifically enumerated freedoms of speech, press, peaceful assembly, petitioning the government, and exercising one's religious faith. Is the nominee's basic approach to the Constitution one that sees government power as presumptively legitimate everywhere except where islands of

refuge are carved out in so many words for the .individua — or is it instead an approach that sees government power over individuals as exceptional and ordinarily in need of justification, with the matter of what *counts* as a sufficient justification depending on the role of the individual right at issue in the system of rights and duties, private and public, that constitute the legal landscape. The first vision contemplates a sea of state power that covers the globe except when the constitutional text decrees otherwise in sufficiently specific terms to be readily enforceable. The second vision contemplates a sea of personal rights that equally circumnavigates the globe except when government is authorized to act against a particular right for a particular set of reasons.

Disputes about frozen embryos, stem cell research, therapeutic and reproductive cloning, the use of human genetic material in non-human animals in order to perform research said to be vital in acquiring disease-preventing strategies, the uses of artificial intelligence, wide-ranging electronic surveillance to protect the public from terrorist attack, and any number of other subjects of controversy may present constitutional problems in which the challenge is not merely to ponder the Constitution's language and the evidence of its meaning at the time of its adoption but to ask broader questions about the newly asserted right.

To those who object that deciding about such matters partakes of lawmaking, beyond the purview of a court, the answer is surely to draw a basic distinction between the policy choices involved in deciding which possibilities to pursue and at what cost, choices that are assuredly legislative in character, and the interpretive process of deciding

what constitutional rights, if any, various policy choices might endanger and thereby to define the boundaries within which policy choices will have to be made. And to people who think that making decisions about textually unspecified constitutional rights is beyond any court's purview because such decisions cannot take the form of objectively and dispassionately "finding" the governing law and then simply applying it, I think the answer is that courts at the apex of any judicial pyramid charged with the power to resolve disputes over the meaning of the system's legal regime to the resolution of live controversies must of necessity engage in this constructive process of *articulating* the law and not merely *finding* it, as though it were there to be discovered by those who look hard enough.

It is surprising to me how often the colloquies in a hearing like this one end up going around in circles about whether the nominee will just "find" the law or will actively seek to remake it in his own image. It's worth recalling that the subject of this hearing, Samuel Alito, certainly had no illusions about the degree to which adjudication, at least in the highest court of any given system, compels the judge to make choices that cannot be said to have been dictated by the relevant precedents and other legal materials. When just a Princeton undergraduate, Alito described as illusory the idea that a judge of a constitutional court can operate as a merely "disinterested finder of law," although he recognized that what he called "the myth of the judge as automaton" had yet to be as profoundly eroded elsewhere as it had in America. Id. [10]

[10] The comparison was with Italy in Alito's 138-page senior thesis, "An Introduction to the Italian Constitutional Court."

That's why it's not a cause for alarm that two different judges, each honest and capable and even distinguished, might come out differently in a complex constitutional controversy or, for that matter, that the court on which Samuel Alito hopes to sit often divides 5-4 on major questions — a fact of some significance in light of how often the decisive vote in these close divisions was cast by Justice Sandra Day O'Connor, whom Alito would replace.

It is customary to subdivide the Constitution's territory into one region dealing, with individual rights against various levels of government; a second region dealing with the vertical division of power between the central, or national, government and the individual states; and a third region dealing with the horizontal separation of powers among the three branches of the national government — the legislative, the executive, and the judicial. But the division of what is ultimately a single, multiply interconnected continent can be highly misleading. The checks and balances that are our system's genius indirectly secure the individual rights that are its reason for being. Restrictions on the power of Congress to protect those individual rights through the enforcement clauses of the Civil War amendments — restrictions more severe, in Judge Alito's Third Circuit jurisprudence, than even the Rehnquist Court was to approve a short time later (in the context of family leave) — may weaken Congress as an institution, at the same time that institutional arrangements of the sort that Judge Alito has either proposed or supported as devices for strengthening the presidency — such as the institution of the presidential signing statement designed, as explained in a draft memorandum of Feb.5, 1986, by Deputy Assistant Attorney General Alito (Office of Legal Counsel), to give the President

"the last word on questions of interpretation;" or the institution of absolute immunity for the Attorney General from liability for monetary damages for carrying out a program of warrantless domestic electronic eavesdropping in violation of the Foreign Intelligence Surveillance Act of 1978 ("FISA") and of "clearly established legal standards" thereunder, which Assistant to the Solicitor General Alito, in a memorandum to the Solicitor General dated June 12, 1984, endorsed (the immunity, not the illegal surveillance!)[11]but which he urged the Solicitor General not to press by seeking certiorari on any issue other than the appealability of the rejection of a claim of qualified immunity, reasoning that the government's chances of "persuading the Court to accept an absolute immunity argument would probably be improved in a case involving a less controversial official and a less controversial era."[12]

Just as the Senate and the public may be diverted from the real issues in a confirmation battle by using the fakeout or decoy in the form of a straw man with high symbolic salience — "will he vote to overrule **Roe ?"** —to deflect attention from its more likely gradual erosion, for instance, so another technique for obscuring what is potentially at stake is that built on the game of "divide and conquer," in which individual pieces of information about the nominee's approach are viewed in isolation from each other, with no attempt to ask whether connecting the dots might form a pattern, or might reveal a whole greater than the sum of its parts. Thus, of the Alito wiretap immunity memorandum, it will doubtless be said, despite the timeliness of the issue as the legality

[11] The quotations are taken from pp. 5 and 6 of the memorandum.
[12] Id. at 6. The case was Forsyth v. Kleindienst, No. 82-1812 (CA3, March 8, 1968). The Supreme Court ultimately rejected the claim of absolute immunity but held qualified immunity available. Mitchell v. Forsyth, 472 U.S. 511 (1985).

of the President's secret program of unchecked and warrantless surveillance comes under increasingly intense challenge, that Samuel Alito did, in the end, recommend *against* taking the immunity claim to the Supreme Court at that time and that, in any event, the absolute immunity position was standard stuff in the Solicitor General's Office of even the Carter Presidency under Solicitor General Wade McCree. And, of the Alito draft memorandum on presidential signing statements, it will presumably be said that the nominee was simply making the best arguments he could for what he plainly regarded as a rather far-out experiment — one that no-one could at the time have imagined blossoming into the potent and nearly ubiquitous tool it has recently become, particularly as a tool for asserting presidential prerogatives, with just 75 signing statements asserting some prerogative of the president having been issued from the Monroe administration to the Carter administration but with 247 such statements being issued by Presidents Carter and Reagan alone, typically to assert the prerogative of the president directly to supervise the "unitary executive branch," to impose a uniform presidential interpretation of each of a law's terms upon that "unitary executive branch" — the phrase has become such a favorite in the Bush presidency that the President has used it nearly 100 times since assuming office, frequently several times on the same page — and to resist the imposition by Congress of reporting and other duties on subordinate executive officials. Although the development obviously postdates Samuel Alito's association with the signing document as a simple idea, the President has more and more brazenly used the device essentially to undo in the Oval Office a complex compromise worked out between The White House, the House, the Senate, and the Joint Conferees. Precisely that occurred on December 30, 2005, when the President included a statement upon the signing of H.R.

2863, a D.O.D. supplemental appropriation to address hurricanes in the Gulf of Mexico and the Pandemic Influenza Act of 2006, Title X of which represented the Graham-Levin amendment to the McCain compromise on the matter of cruel and inhumane treatment of detainees. The signing statement said that the "executive branch shall construe Title X . . . of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks."

Obviously, one cannot treat Judge Alito as if he had engineered this dramatic rise in the use of the presidential signing statement or its potent fusion with the "unitary executive" idea carried by the current administration to a barely believable extreme, in a climate increasingly dominated by a presidential assertion that, for all practical purposes, in the open-ended war on terror, the President either is *above* the law, or the President *is* the law, at least in areas that the President deems to involve the conduct of foreign policy or a matter of national security. Because the subject of this hearing is Judge Alito, not the Bush presidency, this is not the place for a detailed exploration of how the present situation went as far as it did before anyone blew the whistle. Suffice it to recall Justice Jackson's sober reminder, concurring in the Steel Seizure case, that, "[w]ith all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law

be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be the last, not first, to give them up."[13]

Having said that, of course, Judge Alito cannot be held accountable for what the Bush administration has done with the "unitary executive" theory coupled with devices like the signing statement, it remains to note that the Office of Legal Counsel during the years 1986-90, with Samuel Alito as the Deputy Assistant Attorney General in that Office, was a hotbed of ideas all centered on the idea of enhancing the powers of the presidential office, acting through the President himself or at least under his strict hierarchical direction, both over the unruly and stubborn bureaucracy and over the military and foreign policy and national security initiatives of the administration. It was during that period, and from that office, that the Alito "signing statement" memorandum sprang. It was also at that time that the Office of Legal Counsel issued the innocuously named 1986 OLC "Timely Notification" opinion, THE PRESIDENT'S COMPLIANCE WITH THE "TIMELY NOTIFICATION" REQUIREMENT OF SECTION 501(b) OF THE NATIONAL SECURITY ACT, 10 Op. OLC 159 (1986). A statute requires the Executive to give prior notice of covert intelligence activities to eight members of Congress and post-conduct notice to the intelligence committees "in a timely fashion." President Reagan gave no prior notice of the Iran-Contra affair to anyone in Congress and delayed any post-conduct disclosure on a discretionary basis. The OLC opinion concluded that the statute was complied with. That was remarkable in itself, but far more remarkable was the lengthy accompanying report and its assertion (pp. 161-62) that

[13] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952)(Jackson, J., concurring).

Congress simply has no authority "in the area of foreign affairs" that does not "directly involve the exercise of legal authority over American citizens." Such a view would, among many other unthinkable consequences, make all immigration laws impermissible usurpations of Executive power. And the entire construct is but a horizontal slice, linking the Executive to the outside world, of a unified theory that in its vertical slice is the familiar "unitary executive" idea applied to hierarchical supervision. Samuel Alito was one of just three deputies in the OLC at the time, and it would be interesting to know what role he played in the writing or vetting of that memo.

Although the "unitary executive" theory's most enthusiastic and industrious exponents, Christopher Yoo and Steven Calabresi, have written a massive, four-part online article purporting to show that the central elements of the unitary executive idea either were present in every administration from that of George Washington to that of George W. Bush or were suppressed in an era when the President did not acquiesce in the resulting stripping of his powers, but for all practical purposes, as a rallying point and a rhetorical battle cry, the theory had its incubation period in the heady OLC days of 1986-90 and erupted to the surface in the solo dissent of Justice Scalia in ***Morrison v. Olson,***[14] which relied on a potpourri of text, structure, history, with a heavy dash of political theory and citation from the Massachusetts Constitution of 1780, to invoke a thesis that all executive functions, both those enumerated in Article II, Sections 2 and 3, and those residual or inherent powers that are intrinsically executive — itself a nebulous category whose provenance is dubious and whose existence is conjectural — must be performed

[14] 487 U.S. 654, 697 (1988).

by officials politically accountable to, and thus removable without cause by, the President[15]. It was the Scalia formulation and application of the theory, liberating the President from the specter of an independent check on self-dealing or corruption close to the President, that went to the home of the enemy, as it were, by applying the theory in the one quintessential circumstance in which there is a powerful functional reason for for creating a significant degree of independence from the President being investigated. If the theory trumps any and all power in Congress to structure investigations and prosecutions of the Executive Office of the President and the West Wing, then it trumps virtually everything even without the extravagant theory of the OLC Opinion stripping Congress of foreign affairs powers except with respect to U.S. citizens.

The climax of this story, as everyone will by now have figured out, is that it was this Scalia formulation of the unitary executive thesis then private citizen Samuel Alito described as a "brilliant but very lonely dissent"[16] that rightly, according to Mr. Alito, charged the impressionistic test formulated by Chief Justice Rehnquist for the majority with being "not analysis" but "ad hoc judgment." Nor did Alito become reconciled to the mushy majority opinion after becoming a judge. On the contrary, after winning appointment to the Third Circuit, Judge Alito spoke at a Federalist Society symposium on administrative law, which he said brought "back so many fond memories of [his] days in the Office of Legal Counsel, back in the 1980s." Reminiscing about the good old days, the judge said "We were strong prponents of the theory of the unitary executive, that all

[15] Sometimes the theory is thought to require also that the President be able to reach into every such executive agency and compel it to do what he deems wise, but that is not invariably a feaure of the theory.
[16] "Debate – After the Independent Counsel Decision: Is Separation of Powers Dead?"26 AM. CRIM. L. REV. 1667 (1989).

federal executive power is vested by the Constitution in the President."[17] The judge said that he "thought then, and I still think, that this theory best captures the meaning of the Constitution's text and structure."[18] Judge Alito then proceeds to draw a dramatically simplified sketch of the "three types of federal governmental power," asserting that there can be only those three because no others are mentioned and offering an account that, as far as I have been able to determine, has almost no roots either in the history of the founding or in the immediate post-ratification history or in the more recent history.[19] This isn't to say that the presidency has not grown vastly stronger in the years since the Cold War, with major consolidations of power in the administrations of George H.W. Bush, Bill Clinton, and now George W. Bush; it has. But the techniques of hierarchical consolidation, in the vacuum created by congressional silence as to an agency's independence, have involved a mix of bold presidential directives to the agency heads at the front end of an undertaking, requirements that the agencies perform and display the results of various cost/benefit analyses, direct fiscal pressures, and presidential statements "owning" the results of agency action. In her landmark study of the phenomenon, Dean Elena Kagan spells out these devices in great detail.[20] Combining the results of her research with those of the research done by Lessig and Sunstein, which reveals, among other things, that the very notions of "executive" and non-executive actions were different for the founding generation and that categories like "administration" had altogether meanings as well, it's hard not to conclude that the "unitary executive" theory

[17] Administrative Law & Regulation: Presidential Oversight and the Administrative State, reprinted in 2 ENGAGE 11, 12 (Nov. 2001). Although the publication is dated Nov. 2001,
[18] Id.
[19] For an elaborate and subtle study, see Lawrence Lessig and Cass Sunstein, "The President and the Administration," 94 COLUMB. L. REV. 1 (1994).
[20] "Presidential Administration," 114 HARV. L. REV. 2245 (2001).

is a gerry-rigged contraption cooked up with straightedge and scissors by people who had read the Constitution's text and certain canonical Fedderalist Papers but little else on the subject. That would certainly account for the repetitive use of the same few sources and phrases, such as Justice Scalia's statement that the clause vesting "the executive Power . . . in a President of the United States" "does not mean *some of* the executive power, but *all of* the executive power," 487 U.S. at 654 (dissenting opinion), and Judge Alito's statement to the Federalist Society in November 2000 that "the Pfresident has not just some executive power, but *the executive power* — the whole thing."[21] There follow the same (often patently fallacious) textual and structural arguments, the same failure to confront linguistic anomalies created by the theory, and the same invocation of the functional arguments about "energy," "accountability," and a reduction in "dissention," many of which actually address the framers' choice to have a singular rather than a plural presidency and not any question about congressional power under the Necessary and Proper Clause to structure the lines of authority within the bureaucracy or any question about the breadth of executive authority to act in the absence of statute in wartime or of executive authority to act in the face of statutory prohibition in wartime.

Not surprisingly, exactly the same set of arguments and slogans is deployed by Justice Thomas in his lone dissent in ***Hamdi v. Rumsfeld***,[22] arguing that the President needed no statutory authority to detain indefinitely those he determined to be enemy combatants in the war on terror and that any attempt by Congress to cut into that

[21] 2 ENGAGE at 12,
[22] 124 S.Ct. 2633, 2674-85 (2004)(dissenting opinion).

authority would unconstitutionally invade the core of presidential powers. Such is the unitary executive theory, capable of yielding all sorts of results deeply inimical to a constitutional democracy. Given the tight intertwining of the Scalia dissent in ***Morrison;*** the Thomas dissent in ***Hamdi;*** the seedbed of this revolutionary and remarkably simple set of ideas in the work of the OLC in 1986-90 under President Reagan; the role of Judge Alito in that OLC and one supposes, perhaps, in its remarkable opinions such as 10 OLC 159; and Samuel Alito's striking endorsement of the Scalia dissent both in 1989 and in 2000, where the endorsement was accompanied by a mini-lecture on how the theory operates, it is difficult not to suppose that this version of "Unitarianism" will not frame and color a Justice Alito's perception of, and approach to, separation of powers issues and the kinds of issues surrounding unilateral executive abuse that are now rocking the nation. Nothing could be more important than to ventilate this "dark side" of the otherwise bright and sunny Alito disposition and legacy. I hope the questioning of the nominee will do so.

And a final word of caution about the easy "out" of respect for precedent[23], which every nominee seems to employ as a magic elixir, applying the well-worn formulas of ***stare decisis*** for deciding how much weight to give to precedent and when to consider overruling, formulas that any nominee with half a brain could recite in his sleep and that every nominee of either party and wherever located on the left/right spectrum would recite in almost exactly the same way. I call it a distraction because, like the fakeout

[23] Cardozo, I believe, wrote: "To determine to be loyal to precedents does not carry us far upon the road. Precedents and principles are complex bundles. It is well enough to say we shall be consistent, but consistent with what?"

moves of a practiced magician, getting people to play the "will he vote to overrule" game keeps them from thinking seriously about what the record — as supplemented to some as yet uncertain degree by light the nominee's testimony sheds on that record — ***already*** tells us about the way Samuel Alito looks at, interprets, understands, and is proud of having applied, the core concepts of equal liberty and checks and balances that are the pillars of our constitutional democracy.

TESTIMONY OF THE NATIONAL BAR ASSOCIATION

BY ITS PRESIDENT, REGINALD M. TURNER, JR.

BEFORE THE

U.S. SENATE JUDICIARY COMMITTEE

IN THE CONFIRMATION HEARINGS OF

JUDGE SAMUEL A. ALITO, JR. (3d. CIR.)

ON HIS NOMINATION TO THE

UNITED STATES SUPREME COURT

JANUARY 13, 2006

SALUTATION

Mr. Chairman and other distinguished Members of the United States Senate Judiciary Committee, good morning.

I am Reginald Turner, the 63rd President of the National Bar Association. It is an extraordinary honor to testify on behalf of the National Bar Association before this Committee during these Confirmation Hearings regarding the nomination of Judge Samuel A. Alito to serve as an Associate Justice of the United States Supreme Court.

I. THE NATIONAL BAR ASSOCIATION

The National Bar Association ("NBA") was organized in 1925. With a network of more than 20,000 members and 80 bar affiliates, the NBA is the oldest and largest association of African American and minority attorneys, jurists, legal scholars, and law students in the world. When the NBA was organized in 1925, lawyers of color were prohibited from belonging to many other bar associations. At the time, there were fewer than 1,000 African American lawyers in the nation, and less than 120 of them belonged to the Association. Over the past 75 years, the NBA has grown enormously in size and influence. The objectives of the NBA are "... to advance the science of jurisprudence; improve the administration of justice; preserve the independence of the judiciary and to uphold the honor and integrity of the legal profession; to promote professional and social exchange among the members of the American and the international bars; to promote legislation that will improve the economic condition of all American citizens, regardless of race, sex or creed in their efforts to secure a free and untrammeled use of the franchise guaranteed by the Constitution of the United States; and to protect the civil and political rights of the citizens and residents of the United States."

The NBA extends its sincerest thanks to Chairman Arlen Specter, ranking Democratic member, Senator Patrick Leahy, and the other members of the Senate Judiciary Committee for the opportunity to participate in this Confirmation Hearing.

II. THE NBA EVALUATION OF JUDGE SAMUEL ALITO

The NBA has established a rigorous process and clear criteria for evaluating judicial nominees. The NBA takes a position on a nomination only after a complete and exhaustive evaluation of the nominee's record. Judge Alito was evaluated consistent with this process and these criteria. The NBA reviewed Judge Alito's entire record, including his professional and educational background and the available records of his years as a government lawyer. His record is troubling.

Judge Alito has solid educational and professional credentials. However, these credentials, alone, are not sufficient to qualify a lawyer or judge to become an Associate Justice of the United States Supreme Court. We strongly believe that a nominee to our Nation's highest court must share an unequivocal commitment to the basic liberties afforded to all Americans under the United States Constitution.[1] Unfortunately, Judge Alito's judicial decisions and other written records evidence an undeniable hostility to civil rights and personal liberties.

In this country, race and the treatment of racial issues by the judiciary profoundly affect every aspect of American life and play critical roles in the formulation of social, economic, and political agendas. Accordingly, the NBA has adopted a standard to determine whether a federal judicial nominee will interpret the Constitution and laws to effectuate racial and gender equality and eliminate oppression. This standard employs a contextual and historical jurisprudential

[1] See also, Lawyers Committee For Civil Rights Under the Law Report, *The Opposition of Judge Samuel Alito as an Associate Justice of the of the Supreme Court of the United States Statement of Opposition and Final Report* (2006) ["Lawyers Committee For Civil Rights Report"], p. 4.("Recognizing the Supreme Court's critical role in civil rights enforcement and the central role that civil rights plays in our democracy, a nominee must demonstrate a commitment to civil rights as a basic qualification.")

approach, in order to achieve equal justice under the law. Our standard examines not only the professional qualifications of a nominee, but also scrutinizes the nominee's ability to judge fairly and to advance our great Nation's slow but steady progress toward equality of opportunity. The NBA standard challenges unconstitutional and illegal oppression on the basis of race, gender, and class, to ensure that historically marginalized groups obtain the constitutional mandates of due process and the equal protection of the laws.

Despite the claims of neutrality and equality, the legal system is not as colorblind as it pretends to be. In *Grutter v. Bollinger,*[2] which upheld the use of affirmative action in the admissions process at educational institutions, Supreme Court Justice Sandra Day O'Connor acknowledged that: ". . . in a society, like our own . . . race unfortunately still matters."[3] Moreover, insofar as our judicial system has historically marginalized women and people of color, it is imperative that the law be viewed through a historical and contextual lens. A judicial nominee should be able to articulate support for Constitutional principles, statutes, and legal doctrines that serve to extend the blessings of liberty and equality to all Americans, including people of color.[4]

Upon Justice Sandra Day O'Connor's announcement of her retirement from the Supreme Court, the NBA urged President Bush to nominate a candidate for the Supreme Court who is not ideologically rigid and predictable, but who is fair, open-minded and committed to the protection of civil rights, civil liberties and the independence of the judiciary. The NBA's Judicial Selection Committee has reviewed Judge Alito's published opinions and his Senate Judiciary Committee Questionnaire to create a context for comparison to the judicial philosophy of Justice

[2] 539 U.S. 306 (2003).
[3] *Id.* at 333.
[4] Testimony of the National Bar Association by its President, Reginald M. Turner, Jr. Before the U.S. Senate Judiciary Committee in the Confirmation Hearings of Judge John G. Roberts, Jr. (D.C. Cir.) on His Nomination to the United States Supreme Court (September 15, 2005).

O'Connor, who demonstrated a conservative but fair and balanced approach to questions of civil rights and civil liberties. Our committee examined thousands of pages of documents, conducted confidential interviews and discussions with jurists, professors of law, Republicans and Democrats, conservatives and liberals, legal scholars, and officers and members of many organizations, including the American Association of Law Schools, Society of American Law Teachers, American Bar Association, Southeastern Association of Law Schools, Alliance for Justice, Lawyers Committee for Civil Rights, Leadership Conference for Civil Rights, NAACP Legal Defense and Educational Fund, and People for the American Way, to determine whether the nominee meets our exacting standards.

On the basis of the NBA's review of Judge Alito's record, we are precluded from supporting his nomination of Judge Alito to the United States Supreme Court.

The NBA takes this position on the following grounds:

(1) there are numerous available documents demonstrating that the nominee does not support an independent judiciary, civil rights, personal liberties, and equal justice under the law;

(2) there are numerous documents evidencing the nominee's "long-held" views on the authority of Congress to promulgate legislation for the public good under the Commerce Clause and Section 5 of the 14th Amendment of the Constitution, which are inconsistent with well-established jurisprudence, and contrary to the well-being of the public;

(3) the nominee views the Executive Branch as supreme and possessing unlimited powers; and

(4) the record is incomplete, as Judge Alito and the White House have not responded to the NBA's request to meet with the nominee to discuss his qualifications utilizing the NBA standard, so as to permit the NBA Judicial Selection Committee to evaluate fully and completely whether he could be fair and impartial while sitting as an Associate Justice of the United States Supreme Court.

The following is the NBA's summary of the record of Judge Alito and our reasons for opposition to his nomination.

A. The Nominee's Judicial Philosophy Would Severely Curtail Civil Rights.

Judge Alito's record evidences a long held, extremist judicial philosophy. Regardless of the specific facts before him, Judge Alito repeatedly reaches conclusions that would curtail the power of Congress and the Federal Judiciary to protect the rights of all Americans, and particularly the rights of the most vulnerable Americans – minorities, women, the disabled, and the poor. As a consequence, Judge Alito is considered one of the nation's most far-right federal judges.[5] Although Justice O'Connor was the "swing-vote" in cases involving many different areas of the law, the majority of the 5-4 decisions have been in the area of civil rights, involving affirmative action, sex discrimination, disability rights, sexual harassment, voting rights, and the application of civil rights laws to associations.[6] Therefore, if Judge Alito is confirmed as an Associate Justice of the Supreme Court, his extreme judicial philosophy would have a profound and detrimental impact upon the direction of the Supreme Court in the areas of civil rights and civil liberties.

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[5] People For the American Way, *The Record and Legal Philosophy of Judge Samuel Alito: "No One to the Right of Sam Alito on This Court"* (2006) ["PFAW Report"], p. 8.
[6] Lawyers Committee for Civil Rights Report, pp. 3-4

1. Judge Alito's Writings As A Lawyer

Judge Alito's philosophy is unequivocally revealed in his 1985 Justice Department employment application for the position of Deputy Assistant Attorney General ("1985 Job Application"). Among other things, Judge Alito referred to the "supremacy" of the Executive and Congressional Branches over the Federal Judiciary.[7] However, this view was specifically renounced by the drafters of the Constitution, who consciously established three co-equal branches of government, which is documented extensively in historical writings.[8] Accordingly, the NBA believes that Judge Alito improperly and dangerously minimizes the significance of an independent Federal Judiciary, while viewing the Executive Branch as possessing unlimited authority. Such views directly contravene the views of our Constitutional Framers and effectively would lead to the erosion of the system of checks and balances they envisioned and memorialized within the United States Constitution.[9]

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[7] *See* Attachment to PPO Non-Career Appointment Form of Samuel Alito, Nov. 15, 1985 ["1985 Job Application"].

[8] *See generally*, the Federalist Papers (Nos. 47-51). More specifically, Federalist No. 51 highlights the inherent checks and balances needed within a federal government such as ours:

> TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. . . .
>
> We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State."

Alexander Hamilton or James Madison, Federalist Paper No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments (From the New York Packet)(Friday, February 8, 1788).

[9] Based upon his written record, it is apparent that Judge Alito's views have further evolved from his early days in the Department of Justice such that he no longer respects the authority of Congress to promulgate legislation, and now it appears he would concede undue power and authority to the Executive Branch.

Furthermore, Judge Alito expressed disagreement with well-established Supreme Court precedents that relate to matters crucial to Americans' rights.[10] For example, in his 1985 Job Application, Judge Alito indicated that he was attracted to constitutional law because of his "disagreement with Warren Court decisions," including those involving reapportionment.[11] The reapportionment cases to which Judge Alito referred include a series of landmark decisions mandating creation of electoral districts in which minority voters would have real opportunities to elect candidates of their choice.[12] Most importantly, these cases established the constitutional principle of "one person—one vote."[13] Under this fundamental doctrine, every citizen of the United States has the right to an equally effective vote, rather than the mere right to cast a ballot.[14]

In addition, Judge Alito felt so strongly about limiting congressional authority that, as a Justice Department official, he urged President Reagan to veto a minor and uncontroversial bill to prevent odometer fraud because, in Judge Alito's view, the States and "not the federal government" are charged with protecting the "health, safety and welfare" of Americans.[15] Fortunately, President Reagan rejected Alito's extremist advice and signed the bill.[16] Finally, as a Justice Department lawyer, Judge Alito said that he "personally believe[d] very strongly," that affirmative action should never be used even as a remedy for past discrimination, ostensibly because he opposed quotas. He argued this, notwithstanding the fact the very programs he condemned did not involve quotas. At the same time, he proudly boasted of his membership in Concerned Alumni of Princeton, a notorious Princeton alumni group that advocated quotas for

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[10] *See* 1985 Job Application.
[11] *Id.* It appears one of those cases was *Reynolds v. Sims*, 377 U.S. 533 (1964).
[12] *See generally*, *Reynolds v. Sims*, 377 U.S. 533 (1964).
[13] *Id.*
[14] *Id.*
[15] PFAW Report, p. 8.
[16] *Id.*

children of alumni in an effort to reduce the admissions of women and minorities to the prestigious university.[17]

Although these writings are twenty years old, they are relevant today because the extremist views espoused by Judge Alito are reflected in his judicial record.[18]

2. Judge Alito's Judicial Record

Judge Alito's judicial record further evidences that he is unqualified for confirmation to the Nation's highest court. Judge Alito's 1985 self-described, "very strongly" held legal views[19] are manifested in his extremely troubling judicial record. Notwithstanding his statements to the contrary, Judge Alito is a judicial activist who seeks to legislate from the bench, by implementing extreme ideology through court opinions. Most significantly, his opinions evidence an agenda to reverse hard-fought civil rights gains. Judge Alito has an agenda to limit improperly the authority and power of Congress. Significantly, Judge Alito's record demonstrates an inconsistent "criticism of judicial activism on one front while embracing it on another."[20]

To summarize:

- Judge Alito has been the most frequent dissenter among the Third Circuit Court of Appeals judges (appointed by both Republican and Democratic Presidents), since his

[17] *Id.*

[18] It is well known that during the Reagan era, Judge Alito worked on several affirmative action case briefs, which wound up before the United States Supreme Court. The extremist views of the Solicitor General's office can be seen clearly. *See e.g., Local 93, Int'l Assoc. of Firefighters v. City of Cleveland,* 478 U.S. 501 (1986); *Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC,* 478 U.S. 421 (1986). Both of these cases in our view demonstrate Judge Alito's consistent mischaracterization of remedial affirmative action programs as racial quotas. *See also,* 1985 Job Application.

[19] *See* 1985 Job Application.

[20] R. Gordon, "*Alito or Scalito?*," SLATE, Nov. 1, 2005.

appointment in 1990. He has the largest number of dissents (64 written; 70 written or joined).[21]

- According to estimates by University of Chicago law professor Cass Sunstein, more than 90% of Alito's dissents take positions more conservative than those of his colleagues. This is a much more conservative record than other very conservative federal appellate judges. For example, while Judge Michael Luttig – reputed for his conservative ideology – has dissented in the more liberal direction 32% of the time, only 9% of Judge Alito dissents have gone in this direction.[22]
- Judge Alito rejected the views of a majority of his court, as well as the rulings of six other federal appellate courts, when he reasoned that the federal law limiting the possession and transfer of machine guns was unconstitutional, and upheld alleged "limits on Congressional power." The court majority criticized his dissent as "counter to the deference that the judiciary owes" to Congress.[23]
- In civil rights cases where the Third Circuit was divided, Judge Alito has opposed civil rights protections more than any of his colleagues. Indeed, he has advocated positions detrimental to civil rights 85% of the time and has filed solo dissents in more than a third of those cases.[24]

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[21] PFAW Report, pp. 8-11. *See* Appendix A – Judge Samuel Alito's Record of Dissents on the Third Circuit.
[22] *Id.* at. 8. *See also,* Transcript of *A survey course on Samuel Alito's legal views*, NPR: MORNING EDITION, Nov. 11, 2005.
[23] *See, United States v. Rybar*, 103 F3rd. 273 (3d Cir. 1996).
[24] PFAW Report at 8. *See also,* Transcript of *A survey course on Samuel Alito's legal views*, NPR: MORNING EDITION, Nov. 11, 2005.

- In one civil rights case, all ten of Judge Alito's colleagues – appointed by Republicans and Democrats alike – agreed that a sex discrimination victim's case was properly submitted to the jury, contrary to Judge Alito's sole dissent.[25]
- In one case, Judge Alito's dissent condoned the strip search of a 10-year-old girl and her mother, even though they were not named in the warrant that authorized. The majority opinion by then-Judge Michael Chertoff (now Secretary of the Department of Homeland Security) criticized Judge Alito's view as threatening to turn the search warrant requirement into "little more than the cliché 'rubber stamp.'"[26]

a. <u>Voting Rights</u>

As previously stated, in Judge Alito's 1985 Job Application, he denigrated case law that protected the voting rights of citizens of color. Although Judge Alito has only presided over one case interpreting the Voting Rights Act, his decision created a substantial negative impact upon the voting rights of minority voters. In *Jenkins v. Manning*,[27] Judge Alito ruled against minority voters' challenge of a Delaware school board voting plan, which utilized an at-large system, because it illegally diluted their voting strength. Judge Alito's decision perpetuated an electoral system that diluted the voting strength of racial minorities.

b. Limiting Congress' Authority to Remedy Discrimination

Judge Alito's decisions demonstrate that he clearly assigns minimal weight to Congressional authority to remedy discrimination and reduce inequalities.[28] In fact, Judge Alito would require specific Congressional legislative findings to justify the exercise of that

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[25] *Id.*
[26] *Id.*
[27] 116 F.3d 685 (3d Cir. 1997).
[28] Lawyers Committee for Civil Rights Report, p. 5.

authority.[29] For example, Judge Alito's majority opinion in *Chittister v. Department of Community and Economic Dev.*,[30] held that the Family and Medical Leave Act ("FMLA") was inapplicable to a state employer because Congress failed to articulate legislative findings of intentional discriminatory sick leave practices by public employers. Judge Alito held that these provisions did not represent a valid exercise of Congress' power to enforce the Fourteenth Amendment and that the FMLA does not abrogate Eleventh Amendment immunity. In FMLA, Congress had identified the conduct transgressing the Fourteenth Amendment as "the potential for employment discrimination on the basis of sex" in violation of the Equal Protection Clause. However, in Judge Alito's view, Congress had not met the standard established in *City of Boerne v. Flores*,[31] where the Supreme Court held that in order for an exercise of Congress' enforcement power under the Fourteenth Amendment to be sustained, "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[32] Thus in *Chittister,* Judge Alito substituted his judgment for that of Congress, stating *inter alia*: "Notably absent is any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause."[33] Judge Alito remarkably stated that "the FMLA does much more than require nondiscriminatory sick leave practices; it creates a substantive entitlement to sick leave."[34] "This requirement is 'disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act.'"[35]

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[29] *Id.*
[30] 226 F.3d 223 (3d Cir. 2000).
[31] 521 U.S. 507, 520 (1997).
[32] *Id.* at 520.
[33] *Chittister,* 226 F.3d at 228-229.
[34] *Id.* at 229.
[35] *Id.*

As the Lawyers Committee for Civil Rights notes, in *Chittister*, Judge Alito interpreted the standard for legislation under Section 5 of the Fourteenth Amendment as if Congress' authority depended on express congressional findings of discriminatory intent.[36] Furthermore, Judge Alito held that Congress was limited to legislation solely intended to prevent gender discrimination, reasoning that no findings or evidence could justify a statutorily required benefit of a minimum period of leave based upon Section 5 of the Fourteenth Amendment.[37] He reached this conclusion despite consistent and well-established Congressional legislation in this arena.

The Supreme Court effectively renounced Judge Alito's *Chittister* approach in *Nevada Dep't of Human Resources v. Hibbs*.[38] In *Hibbs*, the State of Nevada unsuccessfully argued that Section 5 did not authorize Congress to provide a "substantive entitlement program" under FMLA. The Supreme Court disagreed, stating that "Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' but may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'"[39] Hence, Judge Alito has interpreted Congress' power under the Fourteenth Amendment more restrictively than current Supreme Court precedent dictates. If Judge Alito is confirmed to the Supreme Court, his extreme judicial philosophy would undermine Congress' efforts to enforce civil rights.

United States v. Rybar[40] is further illustrative of this point. In *Rybar*, Judge Alito wrote an extensive dissenting opinion regarding the scope of Congress' Commerce Clause power.[41] Congress' Commerce Clause power is crucial to civil rights enforcement because it is the basis

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[36] Lawyers Committee for Civil Rights Report, p. 6.
[37] *Id.*
[38] 538 U.S. 721 (2003).
[39] *Id., quoting Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000).
[40] 103 F.3d 273 (3d Cir. 1996).
[41] *Id.* –

for many statutes that address private party discrimination.[42] Judge Alito reasoned that a law criminalizing possession of a machine gun required more specific Congressional findings of fact regarding its effects on interstate commerce than were presented in the findings of fact of related statutes, which addressed interstate transfer of firearms. However, the majority decision correctly criticized Judge Alito's view as undermining "the deference that the judiciary owes to its two coordinate branches of government, a basic tenet of the constitutional separation of powers."[43]

c. Employment and Other Civil Rights Cases

Judge Alito's record on the bench demonstrates a predisposition to protect businesses from civil rights claims and to make it more difficult for people of color, women, the elderly and the disabled to obtain judicial redress. Judge Alito's decisions in civil rights cases show that he has consistently used overly stringent procedural and evidentiary standards to rule against claimants seeking remedies for harm incurred on the basis of race, gender, age and disability.

The NBA also is troubled by the results of an analysis of Judge Alito's record on claims of discrimination based upon race, gender, age, or disability under federal law conducted by the

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[42] It is well settled that Congress has broad power – "broad and sweeping" - to regulate interstate commerce. *Katzenbach v. McClung*, 379 U.S. 294 (1964) (where a restaurant refused to serve African-Americans, Congress could regulate a business that served mostly local persons, but sold food that moved across state lines); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (Congress had power to enact appropriate legislation with regard to a place of public accommodation such as appellant's motel even if it is assumed to be of a purely "local" character): *United States v. Wrightwood Dairy* Co., 315 U.S. 110 (1942) (price regulation by the Secretary of Agriculture over milk produced and sold intrastate was authorized by the provisions of the Agricultural Marketing Agreement Act of June 3, 1937, and was a permissible regulation under the Commerce Clause); *Wickard v. Filburn*, 317 U.S. 111 (1942) (the Agricultural Adjustment Act of 1938, which allowed production and consumption of homegrown wheat, was a proper exercise of Congress' power under the Commerce Clause); *United States* v. *Darby*, 312 U.S. 100 (1941) (the FLSA was a proper exercise of Congress' power to regulate interstate commerce*); NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)(in this watershed case, the NLRA was a proper exercise of Congress' power to regulate interstate commerce).

[43] 103 F.3d at 282.

People for the American Way.[44] Of twenty civil rights cases where the appellate court was divided, Judge Alito decided against civil rights protections in seventeen of them (eighty-five percent of the time).[45] Of the remaining three, only one was decided on the merits. The other two cases were decided on statute of limitations grounds. In each of these divided cases, Judge Alito was the only judge who displayed such a consistent anti-civil rights record.[46] In fact, in six of the seventeen civil rights opinions, Judge Alito was the sole dissenter, including one in which Judge Alito was outvoted 10 to 1.[47]

In his dissent in *Bray v. Marriott*,[48] Judge Alito argued for imposing an evidentiary burden on victims of employment discrimination that, according to the majority, would have "eviscerated" legal protections under Title VII of the Civil Rights Act.[49] In particular, the majority contended that Judge Alito's position would protect employers from suit even in situations where an employment decision "was the result of conscious racial bias."[50]

In *Sheridan v. E.I. DuPont de Nemours & Co.*,[51] Judge Alito stood as the lone dissenter in a 10-1 decision of the full Third Circuit.[52] If adopted, his view would have made it more difficult for anyone alleging discrimination to present sufficient evidence to a jury. In particular, Judge Alito would have prevented a woman claiming gender discrimination from proceeding to trial, even where she had produced sufficient evidence showing that her employer's articulated reason to deny her a promotion was a pretext for the employer's alleged discriminatory actions.

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[44] PFAW Report, pp. 40-41.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] 110 F.3d 986 (3d Cir. 1997).
[49] *Id.*,
[50] *Id.*
[51] 100 F.3d 1061 (3d Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997).
[52] *Id.*

In *Glass v. Philadelphia Elec. Co.*,[53] a race and age discrimination case, Judge Alito also would have upheld a lower court's refusal to allow the plaintiff to cross-examine his employers about an alleged hostile work environment.[54] The majority of the court found that such evidence was "relevant to a key aspect of the case," and decided that the exclusion of hostile work environment evidence illegally undermined the plaintiff's right to a fair trial. In contrast, Judge Alito argued that the evidence was "limited," and if presented would cause "substantial unfair prejudice" to the employer.[55]

In *Bhaya v. Westinghouse Elec. Corp.*,[56] a group of employees claiming age discrimination alleged that their manager had acknowledged in a meeting that by laying off the plaintiffs, the company "might be violating . . . labor laws" and may have been "doing something illegal or against the contract."[57] Judge Alito dismissively interpreted these statements narrowly, explaining that they "lack[ed] appreciable probative value."[58] While plaintiffs argued that it was plausible and indeed likely that the manager was referring to anti-discrimination laws, Judge Alito found this argument unreasonable and "remote at best."[59]

As conservative scholar Bruce Fein wrote, "Alito's rulings on civil rights demonstrate a more conservative frame of reference than that of Sandra Day O'Connor" and would shift the court to the right.[60] The NBA concurs with Fein's conclusion.

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[53] 34 F.3d 188 (3d Cir. 1994).
[54] *Id.*
[55] 34 F.3d at 196.
[56] 922 F.2d 184 (3d Cir. 1990), *cert. denied,* 501 U.S. 1217 (1991).
[57] *Id.*
[58] 922 F.2d at 188.
[59] *Id.*
[60] Alliance for Justice, Report on the Nomination of Samuel A. Alito to the United States Supreme Court (2006), p 6; Amy Goldstein and Jo Becker, *Critics See Ammunition in Alito's Rights Record,* WASH. POST, Nov. 3, 2005.

III. CONCLUSION

In conclusion, on the basis of our thorough review of Judge Alito's record and for the reasons cited above, the NBA cannot support the nomination of Judge Alito to become an Associate Justice of the United States Supreme Court. For several decades, Judge Alito has championed limitations on civil rights and voting, as well as attempting to curtail educational and employment opportunities for people of color and women. If his views had prevailed in many cases, our Nation would not be far beyond the regrettable days when opportunities for Americans, like retiring Justice Sandra Day O'Connor and the late Justice Thurgood Marshall, were truncated on the basis of gender and race. Now is not the time for retrenchment. Now is the time for America to step forward into the 21st Century and open the doors of mainstream society for the benefit and protection of all Americans.

Again, thank you for the opportunity to testify here today.

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UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
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The Institute for Public Affairs is the non-partisan public policy research and advocacy center of the Union of Orthodox Jewish Congregations of America, the nation's largest Orthodox Jewish umbrella organization founded in 1898.

National Headquarters
11 Broadway
New York, NY 10004

December 27, 2005

Hon. Arlen Specter, Chair
Hon. Patrick Leahy, Ranking Member
& Members of the U.S. Senate Cmte. on the Judiciary
Washington, DC 20510
By Facsimile & Electronic Mail

Dear Senators,

We write to you on behalf of the Union of Orthodox Jewish Congregations of America with regard to an issue which has arisen in the context of the Judiciary Committee's consideration of the nomination of Samuel Alito to the United States Supreme Court. The Union of Orthodox Jewish Congregations of America, the nation's largest Orthodox Jewish umbrella organization representing nearly 1,000 congregations nationwide, is a non-partisan, religious organization and it has been the UOJCA's longstanding policy neither to endorse nor oppose judicial nominees in the confirmation process. However, we feel compelled to inform you of our views on a key issue of import to our community which has been raised with regard to Judge Alito's nomination.

The issue relates to charges that Judge Alito's views on the relationship between religion and state in our society, as framed by the Free Exercise and Establishment Clauses of the First Amendment, are outside of the mainstream and, in the words of the critics, "risk many of the crucial protections for religious minorities." The critics assert that "Judge Alito's judicial opinions reveal....he gives short shrift to the Supreme Court's long tradition of protecting religious liberty by carefully policing the separation of church and state."[1] As members of a minority faith community within this great nation, we write to you to state that we believe these assertions are misleading distortions of Judge Alito's record and that calling for his rejection based upon these assertions is wrong.

The critics concede, as they must, that "Judge Alito's judicial opinions reveal that...he respects the [rights guaranteed by] the free-exercise clause." This, however, is an understatement of the depth and significance of Judge Alito's record in this arena.

[1] These quotes may be found in the Report Opposing Confirmation of Samuel Alito recently published by Americans United for the Separation of Church & State.

INSTITUTE FOR PUBLIC AFFAIRS

It is critical to recall that in 1990, in an opinion authored by Justice Scalia, the Supreme Court severely curtailed the protection given to every American's First Amendment right to the "free exercise of religion." In *Emp. Div. of Oregon v. Smith*,[2] the court considered the Native American use of peyote as part of religious worship and the state's decision to criminalize peyote with no exception for religious use. The Native Americans challenged the lack of such an exemption as a violation of their free exercise rights. Under then-governing Supreme Court precedents,[3] Oregon would have to have met the highest standard of constitutional proof, akin to what is required in a case challenging the restriction of free speech or any other fundamental right, by proving that the denial of an exemption for religious use was necessary to serve a "compelling governmental interest" and that this interest would be undermined by any exemption.

Writing for a divided court (with Justice O'Connor taking strong exception), Justice Scalia overturned the precedents and lowered the level of protection for free exercise so that the government had to show only that it had a "rational basis" for denying the religious exemption. Religious liberty has been the neglected stepchild of the First Amendment ever since. Bipartisan efforts to fully reverse *Smith* legislatively have been hampered by the high court.[4]

In this context, one can take Judge Alito's record of opinions in cases which squarely raised Free Exercise claims and others which address religious liberty from other bases and – when viewed as a whole – conclude that Judge Alito possesses not only an appropriate level of sensitivity to people of many different faiths, but a recognition that seems to have eluded Justice Scalia fifteen years ago: The first clauses of the First Amendment – the Free Exercise and Establishment clauses -- are meant to be a bulwark against the infringements by government, or other powerful entities, upon an individual's religious conscience and practices. It is not enough to allow Americans to believe as we wish. We must be able, generally, to act in conformity with those beliefs without interference. Accommodations for religious observance are welcome from the legislative or executive branches, but the Framers put freedom of religion in the Bill of Rights to ensure that

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2 494 U.S. 872 (1990).

3 *Sherbert v. Verner*, 374 U.S. 398 (1963) and its progeny.

4 The Court invalidated the Religious Freedom Restoration Act as applied to non-federal government actors in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court upheld the much more limited Religious Land Use & Institutionalized Persons Act with regard to its institutionalized persons provisions last term in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005); the land use provisions of RLUIPA have not yet been reviewed by the high court.

the religious freedom of people of faith, especially minority faiths, is not contingent upon political power.

One can elicit this view on Judge Alito's part from his record in which he has ruled in favor of adherents to a remarkable array of faiths. In 1999, Judge Alito ruled against the Newark Police Department when it sought to ban Muslim officers from wearing beards even though the department allowed beards to be worn for health reasons.[5] In 2000, he chastised his judicial colleagues for avoiding, on procedural grounds, ruling on a kindergartener's free speech rights to have a Thanksgiving picture he drew posted in his public school because it had a "religious theme."[6] In 2001, he wrote a strong concurrence in support of a Sabbath-observant Orthodox Jew whose supervisors at a local college deliberately scheduled faculty meetings for late-Friday afternoons in order to force a conflict between her career and religion.[7] In 2004, he ruled that the imposition of fees and filing requirements on a Native American in order for him to possess certain animals for religious purposes was an unconstitutional burden on his religious liberty.[8] He also ruled in 2004 that a public school could not exclude a religious Evangelical after school club from its premises when it allowed a wide array of secular groups such access.[9]

Judge Alito has also ruled or participated in a handful of cases involving Establishment Clause concerns.[10] The critics assert that these cases suggest that "Judge Alito is out of step" with "settled Supreme Court precedent and the founders' vision" with regard to establishment concerns. This assertion ought to be rejected. A close and non-ideological examination of Judge Alito's cases in this area show him to be working to apply Supreme Court precedents – in an area of the law acknowledged by jurists and scholars across the spectrum to be muddied, at best. His positions in these cases, if reversed by the high court, were reversed by narrowly divided panels and his positions were, it seems, animated by the struggle to strike the delicate balance between the demands of the Establishment Clause and the free exercise and freedom of expression rights of individuals.

We also note that Judge Alito does not automatically render an opinion in favor of a religious plaintiff when countervailing concerns are

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5 *Fraternal Order of Police v. Newark*, 170 F.3d 359 (3d Cir., 1999).

6 *C.H. ex rel v. Oliva*, 226 F.3d 198 (3d Cir., 2000).

7 *Abramson v. Wm. Patterson College*, 260 F.3d 265 (3d Cir., 2001).

8 *Blackhawk v. PA.*, 381 F.3d 202 (3d Cir., 2004).

9 *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514 (3d Cir., 2004).

10 *ACLU of NJ v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471 (3d Cir., 1996); *ACLU of NJ v. Schundler*, 169 F.3d 92 (3d Cir., 1999); *ACLU of NJ v. Twp. of Wall*, 246 F.3d 258 (3d Cir., 2001).

present.[11] While our own organization and constituency might disagree with Judge Alito's decision in any of these cases, neither we, nor any reasonable review of these cases and their briefs, can credibly assert that the ruling authored or joined in by Judge Alito are in any way out of mainstream jurisprudence; only those who advocate the most extreme views of religion-state relations in America – either total separation or total integration – could assert as much.

The Orthodox Jewish community, like so many other American faith communities, has benefited greatly from the religious liberty guaranteed by our Constitution. For us, this issue is the seminal issue upon which the Supreme Court can impact our lives. We urge you to consider the jurisprudence and principles of religious liberty and the perspective a Justice Alito would bring to these matters, if confirmed. We pray your committee's deliberations will be fair and serve the nation well.

Sincerely,

Mark Bane

Nathan J. Diament

[11] *See In re Four Three Oh, Inc.*, 256 F.3d 107 (3d Cir., 2001); *Shelton v. Univ. of Medicine & Dentistry of N.J.*, 223 F.3d 220 (3d Cir., 2000); *Fraise v. Terhune*, 283 F.3d 506 (3d Cir., 2002).

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Rob Keithan
Director

December 15, 2005

Unitarian Universalist Association of Congregations Urges Opposition to the Confirmation of Judge Samuel Alito Jr. to the United State Supreme Court

Dear Senator,

On behalf of the over 1,000 congregations that make up the Unitarian Universalist Association, I urge you to oppose the confirmation of Judge Samuel Alito Jr., to the United States Supreme Court. After a careful review of his decisions, and in particular dissents, we have concluded that Judge Alito does not show sufficient respect for civil liberties. His deciding vote on the court could undermine fundamental rights for decades.

The decision to take a position on a judicial nominee is not one the UUA takes up lightly—or frequently. Indeed, it was only in 2004 that our highest policy-making body approved language explicitly stating that the Association would oppose nominees whose records demonstrated insensitivity to civil liberties. We did not take a position on the confirmation of either Judge John Roberts or Harriet Myers.

The nomination of Judge Samuel Alito Jr. is significantly different, in that he has an extensive judicial record—more than 15 years on the 3rd Circuit Court of Appeals—that clearly reveals his judicial philosophy on a wide range of issues. After extensive research, Unitarian Universalist Association staff agreed that Judge Alito's rulings demonstrate a pattern of views that were outside the mainstream and hostile to established precedent favoring civil liberties. In case after case, Judge Alito found against the rights of individuals in relation to government or corporations. In at least six cases, the Supreme Court voted to overturn decisions of the Third Circuit or Alito's dissent in Third Circuit cases. Several notable cases and patterns are mentioned below.

Police Power

In the case of *Doe v. Groody*,[1] Judge Alito dissented from a Third Circuit ruling that police officers had violated clearly established constitutional rights. Police had strip-searched a mother and her ten-year-old daughter while executing a search warrant authorizing only the search of her husband and their home. Then-Third Circuit Judge Michael Chertoff, now Secretary of Homeland Security, held that the unauthorized search violated "clearly established" rights. Alito disagreed, arguing that even if the warrant did not authorize the search, an officer still could have read the warrant as allowing it.

[1] 361 F.3d 232 (3rd Circ. 2004).

Religious Liberty

In the case of *ACLU-NJ v. Schundler*, Judge Alito held that religious symbols displayed on government property during the holiday season (in this case a crèche and menorah) were not unconstitutional when "secular" decorations such as Frosty the Snowman and Santa Claus were subsequently added to the display. While Justice O'Connor has voted to allow secular holiday displays, she has rejected efforts for religious symbols, including the Ten Commandments, to stand alone in public display.

In *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, Judge Alito joined a dissent from the Third Circuit's ruling which struck down a public school board policy allowing high school seniors to vote on whether to include student-led prayer at their school-sponsored graduation ceremonies. In a subsequent case (*Santa Fe Independent School District v. Doe*), the Supreme Court, with Justice O'Connor in the majority, struck down a public school board policy allowing students to vote on whether to include student-led prayer at high school football games.

Limiting Access to the Courts:

Among the most troubling pattern is Judge Alito's consistent finding that plaintiffs in discrimination cases did not have enough evidence to bring their cases to trial. By denying even the opportunity for judicial remedies, Judge Alito's philosophy undermines one of the most fundamental checks and balances in our system of government. For example:

- Judge Alito has strongly disagreed with Third Circuit rulings protecting the civil rights of African Americans. In *Bray v. Marriot Hotels*,[2] Alito disputed a ruling by Theodore McKee – the Circuit's only African American judge – allowing a race discrimination case to go to trial. McKee said that Alito's position would "immunize an employer from the reach of Title VII if the employer's belief that it had selected the 'best' candidate, was the result of conscious racial bias."
- Judge Alito has narrowly construed statutes in gender discrimination cases. In *Sheridan v,. E.I. DuPont de Nemours and Co.*,[3] Alito was the only judge to dissent from a ruling clarifying the nature of evidence permitting a jury to find an employer engaged in discrimination. Alito's position would have denied the plaintiff the opportunity to go to trial despite significant evidence of discrimination.
- Judge Alito's dissents would have made it harder for victims of discrimination based on disability to prove their cases. In *Nathanson v. Medical College of Pennsylvania*, the majority lamented that under Alito's restrictive standard for proving discrimination based on disability under the Rehabilitation Act of 1973, "few if any Rehabilitation Act cases would survive summary judgment."

Reproductive Freedom

Dissenting in *Planned Parenthood v. Casey*, Judge Alito wrote that the right to reproductive freedom does not prevent states from requiring women to notify their spouses, except in limited circumstances, before getting an abortion.[4] Justice O'Connor cast the deciding vote rejecting Judge Alito's position. Joined by Justices Kennedy and Souter, O'Connor held that the provision Alito supported harkened back to the days when "a woman had no legal existence separate from her husband" and created an undue burden on a woman's ability to obtain an abortion.[5]

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[2] 110 F.3d 986 (3rd Cir. 1997).
[3] 100 F.3d 1061 (3d Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997).
[4] *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991)
[5] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

We Are Not Alone

When the Unitarian Universalist Association makes a decision to adopt a particular stance, we generally find ourselves in the company of other religious organizations with similar views. This holds true for our opposition to the confirmation of Judge Alito.

In late November, the biennial convention of the Union for Reform Judaism—the largest branch of Judaism in North America—voted overwhelmingly to oppose Judge Alito's confirmation, saying that it "would threaten protection of the most fundamental rights" that the Reform Movement supports. "On choice, women's rights, civil rights and the scope of federal power," Alito would "shift the ideological balance of the Supreme Court on matters of core concern to the Reform Movement," according to the resolution adopted by the more than 2,000 voting delegates from more than 500 congregations in all 50 states.

Both our denominations reviewed Judge Alito's rulings and found that his record did not support our stated values. The Unitarian Universalist Association of Congregations criteria and supporting materials are available at http://www.uua.org/. Materials from the Union for Reform Judaism can be found at at http://urj.org.

Liberty is at the core of our Unitarian Universalist faith. Civil liberties are at the heart of our American experiment in democracy. Those civil liberties guaranteed by the Bill of Rights are as fundamental to our practice of democracy as freedom of conscience is to our religion. We believe that Judge Alito's philosophy does not sufficiently respect these fundamental rights, and we urge you to oppose his confirmation.

In Faith,

Robert C. Keithan, Director

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW

RON GETTELFINGER, President ELIZABETH BUNN, Secretary-Treasurer

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IN REPLY REFER TO

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December 19, 2005

Dear Senator:

Next month the Senate is expected to consider the nomination of Judge Samuel Alito to be an Associate Justice on the U.S. Supreme Court. Based on our review of his past writings and judicial decisions, the UAW opposes his confirmation.

While serving on the Third Circuit Court of Appeals, Judge Alito's opinions have consistently reflected a narrow, constricted interpretation of statutes protecting worker rights. In particular, his opinions have excluded state employees from coverage under the Family and Medical Leave Act, denied overtime to newspaper reporters, vacated OSHA citations, absolved corporate officers from liability for unpaid wages, and exempted a company from having to notify workers about an impending plant closing. He even issued a solitary dissenting opinion that would have criminalized "no docking" rules that have been a common industrial practice.

In addition, Judge Alito's opinions in race and gender employment discrimination cases have reflected a restrictive interpretation of civil rights laws that would make it much more difficult for women and minorities to obtain remedies when they are the victims of discrimination. We are especially troubled by Judge Alito's statement in a 1985 job application that he was "particularly proud" of his work in the Reagan Administration to restrict affirmative action and limit remedies for racial discrimination. We are also disturbed by his 1985 writings disagreeing with the concept of "one man, one vote".

The UAW believes that nominees to the Supreme Court must demonstrate that they hold views that are within the judicial mainstream, and are committed to supporting the rights of workers, minorities and women. Unfortunately, we believe that Judge Alito fails to meet this essential test. Accordingly, the UAW urges you to oppose his nomination to the Supreme Court.

Thank you for considering our views on this important issue.

Sincerely,

Alan Reuther

Alan Reuther
Legislative Director

AR:lb
opeiu494
L7998

Violence Policy Center

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January 11, 2006

The Honorable Arlen Specter
Chairman
United States Senate Judiciary Committee
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators Specter and Leahy:

The Violence Policy Center (VPC) is a national non-profit organization dedicated to reducing violence in America. The VPC opposes the nomination of Judge Samuel Alito to the United States Supreme Court.

Our primary objection to the nomination of Judge Alito is his hostility to the authority of Congress to regulate the possession and transfer of firearms, specifically machine guns.

In 1996, Judge Alito wrote a dissent in *U.S. v. Rybar*[1] arguing that the federal machine gun ban exceeded Congress' regulatory authority under the Commerce Clause. Judge Alito argued that possession of a machine gun does not facilitate crime in a way that impacts interstate commerce. Judge Alito also challenged Congress' fact-finding, and even judgment, in enacting the machine gun ban, asserting:

> ...we are left with no congressional findings and no appreciable empirical support for the proposition that the purely intrastate possession of machine guns, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce, and without such support I do not see how the statutory provision at issue here can be sustained....

Judge Alito apparently chose to ignore the history of Congressional fact-finding and action to regulate machine guns.

From 1934 to 1986: Banning Machine Guns

The National Firearms Act of 1934 (NFA) was the first major federal statute to regulate firearms, including machine guns. The 1934 law was Congress' response to the wave of gun violence precipitated by Prohibition and the notorious interstate robbery sprees of criminals such as John

[1] 103 F.3d 273 (3d Cir. 1996), *cert. denied* 522 U.S. 807 (1997).

Dillinger. Congress heard ample evidence that immediate regulation of machine guns was necessary to stem a rising tide of gun violence. At the 1934 hearings in the U.S. House of Representatives that ultimately led to the legislation, Attorney General Homer Cummings warned:

> There are more people in the underworld today armed with deadly weapons, in fact, twice as many, as there are in the Army and the Navy of the United States combined....[T]here are at least 500,000 of these people who are warring against society and who are carrying about with them or have available at hand, weapons of the most deadly character.[2]

As the Federal Bureau of Investigation's current website notes:

> Perhaps the St. Valentine's Day Massacre on February 14, 1929, might be regarded as the culminating violence of the Chicago gang era, as seven members or associates of the 'Bugs' Moran mob were machine-gunned against a garage wall by rivals posing as police.[3]

Infamous North Hollywood Shootout Demonstrates Danger of Alito's Views

The year after Judge Alito argued that there was "no appreciable empirical support for the proposition that the purely intrastate possession of machine guns, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce..."[4] and that Congress therefore lacked the authority to ban machine guns, the unique threat that machine guns pose to public safety and their potential to have a devastating impact on interstate commerce was graphically illustrated in North Hollywood, California, when two men armed with illegal fully-automatic AK-47s equipped with 100-round magazines loaded with armor-piercing ammunition robbed a Bank of America. The bank robbers used assault weapons that they had converted from semiautomatic to fully automatic fire—a practice that Judge Alito actually defended in his dissent in *Rybar*.[5] Ten police officers were wounded in the firefight. The disparity in weaponry between the robbers and police was so lopsided that officers ran to a nearby gun shop to borrow seven rifles and ammunition. A police officer involved in the unprecedented shootout stated, "We knew we were outgunned because we didn't have automatic weapons."

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2 "House Hearings on National Firearms Act," April/May, 1934.

3 http://www.fbi.gov/libref/historic/famcases/capone/capone.htm

4 103 F.3d 273, 294 (3d Cir. 1996).

5 *Id.* at 289. Judge Alito took issue with the majority's contention that regulating intrastate possession helped law enforcement detect illegal transfers. Judge Alito stated "...it is not true that every possession criminalized by 18 U.S.C. § 922(o) must be preceded by an 'unlawful transfer.' A lawfully possessed semiautomatic weapon could be converted by its owner into an automatic."

Congress' Authority to Regulate Firearms and Explosives is Essential to Public Safety

The National Firearms Act imposed a transfer tax and registration requirement on machine guns and, as the majority opinion in *Rybar* noted, was enacted under the taxing power of Congress. However, all subsequent federal firearms legislation was enacted under the Commerce Clause, including the 1986 Firearms Owners' Protection Act (FOPA) which contains the federal machine gun ban.

Other federal statutes enacted under the Commerce Clause include: the Federal Firearms Act of 1938, which requires firearm manufacturers and dealers to obtain federal licenses before engaging in interstate commerce; and, the Gun Control Act of 1968, which broadened existing restrictions on handguns to include a ban on interstate sales, banned mail-order sales of shotguns and rifles, and prohibited the importation of so-called Saturday Night Specials—inexpensive, short-barreled handguns of the type used by Sirhan Sirhan to kill Senator Robert Kennedy. The recently expired federal assault weapons ban survived two challenges arguing that Congress had exceeded its authority under the Commerce Clause in enacting the ban.[6]

In fact, the regulation of intrastate conduct is the cornerstone of federal gun and explosives regulation. The prohibition on interstate handgun transfers is a key tool to prevent illegal gun trafficking. Moreover, in 2002 Congress passed the Safe Explosives Act, which expanded the licensing authority of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to include the intrastate manufacture, purchase, and use of explosives. If Judge Alito's views on firearms and public safety, as expressed through his minority opinion in *U.S. v. Rybar*, became the law of the land, all Americans would be at greater risk from virtually uncontrollable firearms proliferation. The federal government would be almost powerless to keep firearms, ammunition, and other deadly commodities out of the hands of criminals and even terrorists. In a time of increased concern regarding homeland security, such views are not only counter-intuitive, but exceedingly dangerous. The Violence Policy Center urges you to reject the nomination of Judge Alito to the United States Supreme Court.

Sincerely,



M. Kristen Rand
Legislative Director

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[6] *Olympic Arms v. Magaw*, 91 F. Supp. 2d 1061 (E.D. Mich. 2000), *aff'd*, 301 F.3d 384 (6th Cir. 2002); *Navegar, Inc. v. United States*, 192 F.3d 1050 (D.C. Cir. 1999).

January 6, 2006

624 N. Chester Road
Swarthmore, PA 19081

VIA FAX

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senator Leahy:

One unusual feature of the debate over the confirmation of Judge Samuel A. Alito, Jr. to the Supreme Court of the United States is that so many Democrats who know him believe that he should be confirmed. As a Democrat who worked for him without becoming a personal friend, perhaps I can explain why.

I joined the New Jersey U.S. Attorney's Office headed by Judge Alito in January 1990, a few months before he became a judge. As a lifelong Democrat and former member of the ACLU, I worried that I would be pushed to take or condone actions that overrode the constitutional rights of criminal defendants. That never happened. The office that Judge Alito ran respected individual rights, and Judge Alito never pushed us to subvert anyone's rights to obtain a conviction.

Judge Alito's membership in the Concerned Alumni of Princeton, which was hostile to women and minorities at Princeton, has raised questions whether he shares those beliefs and would govern according to them. As U.S. Attorney, however, he put women and minorities in supervisory positions. The chief of appeals is the office's most intellectual position, and his was a woman.

In person, Judge Alito was shy and modest, with a self-deprecating sense of humor. He let others take the spotlight. Although he had the authority as U.S. Attorney to use the office to advance the conservative agenda, he never did because he cared more about preserving the independence and character of the office.

As a practicing lawyer currently with Dechert LLP, I have followed Judge Alito's work as a judge, and his opinions show that he is careful to follow the law and respect individual rights. A good example is the case of Franklin Igbonwa, a convicted Nigerian drug dealer facing deportation when his prison term ended. Igbonwa had testified for the government against other Nigerian drug dealers and feared he would be killed if returned to Nigeria. The trial judge

believed Igbonwa's testimony that the prosecutor had promised to keep him from being deported, and the trial judge ordered the government to honor this promise.

I represented Igbonwa when the government appealed this decision to a Third Circuit panel of three judges, which included Judge Alito. Two judges ruled that the trial judge should not have believed Igbonwa's testimony and reversed the decision stopping his deportation. Any rigid conservative hostile to the rights of minorities and criminal defendants would have joined in a heartbeat a decision to deport a convicted Nigerian drug dealer. Judge Alito, however, dissented. He said that the law required the court to affirm the trial judge's decision to credit Igbonwa's testimony. Unlike the majority, which gave short shrift to Igbonwa's fears, Judge Alito recognized that "the stakes here are high" because "the majority's reversal condemns him to a substantial risk of death resulting directly from his cooperation with the government." Judge Alito concluded that the trial judge should be asked to clarify his findings before the court decided the difficult question whether the prosecutor had the power to stop Igbonwa's deportation.

That case is one example showing Judge Alito's approach to cases –careful, thoughtful, scrupulous in observing the law, respectful of individuals – and why he should be confirmed. He will not be a Robert Bork, whose testimony before this Committee that the Supreme Court would be an "intellectual feast" showed that he lacked the proper temperament for the High Court. Judge Alito has the intellect but not the arrogance of Justice Scalia, who came to the Court determined to remake constitutional law. Judge Alito would be a proper successor to Justice O'Connor because he will decide cases in the same manner she did – with modesty and respect for the individuals involved.

Undoubtedly a Justice Alito would make some decisions I and my fellow Democrats won't like, but approving a Supreme Court Justice should not be like voting for a politician, who receives votes because people like his platform. The Bush administration unintentionally showed with Michael Brown and Harriet Miers that competence in government is more important to the country than politics. My fellow Democrats will not serve the country or their own political interests by rejecting a very qualified nominee whose instinct is to respect rather than remake the law. If measured by competence rather than politics, Judge Alito should be confirmed.

Finally, the press has reported about organized efforts by Judge Alito's former clerks and colleagues to support him publicly. I can assure the Committee that I have not spoken to these groups or to anyone lobbying for Judge Alito's confirmation. I conceived of, wrote, and am submitting this letter entirely on my own.

Respectfully,

R. David Walk, Jr.

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Sam Alito

Rule of Law

Judge Alito's View Of the Presidency: Expansive Powers

Court Pick Endorsed Theory Of Far-Reaching Authority; Tenet of Bush White House

A Debate Over Terror Tactics

By JESS BRAVIN
Staff Reporter of THE WALL STREET JOURNAL
January 5, 2006; Page A1

In November 2000, while the nation fixated on whether George W. Bush or Al Gore would emerge victorious from the electoral confusion in Florida, Judge Samuel Alito laid out his view of what powers the future president would hold.

The Constitution "makes the president the head of the executive branch, but it does more than that," Judge Alito said in a speech to the Federalist Society at Washington's Mayflower Hotel. "The president has not just some executive powers, but the executive power -- the whole thing."

Judge Alito was describing the theory of the "unitary executive," an expansive view of presidential powers that he and his colleagues set forth while working in the Office of Legal Counsel of the Reagan Justice Department. Although the Supreme Court has not always agreed, he said in his speech, "I thought then, and I still think, that this theory best captures the meaning of the Constitution's text and structure."

President Bush has repeatedly invoked this theory as he asserts broad presidential powers to fight the war on terror. Now the president's approach to executive power -- including his authorization of a domestic surveillance program -- is drawing criticism in Congress. Disputes over some White House policies may ultimately be resolved by federal courts. The record of Judge Alito, who is Mr. Bush's latest nominee to the Supreme Court, suggests he could support the president's viewpoint.

Amid controversy over the domestic wiretapping program and the detention of enemy combatants, Judge Alito is likely to be questioned extensively about his views on presidential power during his confirmation hearings, scheduled to open Jan. 9. In separate letters to Judge Alito last month, the Republican chairman of the Senate Judiciary Committee, Arlen Specter of Pennsylvania, and the ranking Democrat, Patrick Leahy of Vermont, both indicated an intention to explore the topic. (See related article.)

In an interview yesterday evening, Assistant Attorney General Rachel Brand, speaking for the Bush administration, cautioned against drawing conclusions from Judge Alito's 2000 speech. "There's no way to say how he would rule" on executive-power issues that might come before the court, she said.

In 2000, Judge Alito referred to the unitary-executive theory of presidential power as "the gospel according to OLC," a reference to his office in the Reagan Justice Department. The theory has since become the foundation for the current administration's assertions that it has the power to interpret treaties, determine the fate of enemy prisoners, and jail U.S. citizens as enemy combatants without charging them.

Thus far, the theory has fared unevenly in federal courts. Bush administration officials have criticized some court rulings and pledged to appoint new judges more sympathetic to executive-power claims.

The judiciary had a "disturbing tendency...to inject itself into areas of executive action originally assigned to the discretion of the president," Attorney General John Ashcroft said in a November 2004 speech to the Federalist Society, a conservative lawyers' network. "These encroachments include some of the most fundamental aspects of the president's conduct of the war on terrorism," he said, and they impede "the tremendous energy and resolve of President Bush."

While serving on the District of Columbia Circuit Court of Appeals, the president's first Supreme Court appointee, Chief Justice John Roberts, joined a June 2005 decision that gave Mr. Bush broad authority to try foreigners before military commissions. The Supreme Court has agreed to hear an appeal, and if Judge Alito is confirmed, he will help decide the case.

In written statements issued when he signs legislation, Mr. Bush routinely cites his authority to "supervise the unitary executive branch" to disregard bill provisions he considers objectionable. A statement Mr. Bush issued on Dec. 30 when he signed Sen. John McCain's antitorture amendment, for example, said in part that the executive branch "shall construe" a portion of the act relating to detainees "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power." The statement raised questions among critics of the administration's policies about the extent to which the White House considers itself bound by the legislation.

Open-Ended

Some supporters of unitary-executive theory argue that the White House has the constitutional power to remove officials of independent agencies such as the Federal Trade Commission if they disobey the president.

Article II of the Constitution says that "the executive power shall be vested in a president of the United States of America," but it doesn't precisely define that power. It says that

the president shall be "commander in chief of the Army and the Navy," but separately assigns the power to declare war, raise armies and regulate the taking of prisoners to Congress. Advocates of the unitary-executive theory contend that the president's power is open-ended compared with that of Congress, noting that Article II doesn't expressly limit executive powers to those "herein granted."

"At its core, the unitary executive is the notion that the Constitution gives the president the executive power, and it includes the power to superintend and control subordinates in the executive branch," says Northwestern University law professor Steven Calabresi, who helped develop the theory in the Reagan Justice Department and has written extensively on its historical basis.

ON THE RECORD

Use of the phrase "unitary executive" by President Bush, broken down by type ...

	2001	2002	2003	2004	2005
Signing Statement	2	31	20	35	15
Executive Order	0	1	2	2	1
Other	0	0	1	0	0
Total	2	32	23	37	16*

LOOKING BACK

...And compared with previous presidents.

Reagan	1
G.H.W. Bush	6
Clinton	0
G.W. Bush	110*

**to date*
Source: Christopher Kelley, Miami University

Adherents to the theory -- called unitarians -- reject the view that regulatory agencies should operate independent of political control. The White House should have final say over rules and decisions issued by the federal bureaucracy, they say.

But advocates differ on the degree of executive authority. Some believe only that Congress cannot create agencies or officers that operate outside the president's direction. Others contend the president has executive powers beyond those granted by Congress or listed in the Constitution.

Bush administration lawyers, in confidential memorandums, adopted this broader view after the Sept. 11, 2001, terrorist attacks. They contended that the "unitary" nature of presidential power over national security meant Mr. Bush could not be constrained either by treaties or laws passed by Congress that governed treatment of enemy prisoners.

In a Sept. 25, 2001, advisory legal opinion prepared for the White House, John Yoo, then a Justice Department attorney, wrote: "The centralization of authority in the president alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch."

An August 2002 memorandum signed by Assistant Attorney General Jay Bybee advised that "even if an interrogation method arguably were to violate [an anti-torture law], the statute would be unconstitutional if it impermissibly encroached on the president's constitutional power to conduct a military campaign." President Bush has since appointed Mr. Bybee to a federal appeals court.

The Justice Department later withdrew that internal legal opinion, but it has not backed away from its theory on presidential power, which also underlies the domestic surveillance program and the detention of U.S. citizens as enemy combatants. In all three instances, the president has asserted an inherent power to take actions that critics say are contrary to specific laws -- respectively, the 1994 Torture Statute, the 1978 Foreign Intelligence Surveillance Act and the 1971 Non-Detention Act.

"If the theory were wrong, there would be no way the Bush administration's antiterrorism policies could be constitutionally justified," says Mr. Calabresi, co-chairman of the Federalist Society, which he co-founded in 1982. Although the theory is closely associated with many Federalist Society leaders, Mr. Calabresi stops short of fully endorsing the Bush administration's view. "They have pushed the envelope, and if I were a judge I am not at all sure I would uphold everything they have done, although I would probably uphold most of it."

'Hotly Debated'

Judge Alito, a Federalist Society member who currently sits on the Third U.S. Circuit Court of Appeals in Philadelphia, noted in his 2000 speech that as a judge, he had had few occasions to rule on presidential authority. He observed that "what the executive power encompasses has been very hotly debated."

He noted that "the Supreme Court has not exactly adopted the theory of the unitary executive," instead taking a "two-track approach." The high court has protected presidential powers specifically enumerated in the Constitution, such as the right to pardon convicts and to sign or veto bills, he said. "But when it's been confronted with an inroad on the general grant of executive power to the president, it has basically engaged in balancing" of competing interests, rather than deferring to the White House's assertion of authority.

IN ACTION

From Bush's Dec. 3, 2003 statement on signing the 21st Century Nanotechnology Research and Development Act:
"The executive branch shall implement these provisions in a manner consistent with the President's constitutional authority to supervise the **unitary executive** branch and to recommend for the consideration of the Congress such measures as the President judges necessary and expedient."

Over the past 80 years, the Supreme Court has backed the president on some questions of executive power, but not on others. In the 1940s, for example, the court upheld several Roosevelt administration policies, including the internment of Japanese-Americans and the trial of German saboteurs before a secret military commission. But in the landmark 1952 steel seizure case, the court rejected President Truman's claim that as commander in chief, he could take possession of steel mills, then closed by strikes, to ensure production of arms for the Korean War. The opinion, by Justice Hugo Black, defined the president's commander-in-chief power narrowly, "even though 'theater of war,' " he wrote, may be "an expanding concept."

In 2004, the Supreme Court cited the steel seizure case to rule that prisoners at Guantanamo Bay, Cuba, and others the president designated as "enemy combatants" had the right to challenge their detentions in court. "We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens," wrote Justice Sandra Day O'Connor, who Judge Alito has been nominated to succeed.

Supporters and opponents of expansive presidential powers disagree about the intent of the Constitution's framers. In his 2000 speech, Judge Alito argued that the framers "saw the unitary executive as necessary to balance the huge power of the legislature and the factions that may gain control of it."

Critics say the framers were concerned about the unchecked power of a king, who could act without regard to elected representatives. "Some people would argue that the whole point of the Revolution was not to have a king," says Michael Froomkin, a law professor at the University of Miami.

Roots in the 1970s

The current debate about presidential power has its roots in the 1970s, when Congress and courts responded to controversial and in some cases illegal practices of the Nixon White House. New laws curtailing presidential power were enacted. The Supreme Court ruled that newspapers could not be barred from publishing leaked classified documents on the Vietnam War, the attorney general could not wiretap suspected subversives without a warrant, and Mr. Nixon had to surrender transcripts of his secret White House tapes to a Watergate special prosecutor.

Lawyers working under Mr. Nixon's successor, Gerald Ford, "began looking at ways they could advance presidential powers in ways that wouldn't raise the alarm bells it did during the Nixon administration," says Christopher Kelley, a political scientist at Miami University in Oxford, Ohio. Leading that effort was Antonin Scalia, who headed the Ford administration's Office of Legal Counsel and today sits on the Supreme Court.

The push to extend presidential powers continued into the Reagan and George H.W. Bush administrations, in part to contend with Congress when it was controlled by Democrats. The Clinton administration asserted a similar authority over government agencies, particularly after Republicans took control of Congress in 1994.

In March, the current administration's efforts to further expand presidential authority may face another test at the Supreme Court. It has agreed to hear a challenge to the president's plan to try suspected foreign terrorists at Guantanamo before military commissions, a type of special court created by the president in which defendants have limited rights. At issue, among other things, is whether the Geneva Convention affords the Guantanamo prisoners further legal protections.

Last month, Congress approved legislation intended to protect prisoners, in part by providing them with limited rights to appeal. The administration is expected to cite that legislation in an effort to head off the Supreme Court review.

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HEADLINE: Alito Once Made Case For Presidential Power

BYLINE: Christopher Lee, Washington Post Staff Writer

BODY:

As a young Justice Department lawyer, Supreme Court nominee Samuel A. Alito Jr. tried to help tip the balance of power between Congress and the White House a little more in favor of the executive branch.

In the 1980s, the Reagan administration, like other White Houses before and after, chafed at the reality that Congress's reach on the meaning of laws extends beyond the words of statutes passed on Capitol Hill. Judges may turn to the trail of statements lawmakers left behind in the Congressional Record when trying to glean the intent behind a law. The White House left no comparable record.

In a Feb. 5, 1986, draft memo, Alito, then deputy assistant attorney general in the Office of Legal Counsel, outlined a strategy for changing that. It laid out a case for having the president routinely issue statements about the meaning of statutes when he signs them into law.

Such "interpretive signing statements" would be a significant departure from run-of-the-mill bill signing pronouncements, which are "often little more than a press release," Alito wrote. The idea was to flag constitutional concerns and get courts to pay as much attention to the president's take on a law as to "legislative intent."

"Since the president's approval is just as important as that of the House or Senate, it seems to follow that the president's understanding of the bill should be just as important as that of Congress," Alito wrote. He later added that "by forcing some rethinking by courts, scholars, and litigants, it may help to curb some of the prevalent abuses of legislative history."

The Reagan administration popularized the use of such statements and subsequent administrations continued the practice. (The courts have yet to give them much weight, though.)

President Bush has been especially fond of them, issuing at least 108 in his first

term, according to presidential scholar Phillip J. Cooper of Portland State University in Oregon. Many of Bush's statements rejected provisions in bills that the White House regarded as interfering with its powers in national security, intelligence policy and law enforcement, Cooper wrote recently in the academic journal Presidential Studies Quarterly.

The Bush administration "has very effectively expanded the scope and character of the signing statement not only to address specific provisions of legislation that the White House wishes to nullify, but also in an effort to significantly reposition and strengthen the powers of the presidency relative to the Congress," Cooper wrote in the September issue. "This tour d' force has been carried out in such a systematic and careful fashion that few in Congress, the media, or the scholarly community are aware that anything has happened at all."

Bush may be acting without fanfare for a reason. As Alito noted in his memo, the statements "will not be warmly welcomed" on Capitol Hill.

"The novelty of the procedure and the potential increase of presidential power are two factors that may account for this anticipated reaction," he wrote. "In addition, and perhaps most important, Congress is likely to resent the fact that the president will get in the last word on questions of interpretation."

LOAD-DATE: January 2, 2006

The Washington Post

A Search for Order, an Answer in the Law; Since his youth, Samuel Alito Jr. has been drawn to conservative ideas. On the eve of confirmation hearings, the first of two articles looks at the forces that shaped the nominee.; [FINAL Edition]

Dale Russakoff and Jo Becker. **The Washington Post**. Washington, D.C.: Jan 8, 2006. pg. A.01

It was May 3, 1971, the crest of the antiwar movement, and Washington was clogged with thousands of denim-and-fatigues-clad protesters demanding an end to the Vietnam War. Blocks from the Capitol, but far from the action, a handful of Princeton University undergraduates in sport coats found themselves in the wood-paneled chambers of Justice John M. Harlan.

Most saw the visit as a detour from their real purpose: to meet generals, lawmakers and diplomats and debate the justness of the war. One young man even dozed off.

But not Samuel A. Alito Jr. Harlan was the one person he wanted to meet when Princeton's politics society arranged the trip. Now the clean-cut young man with dark-rimmed glasses was transfixed by the justice whose dissents from landmark liberal rulings of the Supreme Court had become his guideposts.

"The rest of us didn't grasp Harlan's significance," said George Pieler, then president of the politics society. "The only reason I did was that Sam had told me."

Years later, Alito would write that his distress over the court's liberal activism under Chief Justice Earl Warren in the 1960s had propelled him to study constitutional law. Along the way, he would embrace Harlan's view that the court was usurping power that the Constitution had reserved for lawmakers.

At the time of the visit, this vision was hardly in vogue. After all, it was the Warren Court that had stepped in when legislators would not and declared segregated schools unconstitutional.

But Alito was not one to be swayed by fashion. As protest movements shook the world around him in the 1960s and 1970s, he held fast to the respect for authority he learned growing up in a New Jersey suburb in the 1950s.

Like many conservatives of his generation, Alito was inspired by the presidential campaign of Sen. Barry M. Goldwater (R-Ariz.), stimulated by William F. Buckley Jr.'s National Review, alarmed by the discord over the war in Vietnam and disenchanted with the liberal bias of college campuses.

But rather than turn to activism, he found in the study of law a framework for what troubled him. The early years of his journey were deeply private and intellectual. But he later found company, particularly in the Reagan Justice Department, incubator of scores of leading conservative legal practitioners, including Chief Justice John G. Roberts Jr.

In articles today and tomorrow, The Washington Post will explore the forces, people and ideas that helped shape Alito and hastened his rise in the law. The articles are based on Alito's writings, government documents and more than 100 interviews, including the first extensive one with his family. Like other Supreme Court nominees, Alito did not comment.

The Senate confirmation hearings that begin tomorrow on President Bush's nomination of Alito to the seat of retiring Justice Sandra Day O'Connor represent a milestone not only for him but also for the conservative movement that grew up as he did.

He was born at mid-century to Italian Americans from the proud, immigrant enclave of Chambersburg in Trenton, N.J.

"When the first baby came, I said, 'Sam, our children are going to be the smartest children in Hamilton Township,' " Rose Alito, now 91, recalled in an interview at the two-story, red-brick home in the Trenton suburb where she and Samuel Alito Sr. raised a Supreme Court nominee.

From the beginning, she said, the boy took after his father, a scholarly and reserved man who directed New Jersey's nonpartisan Office of Legislative Services. Perennially pipe-puffing, with thick white hair that gave him a look of distinction, the elder Alito spoke reverentially of the importance of exhaustive, bias-free research in the making of law.

"It was never about what he felt; it was what the law was," recalled former New Jersey governor Thomas H. Kean (R).

The father ingrained exacting standards in his children. "My father would assist us in learning how to write well," said Rosemary Alito, the nominee's sister. "He'd say, 'No, this is wrong, this is wrong, this is wrong. Go write it again.' And I'd go write it again. And he'd look at it again. And he'd review it and give me corrections until he'd find it to be perfect."

The elder Alito was tight-lipped about his own leanings. Some published reports have said he was a Republican; others, a Democrat. Co-workers said he joked that he was "a political eunuch." Asked for the real story, Rose Alito -- a Republican who was a Democrat until 1987 -- and Rosemary Alito, a Republican and a leading employment lawyer, looked blankly at each other, answering with shrugs.

Alito Senior, whose death in 1987 left his son too distraught to deliver a eulogy, had always vacuumed up knowledge. Before working for the legislature, he taught ancient history, physics, math and English at Trenton Central High and had scored so high on an Army aptitude test it raised suspicions of cheating. Similarly, the younger Alito was so far ahead of peers at Hamilton-East Steinert High School that he skewed the grade curve. And, like his father, he kept a lot to himself.

"He was always listening to students' comments, my comments -- analyzing, evaluating, but silently. Kind of inscrutable at times," said Elaine Tarr, his 10th-grade English teacher.

Classmates still speak of his unusual blend of braininess, modesty and quietly hilarious wit. He played baseball, was a star debater, edited the school paper and was elected student council president with an uncharacteristically wacky campaign using posters of women having their hair colored and the slogan "I'll just DYE if Sam isn't elected. Alito for President."

Behind the gentle demeanor was a boy bent on winning. "Oh yes, very competitive!" said his mother. His rivalry with a champion debater at Trenton Central High named Jeffrey Laurenti was so fierce that Alito would not say his opponent's full name -- a relationship highlighted by the caption beside Alito's yearbook photograph: "Jeffrey Who?"

Friends and family members say Alito embraced the respect for authority that was ubiquitous in the 1950s from home to school to Our Lady of Sorrows Catholic Church. Asked if he ever rebelled, Rosemary Alito exclaimed, "Oh my goodness, he never did anything rebellious at all!"

His middle school Latin teacher, Grace Bolge, said she saw in his passion for that language a love of order and rules. "He liked structure and rigidity," she said. "I think that's why he liked debate. It was timed, it was regulated, there were rules for when you could speak and how you spoke."

The order that defined Alito's early years began to give way in the 1960s. Rose Alito does not remember her reaction as the Second Vatican Council loosened the top-down authority of the Roman Catholic Church. But she made clear her displeasure at another change in religious practice: the 1963 Supreme Court decision banning public school Bible reading and prayer, which began Alito's school days through sixth grade.

"I was teaching then, and it used to irk me," she said. "I read poems that had something to do with the atmosphere and the trees when we were not permitted to read the Bible."

As a federal appellate judge, Alito would repeatedly rule for more religious expression in public spheres.

In 1964, the Supreme Court transformed the legislature that Sam Alito Sr. served, ruling in Reynolds v. Sims that the Constitution required individual legislative districts to have essentially equal numbers of voters -- one man, one vote. The opinion prompted a dissent from Harlan that, according to a friend and former colleague Douglas W. Kmiec, is one of the nominee's favorites.

"The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements," Harlan wrote. "This Court . . . does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the political process."

The elder Alito became the New Jersey legislature's redistricting expert, drawing district lines that shifted power from sparsely populated rural counties to cities and suburbs. In the process, the state Senate turned Democratic for the first time in 52 years. As always, Alito Senior expressed no opinion of the result.

At about this time, politics and government became a fascination for his son, and, according to a job application to the Reagan administration, he was impressed by Goldwater's 1964 presidential campaign, a crusade against communism and Washington's dictates to the states in areas including civil rights and public school prayer. Alito became a regular viewer of Buckley's "Firing Line" television program.

Fellow high school debater James Castranova remembers Alito speaking with enthusiasm about reading Buckley's National Review, the opinion journal credited with helping to launch the modern conservative movement. He also recalled Alito's excitement when then- California Gov. Ronald Reagan, a rising conservative star, was roundly deemed the winner of a 1967 televised debate with then-Sen. Robert F. Kennedy (D-N.Y.).

"He was just fascinated that Reagan was able to get the better of Bobby Kennedy," Castranova said.

Castranova emphasized that Alito never trumpeted his views, lest he jeopardize his father's reputation for impartiality. In the 1968 yearbook of Victor McDonald, a vocal supporter of Richard M. Nixon, Alito teased: "Who will replace you next year as Steinert High School's biggest reactionary? I doubt anybody can be as FAR RIGHT as you."

Former Princeton professor Dennis F. Thompson, now at Harvard, remembers a freshman named Sam Alito from 37 years ago for one reason: He was a conservative.

Thompson assigned students in his political theory class to develop a world view of their own, drawing on philosophers. A tide of liberal and left-wing visions rolled in, with a notable exception. "It wasn't conservative in terms of political issues of the day," Thompson recalled of Alito's paper. "It was more about principles -- a respect for tradition, order and authority."

As the antiwar movement engulfed Princeton, Alito stood outside the fray, finding mentors in books and journals of ideas. In the spring of 1970, after the United States invaded Cambodia, students voted overwhelmingly to postpone classes to campaign against the war.

Classmate Richard R. Clifton, now a 9th Circuit appellate judge, remembers Alito had a different concern. Alito thought that a majority vote to suspend classes would be unfair to a minority who wanted to study. "He was very frustrated," Alito's wife, Martha, said he told her. "He wanted his education."

Many students joined selective-admissions dining clubs dominated by sons of the rich, but Alito chose instead the anti-elitist Stevenson Hall (named for Democrat Adlai E. Stevenson), which welcomed all comers. Friends knew Alito as a confirmed anti-snob, flashing a dry, acerbic wit at any sign of pomposity.

He immersed himself in the study of law, history and politics -- and again debate. His closest friends were all, like him, studious majors in Princeton's Woodrow Wilson School who dined at Stevenson, where they were more likely to debate John Rawls's "A Theory of Justice" than Vietnam. Still, "I knew he was greatly bothered by all the upheaval of the '60s," said Ken Burns, now a lawyer in San Francisco.

Alito had a ringside seat on an ambitious student-faculty effort to make Princeton's decision making more responsive to change, to head off student protest. The chairman of the project, professor Stanley Kelley, who knew Alito's academic work, hired him to take notes and do research while passions flared.

The university approved the group's recommendations, giving students much more influence over tenure, curriculum, dorm curfew and other policies. (A conservative alumni group that Alito listed among his affiliations in a 1985 job application, Concerned Alumni of Princeton, would later say the effort had turned Princeton over to left-wing students.) Kelley said Alito never expressed a view of the deliberations.

Samuel Lipsman, an outspoken leftist who headed Princeton's debate panel, knew Alito's leanings, but only because he asked him directly. "I knew he was conservative and he supported the president and defended the war, but he didn't carry signs even metaphorically," said Lipsman, who nominated Alito to succeed him as debate panel president. "He never antagonized."

Alito's good friend and fellow debater, Andrew P. Napolitano, a self-described "notorious campus conservative" and now a Fox News commentator, said Lipsman knew more than he did: "I do not recall hearing a conservative peep out of Sam's mouth."

But in Alito's mind, he would later write, a conservative legal philosophy was forming by his junior year when he read the works of Yale law professor Alexander M. Bickel, a pioneering critic of the Warren Court. At a time when many intellectuals embraced liberal judicial activism as a force for good, Bickel announced in a book titled "The Supreme Court and the Idea of Progress" that the Warren Court's most sacrosanct rulings -- including Brown v. Board of Education and one man, one vote -- were badly reasoned, based not on the Constitution, but on the egalitarian visions of individual justices. A moderate to liberal Democrat, Bickel wrote that no matter how noble the result, this unelected branch was threatening democracy.

Bickel's views ignited profound unease and even fury in intellectual circles, where the Warren Court was seen as having protected individual rights from being trampled by the majority. Yale activists burned Bickel in effigy in 1969.

For Alito, however, discovering Bickel proved a seminal moment. He would write later that he had objected even as a young man to the Warren Court's rulings, particularly on reapportionment, criminal procedure and public school prayer. Bickel specifically critiqued these decisions, arguing that

legislatures, not courts, should execute complex social changes, even if they came more slowly. His vision meshed with Alito's desire for orderly change.

His senior year, Alito crossed paths again with his old debating rival, Jeffrey Laurenti, then a graduate student at Princeton. From similar beginnings as Italian American Catholics raised with moral certainty and respect for authority, they had taken different roads. Laurenti had turned against the Vietnam War and the president. "The scales were falling slowly from my eyes. I was groping," he said. "I don't know that Sam was."

Alito was delving into the history and workings of the Supreme Court. Charles A. Miller, then a Princeton assistant professor of constitutional law, said Alito so loved reading Supreme Court opinions that he persuaded the teacher to completely revise the syllabus of one seminar so that he could take it again.

Alito wrote his research paper for Miller on Justice Oliver Wendell Holmes, who once famously had summed up his philosophy of judicial restraint: "If my fellow citizens want to go to hell, I will help them. It's my job."

Miller was amazed by the college senior's ability "to embrace historical, philosophical and political material and modes of reasoning," according to the 1972 law school recommendation he wrote. "The logic and precision that Mr. Alito uses in both oral and written presentation is almost palpable. None of it is aggressive, indeed sometimes it is self-effacing," Miller wrote, using adjectives Alito's admirers use today.

"It's easy to say I'm prescient," said Miller, now retired, "but I think what's more true is this guy is very consistent."

Yale Law School in 1972 was a temple of legal liberalism, and Alito soon began to feel that some professors were giving him an incomplete view of the law. He would later tell his friend Kmiec that he turned to reading extensively on his own.

"There was this note of regret in his voice that very few of them [professors] seemed to be saying things that he could readily agree with," said Kmiec, now a professor at Pepperdine University Law School.

Bickel soon became gravely ill, unable to teach. His devoted friend on the faculty, Robert H. Bork, was carrying the conservative torch, arguing that the only principled way to interpret the Constitution was to stick to the precise words of the Framers and what they meant at that time.

Bork taught that there was no constitutional basis for rights to privacy, abortion, or one man, one vote, and he criticized court- ordered busing to achieve school desegregation as judicial meddling. Classmates do not recall Alito's reaction to Roe v. Wade in 1973, but he would later write that the decision had no basis in the Constitution. Alito's mother has told reporters that he personally opposes abortion; Alito has not commented on his personal views.

Bork said in an interview that he remembers only one student -- John R. Bolton, now the U.S. ambassador to the United Nations -- who then expressed conservative views openly. "The rest of them kept their heads down," Bork said.

Alito's Yale roommate and Princeton classmate Mark Dwyer said his friend had hoped to have Bork for constitutional law, but ended up with Charles Reich, author of an unofficial bible of the protest movement, "The Greening of America."

Alito applied to be a Supreme Court clerk after law school. But, said his wife, Martha, "it was not to be at that time in his life." Instead, he went home to New Jersey to clerk for Appeals Court Judge Leonard I. Garth in Newark, a 3rd Circuit judicial craftsman in the mold of Alito's hero, Justice Harlan.

In contrast to his intellectual estrangement from Yale, Alito found in Garth a sort of father in the law. Former clerks describe him as a judge who asks himself before deciding any case whether an elected branch of government could resolve it instead.

"Judge Garth and Sam had the same philosophy, and they spoke the same language," said Kenneth Prochnow, Alito's co-clerk in 1976 and 1977.

There was another link. Alito's father had testified before Garth as a demographic expert in a 1972 New Jersey reapportionment case. "It was an extraordinary circumstance because rarely do you remember witnesses," Garth said. "But I was terribly impressed with him. I told Sam about it, and I think he was justifiably proud."

Garth, who once rated Alito 161/2 out of 10 as a clerk, said they used to buy a bag of peanuts and "take long walks in Newark, just the two of us, hashing out cases."

Alito was back in an orderly world after seven years in liberal cauldrons. He moved home with his parents and assumed the role of lector, or reader, at Sunday Mass at Our Lady of Sorrows.

Prochnow remembers his surprise when he realized after the 1976 presidential election that his co-clerk was a Republican. "Sam was disappointed that Jimmy Carter won," Prochnow said. "That was very strange for me, because in the environment I'd been in since 1968, I don't think I'd met any Republicans," he said, referring to his time at Columbia University and New York University Law School. "I can only imagine what it was like for Sam to have developed and held his philosophy, which must have been a minority and unpopular position, in the environments he'd been in."

Comfortable in the monastic, intellectual world of appeals -- a more solitary and research-oriented practice than the free-for-all of trial work -- Alito went to work after his clerkship in the appellate section of the U.S. attorney's office in Newark. His skills quickly made him the go-to lawyer on the most sensitive cases. One involved a top-secret exchange of two convicted Russian spies for five Russian dissidents. The intricacies kept him in the library for days, plumbing law books, as well as a Russian dictionary.

Near the end of the process, another staffer breezed by him in the library stacks, calling out offhandedly, "Hey, Sam, I heard you learned Russian over the weekend."

Martha Bomgardner, a young librarian in the U.S. attorney's office, overheard his quiet and upright-sounding answer: "I don't think that's something to talk about."

"Oh, this is a smart one," she thought.

She told friends she would marry him by the following April. But he was uncommonly shy, and despite multiple daily trips to the library, did not ask her out for 13 months. "He is judicious," she said recently with a laugh.

They had dated about a year when he got an offer from the U.S. solicitor general. The office is arguably the most respected law firm in the country, representing the U.S. government before the Supreme Court. Alito left for Washington in August 1981. "I thought that would be the end," Bomgardner said.

Four years later, Martha Bomgardner would become Martha Alito and Samuel Alito Jr. would be on a very different course.

The Washington Post

Proving His Mettle in the Reagan Justice Dept.; [FINAL Edition]

Jo Becker and Dale Russakoff. **The Washington Post**. Washington, D.C.: Jan 9, 2006. pg. A.01

The captains of the Reagan revolution at the Justice Department had two big concerns about a bookish new recruit named Samuel A. Alito Jr., who arrived in 1981: his blank slate as a conservative activist and his pedigree from a perceived bastion of legal liberalism.

"I wouldn't let most people from Yale Law School wash my car, let alone write my briefs," said Michael A. Carvin, a political deputy at the department.

Six years later, the revolutionaries saw Alito as one of them, tapping him to become U.S. attorney in New Jersey in 1987 and eventually, they hoped, a judge. Speaking on a New Jersey public affairs television program, the young prosecutor showcased the philosophy that had won the confidence of his Washington mentors.

Asked his opinion of President Ronald Reagan's nomination of Robert H. Bork to the Supreme Court, Alito gave a ringing defense of the conservative icon he said had been "unjustifiably rejected" by the Senate in one of the most ideologically polarizing nomination battles in decades.

"I think he was one of the most outstanding nominees of this century," Alito told Michael Aron of NJN News's "Front Page New Jersey" in a little-noticed 1988 interview. "He is a man of unequaled ability, understanding of constitutional history, someone who had thought deeply throughout his entire life about constitutional issues and about the Supreme Court and the role it ought to play in American society."

Confirmation hearings begin today on Alito's own nomination to the Supreme Court, and he is urging senators to focus on his record as a judge, rather than on the opinions he expressed as a Reagan administration partisan. "I don't give heed to my personal views. I interpret the law," he has said.

But Alito's mentors in the Reagan Justice Department carefully heeded those views when they identified him for advancement. Conservatives had struggled for a generation against a Supreme Court they believed was imposing liberal social policies in the guise of constitutional law. Bork was to have been their agent on the high court, but the department's leaders also moved aggressively to elevate like-minded conservatives throughout the judiciary.

Alito proved himself to top Justice Department operatives by distilling their agenda to reshape the nation's civil rights laws and overturn abortion rights into brilliantly analytical legal strategies. Much like his father, who had served both parties in a politically riven New Jersey legislature, he won the trust of the president's most ardent loyalists as well as the career civil servants who were often at war with them.

Alito left Washington an accomplished institutional player with friends in important places. His six years here positioned him to become a Supreme Court nominee as much as did the tomes of jurisprudence he accumulated in 15 years as an appeals judge and 30 years in the law.

Assistant Attorney General William Bradford Reynolds was frustrated. The White House had tasked him with enshrining into law Reagan's conservative policies on racial discrimination, abortion and school prayer. Standing in his way was the Office of the Solicitor General.

The solicitor general represents the government before the Supreme Court. While part of the Justice Department, the office is also known as the "10th justice" for its tradition of independently balancing duty to represent the president with respect for the court and its precedents.

Reynolds charged that many of the office's longtime staff lawyers were hostile to the president's agenda, and were actively undermining it in the guise of showing deference to the court. In response, Solicitor General Rex E. Lee started assigning the "agenda cases" to lawyers who were ideologically compatible with the administration.

"They wanted to find assistants who were sympathetic to [Reynolds's] causes so he couldn't possibly make that claim," said Alito's former colleague Joshua Schwartz, a law professor at George Washington University whose account was confirmed by four other former administration officials. "For affirmative action, it was Sam."

Alito had come to the solicitor general's office as a career lawyer in 1981, after a stint as an assistant federal appellate prosecutor in Newark. Initially, he was assigned to the less controversial area of his expertise, criminal law. But over time, he proved his conservative credentials. He gave money to the National Conservative Political Action Committee, which financed ads painting Democrats as liberal extremists. He donated to Jeffrey Bell, a 1982 GOP Senate primary candidate in New Jersey who opposed abortion and gun control and favored voluntary school prayer. And in 1983, he joined the conservative Federalist Society.

Among the society's featured speakers was Bork, who asserted that the Constitution protected only rights enumerated by the Framers -- a view that foes of his Supreme Court nomination would call threatening to civil rights, abortion rights and limits on police powers.

Any lingering doubts about Alito's commitment to the Reagan cause were put to rest in 1984, when he took over the civil rights agenda cases from a colleague who had left for private practice. Reynolds had branded Alito's predecessor, Carter Phillips, a "quota lover" for insisting on incremental attacks on affirmative action rather than a wholesale assault, Phillips recalled.

But Reynolds came to feel far more comfortable with the mild- mannered Alito. "I don't recall ever disagreeing with him," Reynolds said.

Alito proved his mettle to Reynolds and others in a case called Wygant v. Jackson Board of Education. The case involved a voluntary agreement by a Michigan school board with a history of discrimination to lay off whites ahead of blacks to preserve racial balance. A 1985 brief co-written by Alito argued that the Constitution prohibits the government from treating people differently based on race or gender merely to achieve diversity.

The Supreme Court rejected that broad argument, while striking down the Michigan layoff arrangement. But Solicitor General Charles Fried, who had taken over for Lee, raved about a phrase Alito had come up with to critique affirmative action. Baseball great Hank Aaron would not be regarded as the home-run king "if the fences had been moved in whenever he came to plate," Alito wrote.

More agenda cases started landing on Alito's desk. Charles J. Cooper, who was Reynolds's deputy, said he was "pleasantly relieved" that Alito "was determined not to be an impediment."

Staff lawyers admired the way Alito, while sympathetic to the administration's goals, tended to be more pragmatic about how to achieve them. He was not perceived as "part of the cabal" whose ideological directives threatened the credibility the office had historically had with the Supreme Court, said former colleague Mark Levy, a Democrat who later became a senior political appointee in the Clinton administration.

The administration had been pushing for a frontal assault on Roe v. Wade, the landmark 1973 case establishing a woman's right to an abortion. Senior Justice Department officials saw a vehicle in the 1985 case Thornburgh v. American College of Obstetricians and Gynecologists.

Alito cautioned against what he thought was a pointless and potentially costly gesture. The votes simply were not there. The administration should "make clear that we disagree with the decision," he wrote in a 1985 memo. But rather than urging the court to overturn Roe, he said the focus should be on upholding the abortion regulations at issue in the case, a strategy that he said could make clear the states' interest in "protecting the unborn." That, he said, would "advance the goals of bringing about the eventual overruling of Roe v. Wade and, in the meantime, of mitigating its effects."

Fried overruled him, and the administration lost the case. But Alito's caution was not held against him -- quite the opposite. Cooper said he was convinced that Alito was a team player, simply offering savvy strategic advice to reach the administration's goal. "If it had been followed, who knows where we would be now?" he mused.

Cooper was promoted soon afterward to head the Office of Legal Counsel, the constitutional adviser to the president and his Cabinet. He wanted Alito to be his deputy.

Cooper was impressed not only with Alito's legal acumen, but also his ability to "throttle back his own philosophical passions" in pursuit of administration objectives.

But a big hurdle remained. The position of deputy assistant attorney general required White House political clearance. Cooper and Reynolds knew Alito's loyalties, but the White House did not.

On Nov. 15, 1985, Alito penned an uncharacteristically zealous application letter. Laying bare his personal politics, he declared, "I am and always have been a conservative."

He shared the administration's strenuous opposition to decisions of the Supreme Court in the 1960s, particularly those involving criminal procedure, separation of church and state, and legislative reapportionment, which he viewed as usurping power the Constitution intended lawmakers to wield. And he was "particularly proud" of the contributions he had made toward the administration's conservative civil rights agenda and its efforts to convince the court "that the Constitution does not protect a right to abortion."

Alito got the job and was immediately thrust into a variety of high-profile controversies.

In 1986, Attorney General Edwin I. Meese III disclosed that as much as $30 million from the covert sale of arms to Iran had been secretly diverted to anti-communist guerrillas in Nicaragua. Reynolds and Cooper said Alito helped craft the administration's defense of its actions.

"Sam was the kind of person you want when the entire world is going to be flyspecking everything you write and challenging every construct you advance," Cooper said.

Alito was designated to defend the office's widely criticized conclusion that the law did not bar employers from firing people with AIDS because of "fear of contagion, whether reasonable or not." He also helped the office's efforts to quash an independent counsel's investigation into whether a high-ranking Justice Department official misled Congress. And when Congress began investigating allegations that the White House had fired a top aide because of political pressure from conservatives, Alito advised a key witness to claim executive privilege and tell Congress nothing.

Even as his job grew increasingly political, to those beneath him, Alito remained above politics. He was cautious, thorough and logical. There was no aura of fervency about him, and career lawyers saw him as the epitome of what an Office of Legal Counsel lawyer should be -- someone who considered the law and rendered an opinion, whether the administration liked it or not.

"People make enemies in the types of jobs he had," said Bradford R. Clark, who worked for Alito and is now a law professor at George Washington University. "But there's nobody out there that dislikes Sam."

Former colleague John McGinnis said he believes Alito struggled with conflicting impulses. On the one hand, he said, Alito had a civil servant's respect, honed at the Solicitor General's Office, for incrementalism and stability in the law. At the same time, Alito "really wanted to forward" the administration's legal agenda -- a goal that demanded a radical departure from the status quo.

"That always struck me as a tension in his thoughts," said McGinnis, a Northwestern University law professor.

By that time, Alito knew he wanted to be a judge, said Phillips, a friend since their days in the Solicitor General's Office. But the selection process is fickle, Phillips said, and "other than making yourself the big fish in a small pond, I don't think it's anything you can plan for."

It was time for Alito to head home, to a place where a Reagan conservative might stand out in a sea of moderate Republicans. And to a job with a history of serving as a steppingstone to the bench.

Late one night in the fall of 1986, as Cooper and he were finishing up work, Alito asked his boss for a favor. He had just learned that the interim U.S. attorney for New Jersey was going to step down, and he wanted the job.

The year before, Alito had married Martha Ann Bomgardner, the law librarian he met when he worked in the U.S. attorney's office as a young assistant appellate lawyer, and the couple had a baby boy. The decision to apply, she said, was driven as much by a desire to raise their children near their parents as any thought of becoming a judge.

"Sam, if there's any way I can help you, I will," Cooper recalls telling his 36-year-old deputy.

Cooper said he went directly to the top, making Alito's interest known to Reynolds and Meese.

Reynolds was an especially controversial figure in Washington. Two years earlier, the Republican-controlled Senate had rejected his nomination to become associate attorney general, with members accusing him of placing more importance on rolling back the civil rights of minorities, women and the disabled than on protecting them. Sen. Arlen Specter (R-Pa.) charged that Reynolds had elevated his "own legal judgment over the judgments of the courts."

Reynolds said he felt that he and others working on the administration's civil rights "agenda cases" had been unfairly vilified, noting that the Supreme Court has since struck down some affirmative action programs. But at the time, "we were under fire from all quarters," a defining experience that he thought made those like Alito "more likely to stand fast than to drift," he said.

And that was important because Reynolds, still one of the most powerful figures in the Justice Department, had a plan that he and Meese hoped would carry forward the Reagan legacy long after they were gone. The idea was to quickly move gifted conservative lawyers into positions that could lead to the federal bench.

Alito fit the bill, Reynolds said.

"Were we interested more than anything else in finding younger, rather than older, intelligent people who could take the arguments and policies we felt were important and promote them? Did we think in terms of those people becoming judges? You bet your life," Reynolds said. "Sam was a good candidate for the grooming we were hoping would happen."

To Meese, Alito was only one of "a group of very talented lawyers," he said. But Reynolds said he told Meese that Alito was the man to back for the U.S. attorney job. With the attorney general on board, the deal was all but sealed. Still, six other candidates had applied for the position, and Alito did not leave anything to chance.

He had the support of some powerful figures in New Jersey, including Gov. Thomas H. Kean (R). Kean knew Alito's father, who had headed the New Jersey Office of Legislative Services and had a reputation for scrupulous nonpartisanship. Alito also lined up the support of two New Jersey congressmen.

His chief opponent was a wealthy lawyer named Peter Sudler, who had GOP cachet as a major donor. Alito decided to do a little digging into Sudler at the Federal Election Commission, remembered David Grais, Alito's friend.

"He looked up his records and found that he'd given a lot to Democrats as well, and he made sure that information got to the right people," Grais said. "Sam is modest, but he is not a political naif."

On March 19, 1987, Alito was sworn in as U.S. attorney for New Jersey, an office with a time-honored reputation for political independence. His appointment was cheered as an affirmation of that tradition.

Back home, Alito was known for the quality of the work he did there in the 1970s. No one there saw him as the ideological conservative he had pitched in the letter to the White House just two years earlier.

"He was viewed in New Jersey by the people who knew him as a nonpartisan candidate of excellence -- exactly the opposite of what comes across in that letter," said Dan Rabinowitz, a law school classmate who had worked with Alito in the U.S attorney's office.

Alito took on corrupt public officials and corporate wrongdoers. He prosecuted the country's first international terrorism case. And his office convicted Louis Manna, the consigliere of the Genovese crime family, on charges of racketeering and conspiracy to commit murder.

Federal judges appreciated his willingness to leave to local officials penny-ante narcotics cases that had clogged their courts, despite the high priority the Reagan administration placed on its war on drugs. Internally, Alito was well liked as someone who valued merit above all else.

While he opposed numeric hiring quotas, he took steps to diversify an office that had a reputation as something of a "white boys' club." Alberto Rivas, a criminal defense lawyer and a Democrat, said that when Alito hired him, he was the only Latino lawyer in the office. By the time Alito left, Rivas said, there were four, as well as more blacks.

"His whole experience shows that he has some commitment to diversity," Rivas said.

But the heavily administrative job was not as intellectually challenging as the work Alito had done in Washington. When Judge John J. Gibbons unexpectedly announced his retirement from the U.S. Court of Appeals for the 3rd Circuit on Sept. 11, 1989, Alito jumped at the opportunity to replace him.

Senators from the president's party typically wield great influence in picking their state's judges. But New Jersey had elected two Democrats, so the choice was left to the White House and the new administration of President George H.W. Bush.

Alito again turned to his Reagan Justice Department allies. Cooper, who by then had left government but had close ties to the administration's decision makers, said he made calls at Alito's request. As the president contemplated his choices, White House counsel C. Boyden Gray asked Reynolds to vouch for Alito. Reynolds said he was "fully supportive of Sam."

Phillips recalled how anxious Alito was, but in the end, the president was sold.

On April 5, 1990, Alito and a 1st Circuit nominee named David H. Souter appeared before the Senate Judiciary Committee. Sen. Edward M. Kennedy (D-Mass.) peppered Souter, now one of the more liberal justices on the Supreme Court, about his views. But the 40-year-old Alito was confirmed with nary a substantive question.

In speeches as a judge, Alito has advised law students and legal professionals: "Watch the rhetoric" and "Don't wear your views on your sleeve." In 15 years on the bench, he has practiced what he preaches.

Rather than brandishing his judicial philosophy like a sword, he has tucked it into one tightly reasoned opinion at a time. More methodical technician than theoretical firebrand, Alito has shunned pyrrhic challenges to Supreme Court precedent favored by some of his conservative brethren.

Like the career lawyers in the Reagan Justice Department, his fellow judges speak highly of his skill and collegiality. They see a cautious intellectual who is temperamentally unlikely, in the words of one judge, a Democrat, to "kick long-standing precedent in the teeth."

"He may come out differently than I do," said Judge Thomas L. Ambro, a Clinton appointee, but "I don't see his personal views spilling across the page."

At the same time, Alito has compiled the type of record that his Reagan-era colleagues had hoped for. In his copious opinions on politically divisive issues such as abortion, civil rights and religion in the public square, they see Alito joining a gathering juggernaut of conservative thinking on the nation's highest court.

"He's a Borklette, a Bork without the edge," said Bruce Fein, who was associate deputy attorney general in the Reagan Justice Department. "I see a judge who reads the statutes as written and interprets the Constitution using its original meaning, instead of assuming the role of platonic guardian and ordaining a society he thinks is enlightened."

Today, Alito will begin to tell the Senate, and the country, how he sees himself.

Research editor Lucy Shackelford and researcher Madonna Lebling contributed to this report.

The Washington Times
www.washingtontimes.com

Alito used group to show Reagan accord

By Guy Taylor
THE WASHINGTON TIMES
Published January 13, 2006

Judge Samuel A. Alito Jr. cited his membership in a now-defunct Princeton alumni group in a 1985 application for a politically appointed Reagan administration position to prove he was in line with the administration's legal agenda, said the man who hired him for the job.

Judge Alito listed the conservative Federalist Society and Concerned Alumni of Princeton (CAP) in his application to become a deputy to Charles J. Cooper, who was assistant attorney general in the Office of Legal Counsel.

Democrats criticized CAP this week during Judge Alito's confirmation hearings for the Supreme Court.

"The only purpose of that essay was to satisfy the Office of Presidential Personnel that he was simpatico with the Reagan administration's legal policy agenda," Mr. Cooper said yesterday.

People with ties to CAP, meanwhile, say Democrats are using the politically correct environment of the Supreme Court confirmation hearings to smear the group by misrepresenting its ideology. The organization folded in 1987.

"It was a respected mainstream conservative organization," said Dinesh D'Souza, a native of India and conservative best-selling author who began his career as editor of CAP's magazine in 1983.

"The organization's criticism of affirmative action and race and gender preferences is being manipulated to make it look like the organization opposed minorities and women," he said.

On Tuesday, Sen. Edward M. Kennedy of Massachusetts and other Democrats hammered Judge Alito with questions about his ties to CAP.

William A. Rusher, former National Review publisher and a founding CAP member, said, "Kennedy is trying to give CAP the worst possible reputation in the hope that some of that will rub off on Judge Alito."

"CAP was none of the things Sen. Kennedy is smearing it as being: anti-black, etc.," Mr. Rusher said in an interview posted on the National Review's Web site (www.nationalreview.com).

CAP was founded in 1972 by Princeton graduates seeking to expose a dominance of liberal ideas on the campus, Mr. Rusher and Mr. D'Sousa said.

When asked about CAP this week, Judge Alito said he had no recollection of the organization other than listing it in an essay portion of his 1985 job application.

Mark Dwyer, a New York lawyer and friend of Judge Alito, says he doesn't recall discussing CAP when the two roomed at Yale Law School from 1972 to 1975. But, he

said, he could understand if Judge Alito supported the group because he participated in the Reserve Officers' Training Corps (ROTC) at Princeton, which had CAP's support.

Mr. Cooper doesn't specifically recall seeing the essay portion of the 1985 application. "I'm sure I saw his resume, but I don't remember seeing his essay of his political bona fides," he said.

"Keep in mind this wasn't a resume; it's not something that basically remains fairly stable just adding to it as you continue to add things that warrant mention on a resume," Mr. Cooper said.

Representative Debbie Wasserman Schultz
20th District of Florida

Statement to the Senate Judiciary Committee Hearing for Judge Samuel Alito's Nomination to the United States Supreme Court
January 12, 2006

I am honored to speak to you as you consider the nomination of an individual to a lifetime position on the Supreme Court. Someone who, if confirmed, would serve well into this century.

I come before you today in several capacities.

First, I am here as a Member of Congress, proudly serving the people of South Florida.

Second, I am here to underscore my concerns with Judge Alito's record on gender discrimination.

Third, I am here in one of my most rewarding roles: **as the mother of three young children** who will come of age in an

America guided by many of the decisions this Court will make.

My generation benefited from long, fought Supreme Court battles--resulting in the rights that we enjoy today.

I cannot imagine my children's future in an America without these same hard-won freedoms.

It is for these reasons-- that I am here today to urge you to **reject Judge Samuel Alito's nomination to the United States Supreme Court.**

There is no question that Judge Alito has impressive academic credentials and has led a distinguished career, but academic credentials alone do not qualify an individual for elevation to the highest court in the land.

I realize you are quite familiar with the well-publicized Thornburgh case brief that Judge Alito helped develop as a deputy U.S. Solicitor General.[1]

As Judge Alito's own memorandum on this case demonstrates, he urged the courts to sustain a series of burdens on a woman's right to make her own reproductive health care decisions. He then went further and expanded this notion to include even certain forms of birth control.

This strategy set forth in his 1985 memo is remarkably similar to the strategy adopted by the current pro-life movement to eviscerate the foundations of *Roe vs. Wade*.

Judge Alito also dissented in a key case on women's liberty and personal responsibility.

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[1] (Memorandum from Samuel A. Alito, Assistant to the Solicitor General, to Charles Fried, Acting Solicitor General, re "Thornburgh v. American College of Obstetricians & Gynecologists No. 84-495; Diamond v. Charles, No. 84-1379," at 8 (June 3, 1985)

His written opinion on a law requiring spousal notification by a woman seeking to terminate a pregnancy is as troubling as the analysis that he used to arrive at the decision.[2]

In assenting to spousal notification, Judge Alito clearly ignored a woman's right to autonomy.

This blatant disregard for individual right is what our Founding Fathers designed a system of meaningful checks and balances to guard against.

Once any branch of government surrenders itself to the others, that authority is difficult to regain.

I come from a state where executive power and government intrusion on privacy rights has been world news.

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[2] (Memorandum from Samuel A. Alito, Assistant to the Solicitor General, re: "Mitchell v. Forsyth 472 U.S. 511 (1985)

Florida's Governor pushed the State Legislature to grant him authority to overturn a judicial decision in the Terri Schiavo case, and Congress inserted itself into that family's private tragedy.

Ultimately, the case could have reached the Supreme Court. Judge Alito's work on privacy and Executive expansion cases suggest that if he were confirmed, he might not stand in the way of a similar intrusion.

If confirmed, Judge Alito will be in a position to influence final rulings on executive branch boundaries.

Judge Alito's dissention in another privacy case is particularly disturbing.

In this case, a police officer strip searched a 10-year-old girl and her mother. [3] They were not named in the search warrant; they were simply on the premises.

[3] (Doe v. Groody, 361 F.3d 232 (3d Cir. 2004)

According to the Boston Globe, the 10-year-old girl's lawyer, Andrew Solomon, later reported Judge Alito as saying: ***"Why do you keep bringing up the fact that this case involves the strip search of a 10-year-old child?"***

Yes. Why do we keep bringing up the fact that this case involved the strip search of a 10-year-old child? Because this was not a simple case of whether or not the officers exceeded their investigative authority—it escalated to an unconscionable level.

Judge Alito was the **only** member of a three-judge panel who found the strip search of the 10-year-old acceptable under his interpretation of the law.

I am horrified to think that someone could strip search my children based on selective interpretation of a warrant.

The standard must be higher when cases involve the most vulnerable members of our society: our children. When enforcement authorities lapse in their judgment, our courts MUST not!

As you consider this nomination, I ask you to reflect: Would you be comfortable if your own child was the subject of a strip search? Would you be comfortable if your little girl was the plaintiff with Justice Alito as the deciding vote that sanctioned this authority?

This case was about a child, but it was also about the protections of the Constitution that apply to each of us.

Judge Alito's record also indicates an indifference to civil rights.

One of the most telling indicators of Judge Alito's stance on discrimination is his membership in the Concerned Alumni of Princeton (CAP.)

Let's be clear. The organization was hostile to Princeton's efforts to increase admission of women and minorities.

To put this in perspective, Judge Alito was highlighting his CAP membership in a 1985 job application for the Reagan Justice Department four years after Sandra Day O'Connor broke the glass ceiling to become the first woman to serve on the Supreme Court.

Senators, in closing, I suggest to you, that while highly regarded for his intellect, integrity, and legal experience. Judge Alito is a nominee who will replace one of only two women justices. This **reflects a missed opportunity to retain, or expand, the existing diversity of the Court**.

While I have not always agreed with her decisions, Justice O'Connor has cast the deciding vote to protect fundamental freedoms time and again.

I distinctly remember the feeling I had in 1981, when I was 14-years old and heard that a woman was going to serve on the Supreme Court. It proved what my parents told me my whole life: that in America, little girls really can grow up to be anything they want to be.

Replacing Justice O'Connor with Judge Alito risks turning back the clock, both literally and figuratively. It would mock President Reagan's legacy.

Long after we have completed our public service, the decisions made by the Supreme Court will continue to impact all Americans.

While it is not my place or role to cast judgment on your ultimate decision, **we can be certain that history will!**

Again, thank you for the opportunity to speak with you this afternoon.

Statement of Jack White
Associate, Kirkland & Ellis LLP
before the Senate Committee on the Judiciary

Hearing on the Nomination of Samuel A. Alito, Jr.
January 12, 2006

Mr. Chairman, Senator Leahy and Members of the Committee. Thank you for the opportunity to testify today. My name is Jack White. I am an Associate in the law firm of Kirkland & Ellis LLP. I am here today in support of the confirmation of Judge Alito, to be the next Associate Justice on the United States Supreme Court. I served as a law clerk for Judge Alito on the U.S. Court of Appeals for the Third Circuit from 2003 to 2004.

To provide context for my comments, I would like to share some personal information about myself. I am the son of African-American parents who were born in the segregated south. Their respect for the recognition of civil liberties that have enabled them to succeed and raise principled children has inculcated the same respect in me. This respect has led me to become a member of the NAACP and the ACLU. The same respect for our freedoms encouraged me to serve our country on Active Duty as an officer in the United States Army, and I continue to serve as a Captain in the United States Army Reserve. I have also served as a minister in Savannah, Georgia.

My first opportunity to meet Judge Alito introduced me to his diligence and sense of duty. The remainder of my interactions with him have verified my initial impressions. I met Judge Alito in his chambers a few weeks after the September 11, 2001 tragedy. As the Adjutant and a Company Commander in a Reserve Reception Battalion in Pasadena, California, I had difficulty getting authorization to travel to New Jersey for a job interview. Notwithstanding Judge Alito's assurances that I did not need to travel to meet him face to face, as an ambitious law student, I was determined to do so. When I arrived in Newark, New Jersey, at the U.S. Post Office and Courthouse where Judge Alito's chambers are located, he and the security guards were the only people there. It was a holiday, no clerks were working, no other employees in the building were working, but Judge Alito was steadily preparing for an upcoming sitting. Yet, he took the time to tell me how he prepared for oral arguments and what he required of his law clerks in contributing to the decision-making process. Then, he took the time to tour his chambers and the courthouse with me.

As I clerked for Judge Alito, I saw this same sense of duty, diligence, humanity, and respect for his role as a federal appellate judge. Judge Alito required searching analysis of the factual and procedural background of every case. He required thorough evaluation of the applicable law in every case. And, he uniformly applied the applicable law to the facts of every case. Judge Alito recognized that every case was the most important case on the docket to the parties and attorneys with something at stake. There was no wavering from this consistent, predictable method of his judicial decision-making

process. Working for Judge Alito, I saw in him an abiding loyalty to a fair judicial process as opposed to an enslaved inclination toward a political or personal ideology.

What I found most intriguing and particularly exceptional about Judge Alito's judicial decision-making process was the conspicuous absence of personal predilections. As a novice recent law school graduate, I incorrectly began the time I spent in Judge Alito's chambers by occasionally coming to conclusions about a case after a cursory review of the briefs. I quickly learned that Judge Alito had no tolerance for any recommendation that was not consistent with a searching review of the law. I never witnessed an occasion when personal or ideological beliefs motivated a specific outcome in a case. After a year of working closely with the judge on cases concerning a wide variety of legal issues, I left New Jersey not knowing Judge Alito's personal beliefs on any of them. The reason I did not know Judge Alito's personal beliefs was that the jurist's ideology was never an issue in any case he considered while I was in his chambers. In fact, it is never an issue in any case. My fellow former co-clerks have agreed and communicated this notion in a letter we provided to this committee.

Although Judge Alito's sense of duty, diligence, and the decision-making process have inspired the collective support of his former law clerks, there is an additional characteristic that also heavily impressed me personally. On a daily basis, Judge Alito dealt with a wide variety of individuals, including law clerks, fellow judges, experienced and inexperienced attorneys, UPS delivery personnel, law students, janitorial staff, and

individuals throughout the community. Without fail, I saw Judge Alito treat everyone with dignity and respect. In fact, on one occasion, my parents went to New Jersey to visit me. Judge Alito suggested that I bring them to chambers. Because oral arguments in several cases were rapidly approaching, I thought Judge Alito would shake their hands and we would be on our way. Over an hour later, after sitting down and talking with Judge Alito, my parents understood my tremendous respect for this jurist. That day, my parents left Judge Alito's chambers believing that meeting them was the highlight of Judge Alito's day.

Working for Judge Alito provided me with the opportunity to witness American justice at work. I saw a jurist with an abiding respect for the strength, purpose, and authority of our Constitution, and a particular regard for the limited role of the judiciary envisioned in the framers' separation of powers. From my experience, I will feel confident with Judge Alito serving as an Associate Justice on the U.S. Supreme Court, interpreting laws that affect me. It was my honor and privilege to clerk for him, and it is my honor to appear here on his behalf.

I would be pleased to answer any questions you may have.



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Executive Director
Shelley Lindauer

January 9, 2006

The Honorable Patrick J. Leahy, Ranking Member
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Fax (202) 224-3479

Dear Senator Leahy:

Recognizing the profound significance of the Judiciary Committee hearings on the nomination of Judge Samuel Alito, Jr. to the United States Supreme Court for the future of jurisprudence in the United States, Women of Reform Judaism, comprised of 75,000 members in 550 affiliates in North America, urges you to oppose his confirmation.

Women of Reform Judaism rarely opposes judicial nominations. Its resolution "Judicial and Executive Branch Nominations" adopted in 2004, however, emphasizes the need for balance of legal and social perspectives on the federal bench. This resolution also enables Women of Reform Judaism to oppose judicial candidates whose record demonstrates opposition to the core values, rights and principles supported by our organization.

In his years in the Reagan Administration and on the Third Circuit Court of Appeals, Judge Alito has been a strong and consistent voice for restricting women's rights, extending police powers and destroying the wall separating church and state in schools and in community religious displays. Judge Alito has also taken anti-affirmative action positions and has supported stringent barriers in discrimination cases. Judge Alito's vote could be a crucial one on the court in all these areas and more, replacing the balance provided by Justice Sandra Day O'Connor with a marked shift that would endanger the civil liberties and civil rights of the people of the United States.

Committed to the precepts of our tradition and adhering to the words of Deuteronomy, which tell us to pursue justice (Deuteronomy 16:20), we look to the Supreme Court to protect the civil liberties and civil rights of all Americans. Based on his record, we are concerned that Judge Alito will be unable to put aside his private views to dispense equal justice for all and oppose his confirmation.

Respectfully,

Shelley Lindauer

Rosanne M. Selfon

Women of Reform Judaism, an affiliate of the Union for Reform Judaism, is the collective voice and presence of women in congregational life. Stronger together, we support the ideals and enhance the quality of Jewish living to ensure the future of progressive Judaism in North America, Israel and around the world.

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DECEMBER 8, 2005

SENATOR PATRICK LEAHY

U.S. SENATE

WASHINGTON D.C. 20510

DEAR SENATOR LEAHY:

I AM WRITING ON BEHALF OF THE THOUSANDS OF WOMEN HELPED BY OUR ABORTION FUND (PRIVATE, NONPROFIT) TO URGE YOUR OPPOSITION TO SAMUEL ALITO TO THE SUPREME COURT.

MR. ALITO'S OPPOSITION TO ABORTION FOR ANY WOMAN IS WELL DOCUMENTED AS IS HIS SUPPORT OF USING PUBLIC MONEY FOR RELIGIOUSLY SEGREGATED SCHOOLS. IT WOULD BE TRAGIC FOR WOMEN AND FOR THE PRINCIPLE OF SEPARATION OF CHURCH AND STATE IF HE IS CHOSEN FOR THE COURT. IF HE IS SEATED, WE WOULD HAVE A NINE-MEMBER COURT WITH A MAJORITY, FIVE OF THEM, RIGHTWING, RADICAL CATHOLIC MEN.

OUR NEIGHBOR, CANADA, HAS A NINE-MEMBER COURT, AND FOUR OF ITS MEMBERS ARE WOMEN, INCLUDING THE CHIEF JUSTICE. I THINK THE CHOICE OF ALITO SHOULD BE FILIBUSTERED ON THE BASIS OF HIS BACKGROUND AND STATEMENTS, AND WITH THE HOPE THAT SOMEWHERE IN THIS COUNTRY THERE IS A REPUBLICAN WOMAN WHO IS MAINSTREAM ENOUGH TO RECOGNIZE WOMEN'S RIGHTS IN THIS 21ST CENTURY.

PLEASE OPPOSE ALITO AND PREVENT TRAGEDY FOR WOMEN IN THE FUTURE.

Anne N Gaylor

ANNE NICOL GAYLOR

ADMINISTRATOR

eliminating racism
empowering women
ywca

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January 10, 2006

The Honorable Arlen Specter, Chairman
The Honorable Patrick J. Leahy, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy:

On behalf of the YWCA USA, representing over 2 million women and girls with 300 associations nationwide, I am writing to write to express our opposition to the confirmation of Judge Samuel A. Alito, Jr. to the Supreme Court of the United States. His views are not consistent with the value of equality that our country holds dear, nor are they consistent with the YWCA USA mission of eliminating racism and empowering women. Over the past 50 years the Supreme Court's jurisprudence has often served to protect the fundamental constitutional rights of all Americans. After closely examining his record, the YWCA USA has concluded that if Judge Alito were to replace Justice O'Connor on the Court, this protection would likely halt and in fact reverse with regard to individual rights. Judge Alito's record reveals a history of troubling decisions in the areas of civil rights, civil liberties, and fundamental freedoms. The YWCA USA is extremely concerned that the confirmation of Judge Alito to the Supreme Court would be harmful for women and people of color.

If Judge Alito were confirmed, he has the potential to change the direction of the court and devastate the rights of women. For example, in the landmark case *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Judge Alito concluded that is was not an "undue burden" for a married woman seeking an abortion to have to notify her husband, a position that the Supreme Court later struck down. This case raises key questions about whether, if confirmed to a seat on the Supreme Court, Alito would vote to overturn *Roe v. Wade*. Furthering the YWCA USA's concerns, about whether Judge Alito would seek to strip away women's reproductive freedoms, are his own words. As a lawyer in the Reagan administration, Samuel Alito wrote, that he "personally believed" that "the Constitution does not protect a right to an abortion." In addition, during his tenure with the Solicitor General's Office he was one of the chief engineers of a multi-tiered strategy to reverse *Roe v. Wade*. Alito wrote that an amicus brief in *Thornburgh v. American College of Obstetricians and Gynecologists* was an "opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime of mitigating its effects." While it is impossible to know for certain how Alito would rule in a particular case before the Supreme Court, these statements along with Judge Alito's past opinions make it difficult to believe that he would effectively uphold the fundamental freedoms of women. The rights, health, and safety of women are too important to the YWCA USA to justify this risk

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The YWCA USA is also concerned with Judge Alito's record on civil rights and affirmative action. It is quite troubling that Samuel Alito touts his work as a lawyer in the Reagan administration opposing certain affirmative action programs as something he was "particularly proud" of. One example of Alito's work against affirmative action during the Reagan administration is the case of *Local 28 of the Sheet Metal Workers' International Association v. EEOC*. Alito and the Solicitor General's office argued that it was illegal for courts to order remedies including affirmative action even in cases of intentional, on-going and "egregious racial discrimination." Alito signed a brief arguing the extraordinary theory that relief in Title VII cases could be granted only to "identifiable victims of discrimination," contradicting an earlier view of the Equal Employment Opportunity Council (EEOC) itself. The Supreme Court rejected Alito's argument, stating that affirmative action relief "may be ordered by a court as a remedy for past discrimination even though the beneficiaries may be non-victims." Furthermore, in the 1970s and 1980s Alito was a member of Concerned Alumni of Princeton (CAP), an organization that actively sought to limit the number of women and minorities accepted to the university. In contrast, Justice O'Connor cast the decisive vote in *Grutter v. Bollinger,* upholding affirmative action in higher education. If Judge Alito's views on affirmative action were to replace Justice O'Connor's on the Supreme Court, institutes throughout the country would be harmed. Eliminating this important tool for promoting diversity would deny universities, workplaces and other organizations the enlightenment provided by a greater variety of backgrounds.

In addition to a restrictive approach towards affirmative action, Judge Alito's record strongly questions the legitimacy of employment discrimination claims, and in a number of instances, Judge Alito issued opinions that made it far more difficult for victims of discrimination to get to court and prove their cases. Again, this is an area where Justice O'Connor has often been the swing vote in protecting and advancing civil rights. In contrast, Alito has ruled against three of every four people who claimed to have been victims of discrimination.

In one such gender discrimination case, *Sheridan v. E.I. Dupont de* Nemours, Alito was the sole dissenter in a 10-1 decision; arguing that he would, require victims of discrimination to present much more evidence before they would be entitled to take their case to trial. Were this position adopted more broadly, it would make it much more difficult for victims of discrimination to have their day in court and remedy these actions of prejudice. In another employment discrimination case, this one dealing with race, Alito went even further than upping the level of evidence needed for a trial stating that even if discrimination occurred it may not be against the law. In *Bray v. Marriott Hotels*, Ms. Bray, an African-American woman, applied for a promotion but a white woman was hired for the job instead. Her employer, Marriott, did not follow its own guidelines for hiring and several of the key employees involved in the process gave conflicting statements about how the decision to hire the white woman was ultimately made. Judge Alito argued in his dissent that it might not be illegal for an employer to overlook a qualified person of color even if the employer's belief that it had selected the 'best' candidate was the result of conscious racial bias." The majority opinion responds to this analysis by noting that Title VII would be eviscerated if the analysis were to halt where the dissent suggests. In addition to the troubling interpretation of Title VII, Alito's dissent demonstrates skepticism about the legitimacy of discrimination claims. He closed his dissent with the disturbing pronouncement that a percentage of discrimination cases are manufactured by disgruntled employees, rather than victims of discrimination. This shows a lack of sensitivity about the on-going national problem of discrimination in the workplace. In contrast to Judge Alito, 70% of Americans believe racism is a problem in the workplace today. This again illustrates that Samuel Alito is out of step with mainstream America in the area of discrimination.

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Finally, it is important to look at the make-up of the court. Given the role that Justice O'Connor plays on the court, it is necessary to review Judge Alito not only on his merits but also in the context of whom he will be replacing on the bench. Justice O'Connor has added an important, independent and unique voice to the Supreme Court. As the first women to sit on the nation's highest court, she has broken barriers for women not only by blazing a trail but also by providing a voice and a vote on the Court for all women. Indeed, time and again on those issues that affect civil rights, and women's rights, including reproductive freedoms, Justice O'Connor is the deciding fifth vote. Numerous laws have been shaped and upheld by this 5 to 4 margin. Thus it is important to evaluate not only if Judge Alito is qualified to sit on the Supreme Court, but also if he will protect and honor the legal and social legacy of the woman he would be replacing.

The concern that Alito would overturn well-established legal principles and social achievement in the areas of women's rights and civil rights, that the YWCA has worked to protect for almost 150 years, is too great to ignore. That is what his record indicates and furthermore, during his confirmation hearing he stated, "If I'm confirmed...I'll be the same person I was on the Court of Appeals." For these reasons, the YWCA USA feels that Judge Alito's confirmation to the Supreme Court would negatively impact the lives of women and people of color and therefore is urging you to **reject the nomination of Judge Samuel Alito to the United States Supreme Court.** Senators must standup and protect the rights of the people they represent by voting against Alito's lifetime appointment to the Supreme Court. The nation has come too far in the fight for equality and worked too hard to protect the rights of all individuals

Sincerely,

Peggy Sanchez Mills
YWCA USA CEO

cc: Members of the Judiciary Committee