The Senate met at 9:30 a.m. and was called to order by the President pro tempore (Mr. STEVENS).

PRAYER
The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.
Almighty and merciful God, who has given us grace in times past and hope for the years to come, strengthen us to continue to grow in grace and in our knowledge of You. Quicken our hearts with warmer affection for You and Your creation. Stir up the talents in each of us and give us a desire to serve You and humanity.

Bless the Members of this body and the staffs that serve them. Increase their faith as You increase their years. Give them the moral fitness to live lives of integrity and faithfulness. May they not falter under the burdens they are asked to carry in these uncertain days. Bless them with clear minds and open eyes that they will not seek to solve tomorrow’s problems with yesterday’s solutions.

We thank You for our new Senate page class. Inspire our pages to trust You passionately so that You will direct their steps. We pray in Your Holy Name. Amen.

PLEDGE OF ALLEGIANCE
The President pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

RESERVATION OF LEADER TIME
The President pro tempore. Under the previous order, the leadership time is reserved.

MORNING BUSINESS
The President pro tempore. Under the previous order, there will be a period for the transaction of morning business with Senators permitted to speak therein for up to 10 minutes each.

RECOGNITION OF THE MAJORITY LEADER
The President pro tempore. The majority leader is recognized.

SCHEDULE
Mr. FRIST. President, I welcome everyone back to begin this second session of the 109th Congress.

In a few moments we will begin another historic debate in the Senate Chamber as we consider the nomination of Samuel Alito to be Associate Justice of the Supreme Court of the United States.

We will lock in a debate structure in a few moments so we will be able to alternate hours back and forth between the two sides of the aisle. This will help facilitate the schedule so Members will have a better understanding of when they will have the opportunity to come to the floor to give their statements and to participate in that debate.

We will remain in session all day today and into the night this week to accommodate Senators who wish to make statements. As I mentioned, every Senator will have the opportunity to speak, but it is my hope we will be able to lock in a time certain for a vote on this qualified nominee as soon as possible in order that our fellow Senators will know when that confirmation vote will occur. I would like to be able to do that shortly. I have been in discussion with the Democratic leader, and we will continue that discussion on that particular matter.

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

Mr. FRIST. President, at this point, I ask unanimous consent that the Senate proceed to executive session for the consideration of Calendar No. 490, the nomination of Samuel Alito to be an Associate Justice of the Supreme Court of the United States.

Without objection, it is so ordered.

The Senate will proceed to executive session, and the clerk will report.

The legislative clerk read the nomination of Samuel A. Alito, Jr., of New Jersey, to be an Associate Justice of the Supreme Court of the United States.

Mr. MCCAIN. Mr. President, will the majority leader yield to me for 1 minute while I bring up an issue that we were discussing yesterday?
Mr. FRIST. Mr. President, I will be happy to yield.

The PRESIDENT pro tempore. The Senator from Arizona.

LOBBYING REFORM

Mr. MCCAIN. Mr. President, I thank the majority leader for his leadership in moving the issue of lobbying reform forward. We had a good meeting yesterday amongst other Members, and Senator LIEBERMAN and I and others also, as the majority leader knows, have introduced legislation that has been brought forward in various forms in our Government today. I think we need to put together a bipartisan coalition to address this issue as quickly as possible. We need to sit down with Members on both sides of the aisle in whatever format the majority leader and the Democratic leader decide so we can get to work right away and get legislation done to curb the lobbying excesses that we all brought to light that need to be fixed.

At another time I would like to talk with the majority leader about the issue of earmarks, but I thank the majority leader for urging rapid action on this legislation that has been brought forward in various forms, and I hope we will be able to immediately sit down with Members from the other side of the aisle, come to conclusions and agreements—since it is pretty obvious the majority of the fixes that need to be made—and move forward. I thank the majority leader and the Democratic leader for urging rapid action in addressing this issue which is causing us, our image and our reputation to be hurt very badly in the eyes of the American people.

I thank the majority leader.

Mr. FRIST. Mr. President, just a very short comment. I have been in discussion with the Democratic leader on this subject. Our distinguished colleague from Arizona has just said, and I point out the Republican side have put together a working group in terms of how to address this very important issue. It has to be done in a bipartisan way. America can't have two laws on this, one for one party and another for the other party. We need to do this in a bipartisan way.

We have a great structure to build upon in the legislation that has been introduced in a bipartisan way with Senators MCCAIN and LIEBERMAN. I look forward to working with both sides of the aisle in developing an appropriate response over the coming days.

Mr. President, I now ask unanimous consent that the time from 10 a.m., until 8 p.m. tonight be divided, with the time from 10 to 11 under the control of the majority leader or his designee, the time from 11 to noon under the control of the Democratic leader or his designee, with each hour rotating back and forth in that same manner. I further ask unanimous consent that on Thursday this same division occur, with the first hour from 10 to 11 under the control of the Democratic leader or his designee.

The PRESIDENT pro tempore. Is there an objection?

Without objection, it is so ordered.

Mr. FRIST. Mr. President, today, I am honored to open debate on the nomination of Judge Sam Alito to be the 110th Associate Justice of the Supreme Court of the United States. I enthusiastically support his confirmation.

Judge Alito deserves to become Justice Alito. Those who oppose him are smearing a decent and honorable man and imposing an unfair political standard on all judicial nominees.

I support Judge Alito because he is exceptionally qualified to be a Supreme Court Justice. I support Judge Alito because he is a man of integrity and modest judicial temperament. I support Judge Alito because he has a record that demonstrates a respect for judicial restraint, a commitment to the rule of law and the Constitution.

There is no question that Judge Alito is exceptionally well qualified. He is measured, brilliant, deeply versed in, and respectful of, the law, and a man of character and integrity. But there is another reason to support Judge Alito. I support Judge Alito because denying him a seat on the Supreme Court could have devastating long-term consequences for our judicial nomination process. Let me address these issues one at a time.

Exceptional qualifications: From the moment President Bush nominated him last October, Judge Alito's exceptional qualifications had a "wow" factor that impressed Senators of both parties. In every respect, Judge Alito is a nominee who meets the highest standards of excellence.

He is a graduate of Princeton and Yale Law School. He has dedicated more than 30 years of his professional life to public service as a Federal prosecutor and assistant to the Solicitor General, where he argued more than 300 cases and has written more than 3,500 opinions. The American Bar Association gave Judge Alito its highest rating, unanimously "well qualified." He is a man of integrity and modest judicial temperament.

Exceptional qualifications only begin to reveal why Sam Alito should be confirmed to the Supreme Court. Throughout his career as a prosecutor and a judge, Sam Alito has been a man of integrity who is fair-minded and evenhanded. He has earned the trust and respect of his colleagues, Republicans, Democrats, and Independents. That is one reason seven Federal judges endorsed his nomination and testified on his behalf.

Through the Judiciary Committee hearings, we saw a clear picture emerge of Judge Alito's modest judicial temperament. Despite enduring relentless questioning of his credibility, integrity, and personal and political views, Judge Alito remained unflappable, never once raising his voice or becoming confrontational, focusing clearly and articulately on the facts at hand, and the constitutional questions presented to him. He understands the limited role of a judge—judicial restraint, impartiality, and a commitment to the rule of law.

In addition to all of his exceptional qualifications, integrity, and temperament, Judge Alito has a record of confirmation because he understands the limited role of a judge to interpret the law and not legislate from the bench. He practices judicial restraint and refuses to prejudge cases or apply a personal political agenda on the bench. In his hearing before the Judiciary Committee, this philosophy was clear. He said:

A judge can't have an agenda. A judge can't have any preferred outcome in any particular case. . . . The judge's only obligation is to interpret the law to the best of his or her ability, to focus solely on the meaning of the law, and what that means is that in every single case, the judge has to do what the law requires.

In his 15 years on the bench, Judge Alito has done exactly that. Just listen to the words of one of Judge Alito's former law clerks, who is a Democrat who, by the way, still has a "Kerry for President" bumper sticker on his car. His words:

Until I read [Judge Alito's] 1985 Reagan job application, I could not tell you what his political views were . . . When we worked on cases, we reached the same result about 90 percent of the time . . . It was my experience that Judge Alito was (and is) capable of setting aside any personal biases he may have when he judges. He is the consummate professional.

Long-term consequences for the judicial nominations process: Perhaps the most important reason to support Judge Alito has less to do with Judge Alito himself and more to do with our judicial nominations process. Regardless of their political views, Senators should treat judicial nominees with dignity, respect, and fairness, not just because it is the right thing to do but because a process that politicizes and degrades judicial nominees will drive away the best and our brightest away from the bench. I am profoundly disappointed in the unfair and unseemly treatment of Judge Alito during this process. His judicial record has been distorted and mischaracterized. He has been labeled as nonprogressive during his hearings, despite providing candid and articulate answers to more than 650 questions and over 18 hours of testimony—far more than many, perhaps any Supreme Court nominee in the modern era. And Judge Alito has been the victim of a calculated but unsuccessful campaign to smear his character, his integrity, and his credibility.

In an editorial in support of Judge Alito, published on January 15, the...
The Washington Post expressed this concern, even though they would have chosen a different nominee than Judge Alito:

He would not have been our pick for the high court. Yet Judge Alito should be confirmed because of his positive qualities as an appellate judge and because of the dangerous precedent his rejection would set... Supreme Court confirmations have never been free of politics. But neither has their history generally been one of party-line votes or of ideology as the determinative factor. To go down that road is to believe that the constitutional law of Republican law—which is repugnant to the ideal of the rule of law. However one reasonably defines “mainstream” of contemporary jurisprudence, Judge Alito’s work lies within it. While we harbor some anxiety about the direction he may push the court, we would be more alarmed at the long-term implications of denying him a seat. No President should be denied the prerogative of putting a person as qualified as Judge Alito on the Supreme Court.

I ask unanimous consent that the full text of the Washington Post editorial of January 15 entitled “Confirm Samuel Alito on the Supreme Court” be printed in the RECORD at the conclusion of my remarks.

Mr. FRIST. Thirteen years ago, a Republican minority in the Senate voted to confirm the qualified nominee of a Democratic President by an overwhelming vote of 96 to 3. Despite a well-documented liberal record, Justice Ruth Bader Ginsburg sits on the Supreme Court today because Republican Senators chose to focus on her qualifications and not to obstruct her nomination based on her judicial philosophy or ideology. I urge my colleagues to vote to confirm Judge Alito by applying that same fair standard. As we debate this week, I hope we can put aside partisan rhetoric and the politics of personal destruction and stand on principle. Qualified judicial nominees such as Judge Alito deserve respectful debate and a fair up-or-down vote on the Senate floor. As Senators, it is our fundamental constitutional duty and responsibility.

[From the Washington Post, Jan. 15, 2006]

CONFIRM SAMUEL ALITO

The Senate’s decision concerning the confirmation of Samuel A. Alito Jr. is harder than that of now-Chief Justice John G. Roberts Jr. Judge Alito’s record raises concerns across a range of areas. His replacement of Justice Sandra Day O’Connor could alter—for the worse, from our point of view—the Supreme Court’s delicate balance in important areas of constitutional law. He would not have been our pick for the high court. Yet Judge Alito should be confirmed, both because of his positive qualities as an appellate judge and because of the dangerous precedent his rejection would set.

Though on him by Democratic senators and liberal interest groups have misrepresented his jurisprudence, Judge Alito’s record is troubling in areas. His general tendency to defer to elected representatives at the state and federal levels sometimes goes too far—giving rise to concerns that he will prove too tolerant of claims of executive power in the war on terror. He has tended at times to read civil rights statutes and precedents too narrowly. He has shown an aggressive police and prosecutorial tactics. There is reason to worry that he would curtail abortion rights. And his approach to the balance of power between the federal government and the states, while murky, seems unpromising. Judge Alito’s record is complicated, and one can therefore argue against imputing to him any of these tendencies. Yet he is undeniably a conservative whose presence on the Supreme Court is likely to produce more conservative results than we would like to have.

Which is, of course, just what President Bush promised concerning his judicial appointments. A Supreme Court nomination isn’t a forum to refight a presidential election. The president’s choice is due deference—the same deference that Democratic senators would expect a Republican Senate to accord the well-qualified nominee of a Democratic president.

And Judge Alito is superbly qualified. His record on the bench is that of a thoughtful conservative legal ideologue. He pays careful attention to the record and doesn’t reach for the political outcomes he desires. His colleagues speak highly of him. His integrity, notwithstanding efforts to smear him, remains unimpeached. Humility is called for when predicting how a Supreme Court nominee will vote on key issues, or even what those issues will be, given how people and issues evolve. But it’s fair to guess that Judge Alito will favor a judiciary that exercises restraint and doesn’t substitute its judgment for that of the political branches in areas of their competence. That’s not all bad. The Supreme Court sports a great range of understanding, but less than the disagreement about the scope of proper judicial power. The institutional self-discipline and modesty that both Judge Alito and Chief Justice Roberts profess could do the court good if taken seriously and applied apolitically.

Supreme Court confirmations have never been free of politics, but neither has their history generally been one of party-line votes or of ideology as the determinative factor. To go down that road is to believe that the constitutional law of the (Republican law—which is repugnant to the ideal of the rule of law. However one reasonably defines “mainstream” of contemporary jurisprudence, Judge Alito’s work lies within it. While we harbor some anxiety about the direction he may push the court, we would be more alarmed at the long-term implications of denying him a seat. No President should be denied the prerogative of putting a person as qualified as Judge Alito on the Supreme Court.

Mr. FRIST. I suggest the absence of a quorum.

The PRESIDENT pro tempore. The clerk will call the roll.

Mr. FRIST. I suggest the absence of a quorum.

The PRESIDENT. The clerk will call the roll.

Mr. SPECTER. The President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. CORNYN). Without objection, it is so ordered.

JUDICIARY COMMITTEE AGENDA

Mr. SPECTER. Mr. President, before proceeding to the roll call, I ask unanimous consent that the nomination of Judge Alito to the Supreme Court of the United States, I think it worthwhile to comment very briefly on some of the scheduling items for the Judiciary Committee.

As we all know, the PATRIOT Act was extended from December 31 until February 3. I circulated a letter today among our colleagues, and I ask unanimous consent that it be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. SPECTER. It outlines the alternatives which we face at the present time. One is to let the act expire on February 3, which I think no one would like. Second would be to extend the current bill for a period of time. We will be discussing a 4-year extension. Or, third, to have cloture imposed on the filibuster which is in effect and then vote to utilize the conference report and pass the act. It is always possible to take another course of action if there is unanimous consent. The PATRIOT Act was technically discharged at this point, and the House of Representatives has made it emphatically clear that they have gone as far as they think it reasonable to go on the compromises. There have been very substantial compromises worked out. At one juncture, there were three additional requests which we took to the House and got all of them, the most important of which was a sunset provision changed from 7 years to 4 years. Then additional changes were requested, and they could not be accommodated.

That is where we stand at the present time. I know there are discussions under way to try to get some additional changes made. My own view is those prospects are somewhere between bleak and nonexistent.

Mr. LEAHY. Mr. President, will the Senate yield on that point for a moment?

Mr. SPECTER. Certainly.

Mr. LEAHY. Mr. President, the distinguished senior Senator from Pennsylvania has worked as hard on this issue as anybody here. As the distinguished Presiding Officer knows, the original PATRIOT Act was written by myself, the distinguished Senator from Pennsylvania, and others. It was the distinguished Republican leader from Texas, Dick Armey, and I who put in the sunset provisions so we would be forced to come back and look at different parts of it. Much of the PATRIOT Act is permanent law, but we should look at certain parts. Those are the parts that are now most in contention because they will expire.

The distinguished Senator from Pennsylvania and I were at the White House on another matter recently and talked briefly about this with the President. I know the distinguished Senator from New Hampshire, Mr. Sununu, has been working very hard with us. I think the changes that still need to be made are relatively minor. I urge parties, especially all of us who helped write the original PATRIOT ACT, to finally put this matter to rest and move on to other matters.
Act, to make that one last effort. That would include, of course, the White House and the other body to do it.

The chairman of the Judiciary Committee has worked extraordinarily hard on this legislation. I, like so many others, now continue to work with him. I think with a little nudge from the White House—that nudge may have to be a quiet one among the principals in both bodies—that can be done. I commend the Senator from New Hampshire for the work he is doing on this bill.

I thank the chairman of the Judiciary Committee for yielding, even though it is on his time.

Mr. SPECTER. Mr. President, I thank the Senator from Vermont for his comments. I thank him for the hard work he has done in the past year on the Judiciary Committee on many matters, including the PATRIOT Act. I think we have set a tone and have been able to agree on almost all matters. If there are further modifications made, agreeable on all sides, before February 3, I would be more than willing to be a party to that.

My preference is the bill which passed the Senate, but we have a bill that is a better bill than the House has its own point of view, and I think they have been reasonable. We have a good bill, certainly a bill in the conference report which is vastly improved with respect to civil rights over the current bill. But if there are other modifications made, agreeable on all sides, before February 3, I would be more than willing to be a party to that.

The Judiciary Committee, on the second item, is scheduled to hold a hearing on the wartime Executive power and NSA’s surveillance authority on February 6. I think my colleagues will be interested in a letter which I have written to the Attorney General dated January 24, yesterday, outlining a series of some 15 questions to be addressed in advance of the hearing or at the time of the Attorney General’s opening statement—at least that request—to try to set the parameters and issues of that hearing. I ask unanimous consent that the letter to Attorney General Gonzales be printed in the Record at the conclusion of my statement today.

The PRESIDING OFFICER. Without objection, it is so ordered. (See exhibit 2.)

Mr. SPECTER. A third item of Judiciary Committee scheduling involves the asbestos reform bill. The leader has stated his intention to bring it up on February 6. As not customary by us, we meet in the afternoon. I intend to absent myself from the Judiciary Committee hearing on NSA to come make an opening statement. Then we will proceed on that bill.

Senator LEAHY and I sent a letter yesterday to our colleagues asking that, if there are amendments to be offered, and I am sure there will be, that they be provided to the managers in advance so we can organize proceeding on the bill and seek time agreements. That has been a very difficult and contentious issue, but it was passed out of the committee last year after numerous sessions marking up the bill and extending debate by a variety of amendments. Many were accepted, some were rejected.

The Supreme Court of the United States has called upon Congress to address this issue itself to a solution in the courts on class actions. There are thousands of people who are suffering from the injuries of asbestos—mesothelioma, which is deadly, and asbestosis, and others—who cannot recover because their employers are bankrupt. Over 75 companies have gone bankrupt, and more are threatened with bankruptcy.

The bill which we have reported to the floor is the product of enormous effort and enormous analysis by the Judiciary Committee. It was voted out of committee 13 to 5. Senator LEAHY and I have convened meetings, along with the assistance of Judge Becker, a senior Federal judge—he had been Chief Judge of the Court of Appeals for the Third Circuit—where we have brought in the so-called stakeholders: the insurers, the trial lawyers, the AFL/CIO, and the manufacturers. They worked through that bill which has festered in the Congress for many more than a decade. I first saw it when Gary Hart, then-Senator from Colorado, brought in Johns Manville, which was a key constituent of his, which was having a problem. I believe it is clear if we are not able to act now, it will be decades before this kind of an effort can be mustered again.

I have one additional comment on the scope of the work. After it was passed out of committee in late July of 2003, I asked Judge Becker to assist as we met in his chambers in Philadelphia—two full days in August. We have had about 50 meetings since, attended by sometimes more than 40 or 50 people.

We are still open for business to consider modifications. We know the legislative process is one where, when it comes to the floor, there are amendments. There are more ideas. But this is an issue which is of tremendous urgency. The President has spoken about it. The Majority Leader is firmly behind legislation by the Senate. The Speaker of the House of Representatives has spoken about it. But candidly and openly, we face very powerful interests who are opposed to any action.

There are very substantial dollars involved. There is very substantial pain and suffering involved. Those of us who have worked on the bill—led by the distinguished Senator from Vermont and myself and others—have come to the well and come to the wall. We still are open for business and invite comments. But anybody who has amendments, we would like to hear from you as early as possible so we can consider them, try to work out time agreements, and try to move the bill ahead in a managers’ context.

I am glad to yield to Senator LEAHY.

Mr. LEAHY. Mr. President, again I appreciate with what the Senator from Pennsylvania has said. This is a bipartisan bill. In fact, to emphasize it, he and I have sent a letter to all of our colleagues, signed jointly, asking them, if they have amendments this week, they plan to offer, to let us know.

It should be emphasized that not only did we have hours upon hours of hearings, but we had many open meetings in the office of the Senator from Pennsylvania, in my office, and the offices of others. We made sure that the stakeholders, all the stakeholders were able to come to those meetings. We also made sure that the office of every Senator—everybody who expressed any interest, Republican or Democrat—was invited to those meetings. They were wide open. In fact, almost all of the Senators on both sides of the aisle either attended those meetings or had staff attend those meetings.

At these meetings not only did we, again, every single stakeholder was involved. It was open. It was bipartisan. That was made clear by the Senator from Pennsylvania from the beginning, that they would have to be open and bipartisan. He, as would be expected, has made commitment all the way through.

I would highlight two things the Senator from Pennsylvania just said that were of concern to me. One, if we do not do it now, we lose the opportunity. I believe it will be decades before anybody would put together the kind of coalition that it has been possible to put together. The other thing he said was that it is not just some of the powerful financial stakes involved, but it is a powerful amount of suffering that is going on by the people who are suffering from asbestos poisoning in all the different forms. They are the ones who are held in limbo throughout all this time. We can bring some relief to them now; not the possibility of relief 10 years from now after a series of lawsuits go through, but now.

We have had members of the Supreme Court, ranging from the late Chief Justice William Rehnquist to Justice Ruth Bader Ginsburg—certainly two differing philosophies—who have called upon the Congress to bring about a legislative solution because our courts are unable to handle all the cases that might come up. Let’s be clear about that. There are some who say we are litigating forever on this, but the fact is our courts are unable to handle it. It cries out for a legislative solution.

I urge people to come to this with an open mind, vote it up or down, vote the amendments up or down. I have heard some opponents quoted as being prepared to demagog this bipartisan bill. This bill did not just suddenly spring
out of nowhere; it was worked on in such a way that it is a bipartisan bill. And I might say there is pain in it for everybody. Everybody has had to give something in this. The Senator from Pennsylvania did not get everything he wanted. And I might say there is pain in it for us all. And that is why we are waiting for us to act.

The time is right to act. We can pass a bipartisan bill. I believe the other body would be glad to see such a bill. The President has stated publicly and honestly, they gave up a lot on it. But the people who are suffering from asbestos poisoning in whatever form are the people we are waiting for us to act.

But the people who are suffering from asbestos poisoning in whatever form are the people we are waiting for us to act. And I might say there is pain in it for everybody. Everybody cries out for some bipartisan action around here. This is one of those cases where Republicans and Democrats could come together, where the Congress and the White House could work together, and actually those who benefit will be the people suffering. We ought to get on with it.

EXHIBIT 1

U.S. SENATE, Washington, DC, January 25, 2006,

DEAR COLLEAGUES: The Patriot Act is due to expire on February 15, 2006 after being extended from its prior expiration date of December 31, 2005.

The Senate is faced with three options: 1. Invoke cloture on the Conference Report and pass the Conference Report as the House of Representatives has already done; 2. Extend the PATRIOT Act for a period of time. The current discussion with the House is to extend it for four years; or 3. Let the Act expire.

To my knowledge, no one wants to let the Act expire. Technically, the House/Senate Conference has been discharged with the filing of the Conference Report. While it is always possible to take another course of action such as changing the Conference Report if there is unanimous agreement, the House has taken the emphatic position that there will be no more concessions from the Conference Report and the House is very firm in this position.

Everyone, including those who are urging further House concessions, agrees that the Conference Report is much more protective of civil rights than the current Patriot Act. I am enclosing a side-by-side comparison. While I would have preferred the Senate bill, we do have a Bipartisan System and the Conference Report was hammered out after extensive negotiations with significant concessions by the House. Senate proponents for further House concessions had, at one point, stated their willingness to sign the Conference Report if three conditions were met including a change in the sunset date from seven to four years. Those conditions were met and then there was insistence on further concessions.

I urge the Senate to invoke cloture and pass the Conference Report as the best of the available alternatives.

Sincerely,

ARLEN SPECTER.

SIDE-BY-SIDE COMPARISON

January 25, 2006

Congressional Record — Senate

S39


Requests for Business Records ("Library Provision") Section 215

Application to the FISA Court for an order under Section 215 requires a statement of facts.

No reporting to Congress or the public.

Records of the FISA judge find that the standards of facts "reasonable grounds to be convinced that the tangible things sought are relevant to an authorized investigation". May not be used for threat assessments.

Encourages the FBI to demonstrate a connection to terrorism or espionage by providing a presumption of relevance if the records sought pertain to: (a) a foreign power or an agent of a foreign power; (b) the activities of a suspected agent of a foreign power who is the subject of the investigation; or (c) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of the investigation.

Requires the use of minimization procedures that will prohibit "the retention, and prohibit the dissemination" of information concerning U.S. persons.

Explicit right of recipients of Section 215 requests to consult legal counsel.

Explicit right of recipients of Section 215 requests to challenge their legality in court.

Requirement that the FBI Director, Deputy Director, or Executive Assistant Director personally approve requests for certain sensitive documents, including library records, medical records, educational records, and gun records.

Limits the scope of Section 215 requests to materials that could be obtained by grand jury subpoena or a similar court order for the production of records.

Adds the Senate Judiciary Committee as a recipient of the "fully informed" reports.

Reporting to Congress on the number of applications for orders and extensions of orders approving electronic surveillance.

Public reporting on the number of applications under Section 215 and the total number of such orders granted, modified, or denied.

Two comprehensive audits by the Justice Department's Inspector General regarding the use, including any improper or illegal use, of Section 215. The first report will examine the use of Section 215 in 2005-06; the second report will examine the use of Section 215 in 2005-06. The reports will examine "each instance" in which the government submitted an application under Section 215, and the Conference Report provides detailed specifications of what the investigation should cover.

Four-year sunset.

Delayed-Notice Searches ("Sneak and Peek" Searches) Section 213

Notice to the target of the search must be given "within a reasonable period not to exceed 30 days after the date of its execution" , or on a later date certain if the facts justify it.

Extensions on the period of delay only upon an "an updated showing of the need for further delay".

Extensions are limited to 90 days or less, unless the facts of the case justify a longer period.

Notice may not be delayed if the only reason for doing so is that the court finds reasonable cause to believe that immediate notification may result in undue delaying a trial.

Public reporting on the number of applications for delayed-notice warrants and extensions; and the number of such warrants and extensions granted or denied; the duration of delays in giving notice.

Notice to the target of the search may be given within a "reasonable period": no limitation on the maximum period of delay.

Extensions on the period of delay may be granted upon mere "good cause shown".

No maximum period of extension.

Notice may be delayed if the court finds reasonable cause to believe that immediate notification may result in undue delaying a trial.

No reporting to Congress or the public.

No requirement that the Justice Department's Inspector General audit the use of Section 215.

Roving Warrants Section 206

Application requires "the identity, if known, of a description of the specific target of the surveillance".

FISA Court's orders must specify "the identity, if known, of the specific target of the surveillance." For so-called John Doe roving warrants, the FISA Court to "find", based upon specific facts provided in the application, that the actions of the target of the application may have the effect of thwarting the identification of a specified person.

Requests that within ten days of beginning of surveillance at any new facility or place, the FBI notify the FISA Court of such surveillance.

FISA Court's orders must specify "the identity, if known, or a description of the target" of the surveillance.

Notice may not be delayed if the only reason for doing so is that the court finds reasonable cause to believe that immediate notification may result in undue delaying a trial.

No reporting to Congress or the public.

No requirement to report to Senate Judiciary Committee.

National Security Letters ("NSL")

Application requires "the identity, if known, or a description of the target" of the surveillance.

FISA Court's orders must specify "the identity, if known, or a description of the target" of the surveillance.

No explicit right of recipient to consult legal counsel.

No explicit right of recipient to challenge their legality in court.

No explicit right of recipient of Section 215 requests to challenge their legality in court.

No special requirements for sensitive documents such as library records.

No specified limitation on the scope of Section 215 requests.

"Fully informed" reports given only to House and Senate Intelligence Committees.

No reporting to Congress on Section 215 requests for sensitive documents.

No public reporting.

No requirement that the Justice Department's Inspector General audit the use of Section 215.

No requirement that the Justice Department's Inspector General audit the use of NSLs.

No requirement that FBI notify the FISA Court when surveillance begins at any new facility or place.

No requirement to report to Senate Judiciary Committee.

Advisory General to inform Congress twice per year on all roving warrants under 206.

No requirement that FBI notify the FISA Court when surveillance begins at any new facility or place.

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No requirement that the Justice Department's Inspector General audit the use of NSLs.

No requirement to report to Senate Judiciary Committee.

No explicit right of recipient to challenge the nondisclosure requirement in court.

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Mr. SPECTER. Mr. President, I thank my distinguished colleague for those comments.

There is no doubt about the suffering of those who are afflicted with mesothelioma and asbestosis and other ailments. There is also no doubt about the tremendous impact it has on the many of the United States. It has been estimated that there could be a bigger boost than any kind of tax cuts you could have or any sort of economic recovery program you could have to be able to deal with the more than 75 companies that have gone into bankruptcy and others where bankruptcy is threatened.

The amount of work that the Senator from Vermont has specified has been gigantic. It has been 3 years in process. Senator Harkin took the lead with the trust fund concept where the manufacturers and the insurers have agreed to put up some $140 billion into the trust fund with no government payments and so coming out of the pockets of the taxpayers.

The meetings which have been held and the efforts and the momentum which we have had can't be recaptured. I think it is fair to say, certainly during my tenure here of 25 years, that I have never seen legislation worked on to the extent this legislation has been, with the complexity of the problem and the involvement of Senators and staff and so-called stakeholders. If it is not novel, it is new.

Mr. SPECTER. Mr. President, I support the nomination by President Bush of Circuit Court Judge Samuel A. Alito, Jr., to the Supreme Court of the United States because he is qualified.

Mr. SPECTER. Mr. President, I support the nomination by President Bush of Circuit Court Judge Samuel A. Alito, Jr., to the Supreme Court of the United States because he is qualified.
He is not an originalist. He does not look only original intent. He does not look only to the static black letter, but he understands the importance of evolving values and of evolving reliance.

I questioned him at length about the reliance factor in Casey v. Planned Parenthood. I think Judge Alito went as far as he could go on the assurances of maintaining an open mind on this important subject.

When it came to the issue as to whether he reviewed it and regarded it as settled law, his testimony was virtually identical to the testimony of Chief Justice Roberts, who testified that it was settled. As Chief Justice Roberts put it in his confirmation hearings, it is settled beyond that. Chief Justice Roberts left open the unquestionable right and duty of the Court to review all cases on the merits when they are presented and to afford appropriate weight to stare decisis and to precedents. The position that precedents can never be overturned.

I think a fair reading of the record is that Judge Alito went about as far as he could go without answering the issue in the case on a specific case, which would be beyond the purview of what a nominee ought to do.

In taking up questions of Executive power, Judge Alito did not answer questions posed by the President's authority to go to war with Iran. How could a nominee answer a question of that magnitude in a nomination proceeding without knowing a lot more about the circumstances? And judges make decisions after they have a case and controversy, when they have briefs admitted, when they have arguments prepared, when they have discussions with their colleagues, and they reflect on a matter and come to conclusion, not sitting at a witness table in a Judiciary Committee hearing. Judge Alito answered the questions as to the considerations which would be involved. Again, he went about as far as he could go.

On the question of congressional power, I questioned him at length on concerns I have about what the Supreme Court has had to say about declaring acts of Congress unconstitutional because the Supreme Court disagrees with our ‘method of reasoning.’ The columns of the Senate building are lined up exactly with those of the Supreme Court, situated across the green. An interesting historical note, in an early draft of the Constitution, the Senate was to nominate Supreme Court Justices. That would be an interesting process, given the political complexion of the Senate today.

Back to the point. What superior wisdom and what superior method of reasoning comes when a person crosses the threshold of the Supreme Court of the United States? Our method of reasoning may not be too good, but it is our method of reasoning. To have the Court say that they declare acts unconstitutional because they do not like our method of reasoning is, candidly stated, highly insulting. Judge Alito said the obvious: Our method of reasoning was as good as the Court's. It is in the decision of the Americans with Disabilities Act, where the Supreme Court has imposed a test of what is proportionate, taking it out of thin air in a 1997 decision, what is congruent and proportionate is a test which cannot be applied with any consistency. It lends itself to legislation from the bench. Justice Scalia characterized it accurately, calling it ‘a flabby test,’ where the Court was functioning as the taskmaster of Congress to see that we had done our homework. Judge Alito’s answers showed an appropriate respect for separation of powers and congressional authority.

The decisions of the Supreme Court questioning the constitutionality of laws has led a number of Senators on the committee to prepare legislation which would give the Congress standing to go to the Supreme Court to argue to uphold our legislation. We thought initially about having a Judiciary Committee observer when the Court had done and from that, thought about seeking to intervene as amicus curiae, as a friend of the court, and took it the final step: Why not go to the Court and argue our cases ourselves, through counsel, which is an appropriate way. Congress has the authority to grant standing. We can grant standing to ourselves to see to it that our views are appropriately presented to the Court.

We respect the Court as the final arbiter of the Constitution. That is our system. But the arguments and the considerations and the record which Congress amasses ought to be considered by the Court. Now the constitutionality of statutes by the Solicitor General. But in cases where there is a conflict between what the Congress has to say and what the President has to say, we ought to be in a position to make our own submissions to the Court.

The issue of Executive authority and the current surveillance practices came up for discussion in Judge Alito’s confirmation hearings. Again, he could not say how he would rule on the case. However, he did answer by giving us the factors and items which he would consider.

Many issues were discussed. Judge Alito approached them with an open mind. One subject of particular concern to this Senator is the issue of televising the Court, which I think ought to be done. The Supreme Court of the United States today makes the final decisions on so many of the cutting-edge issues of our time. The American people ought to know what is going on. A number of the Justices appear on television programs. There is
no reason why the Court proceedings should not be televised. Senator Biden and I made that specific request on the case of Bush vs. Gore and got a response from Chief Justice Rehnquist denying it; however, they released an oral transcript of the proceedings at the end of the day and the Court basically did more of that, which is a step forward.

The Congress has the authority to make decisions on the administration of the courts. For example, the Congress decides how many Supreme Court Justices there will be. We established the number at nine. Remember, in the Roosevelt era there was an effort to pack the Court and increase the number to 15. That is a congressional judgment. We decide when the Court starts to function: The third Monday in October. We decide what is a quorum of the Court: Six. We legislate on speedy trial rules. It is within the purview of the Congress to legislate, to call for the televising of Court proceedings. We can maximize the ultimate decision would rest with the Court if they decided to declare our act unconstitutional. Under separation of powers, that is their prerogative. I respect it. We ought to speak to the subject.

On the subject of television, again, Judge Alito did not give the answer I liked to hear—that he is for television in the Court—but he said he had an open mind and would consider it. Again, that is about as far as he could go.

One panel of particularly impressive witnesses was seven judges from the Court of Appeals from the Third Circuit who had worked with Judge Alito. There is precedence for judges testifying. Retired Chief Justice Warren Burger came in to testify in the nomination proceedings for Judge Bork. That is something for which there is precedent. These judges have unique knowledge of Alito because they have worked with him in many cases.

Judge Becker, for example, former Chief Judge of the Third Circuit, now on senior status, sat with Judge Alito on more than 1,000 cases. Judge Becker has a national reputation as an outstanding jurist. Recently, he received the award as the outstanding Federal judge in the country. He testified about Judge Alito not having an agenda, not being an ideologue and having an open mind.

Judge Becker is regarded very much as a judge’s judge, a centrist judge, and pointed out he and Judge Alito have disagreed very few times—about 25 times—during the course of considering more than 1,000 cases.

After the arguments are concluded, the three judges who sit on the panel retire and discuss the case among themselves; no clerks present, no secretaries present, just a candid discussion about what went on. That is where the judge really let their hair down and talk about the cases and get to know what a judge thinks. It is a high testimonial to Judge Alito that these judges sang his praises, in terms of openness and in terms of studiousness and in terms of not having an agenda.

One of the witnesses, former Judge Tim Lewis of the Third Circuit, an African American, testified about his own education and about a woman’s right to choose, his own dedication to civil rights, civil liberties, and testified very forcefully on Judge Alito’s behalf. He said very bluntly he would not be there if he did not have total confidence in Judge Alito.

One further commitment: That is on the party-line vote which we seem to be coming to. He was voted out of committee, 10 to 8; 10 Republicans voting for Judge Alito; 8 Democrats voting against Judge Alito. It is unfortunate our Senate is so polarized today. I believe this Senate and this body would benefit greatly by more independence in the Senate.

I have not voted in favor of Judge Alito as a matter of party loyalty. If I thought there would be a no rule, I would not vote no, as I have in the past on nominees of my own party from Presidents of my own party.

But we need to move away from the kind of partisanship, which has ripped this Senate to the core. I think it is important the American people have confidence in what the Senate does on the merits and that we avoid projecting the appearance of party politics. I believe it is important for Judge Alito favoring the computer who favor a woman’s right to choose so he does not feel in any way beholden to or confirmed by people who have one or another idea on some of these questions. Without naming names and identifying people, we have more than six Republicans who are pro-choice, who support a woman’s right to choose. So the balance of power will be, if confirmed, not only on one side of that issue or another.

But I think we would do well to reexamine the procedures which we utilize in the confirmation process to try to move away from partisanship and towards getting an idea of the judge’s temperament, his background, his jurisprudence, where he stands, without pressing him to the wall as to how he stands on any particular issue.

When we had the nomination of White House Counsel Harriet Miers, she was opposed by some because, as I pointed out, there was no guarantee she would vote to overturn Roe. Well, you cannot get guarantees from Supreme Court nominees. I have said before, and I think it is worth repeating, guarantees are for used cars and washing machines. They are not for nominees to the Supreme Court of the United States.

I think, when we examine temperament and background, including jurisprudence, those are the appropriate tests. We need to know with certainty how Judge Alito is going to vote. The cases are full of surprises. Justice Sandra Day O’Connor was very much opposed to abortion rights before she came to the Court. And she has been one of the foremost proponents of a woman’s right to choose, subject to some limitations. Justice Anthony Kennedy spoke very disparagingly about abortion rights before coming to the Court, and he has supported Roe vs. Wade. Justice David Souter, as an attorney general for New Hampshire, opposed repealing New Hampshire’s law banning abortions, even after it had been declared unconstitutional by the Supreme Court of the United States. The National Organization for Women had placards with big placards “Stop Souter or Women Will Die.” Justice Souter, too, has supported Roe v. Wade.

So no one knows what will happen. President Truman was disappointed by his nominees in the famous steel seizure case. Again and again and again, there have been surprises. The rule is, the Senate can become very rigid and narrow-minded and in the Senate we are left to our best judgment as to qualifications without guarantees. The separation of powers entrusts to the President the role of making the nominations. It is not for the Senate to declare制动 or to confirm and then to confirm or not to confirm. After that, it is up to the Justices to make the decisions on the Court. The separation of powers has served us well.

Those are the facts which have led me to vote Judge Alito out of committee affirmatively. And my vote will be cast when the roll is called later in this floor debate.

Mr. President, today the Senate begins the debate on the confirmation of Judge Samuel A. Alito to be an Associate Justice of the United States Supreme Court.

It has been 86 days, three months, since President Bush announced his choice of Judge Samuel Alito to fill the seat being vacated by Associate Justice Sandra Day O’Connor. During this time, my staff and I have undertaken an extensive review of Judge Alito’s record, including an examination of his 238 major decisions while serving on the Third Circuit Court of Appeals, a review of 49 of the cases Judge Alito handled during his tenure as a United States Attorney, analyses of 43 speeches and articles Judge Alito authored, and evaluations of the 38 formal opinions, petitions, and Supreme Court briefs which Judge Alito wrote while serving in the Department of Justice. Additionally, the Judiciary Committee held 30 hours and 29 minutes of hearings, which included 17 hours and 45 minutes of questioning of Judge Alito and testimony from 33 outside witnesses.

Based on my thorough review of his record, I intend to vote to confirm Judge Alito as the 110th Justice of the United States Supreme Court. I did not reach this decision lightly. As I have said before, except for a declaration of war or its virtual equivalent, a resolution for the use of force, no Senate vote is as important as the confirmation of a Supreme Court justice. And this vote is one of the few that requires Senators to free themselves from the straight-jacket of party loyalty and exercise independent judgment. Under separation of powers, Senators are separate from
the executive branch and have a full, inde-
pendent role in staffing the Third Branch of
government. I have long adhered to this
view, which led me to vote against Judge
Bell’s nomination even though he had been
nominated by a President of my own party.
If I thought Judge Alito should not be con-
firmed, I would vote no again.
Judge Alito’s academic credentials,
having excelled at Princeton Univer-
sity and the Yale Law School, Judge Alito
began his commitment to public service with a prestigious clerkship for
Judge Leon I. Garth of the United States
Court of Appeals of the Third Circuit. For
the next two years, Judge Alito served his
country as an Assistant to the U.S. Solic-
itor General, a Deputy Assistant Attorney
General in the Office of Legal Counsel, and
as bond counsel to the Attorney General of
New Jersey and an assistant United States Attor-
ey in that same office. When Judge Alito
was appointed to his current position on the
Third Circuit Court of Appeals, the ABA
unanimously voted to award Judge Alito its
highest possible rating, and Judge Alito en-
joyed broad bipartisan support, as reflected by
the fact that he was confirmed by unani-
mous consent.
Judge Alito’s achievements are all the more
deserving given one realization he faced:
Judge Alito was not born with a silver spoon
in his mouth. Judge Alito’s father was
brought to this country from Italy as an in-
fant and raised in poverty. Although Judge
Alito’s father graduated at the top of his high school
class, he had no money for college, and he
was set to work in a factory. It was only be-
cause at the last minute, a kind person ar-
ranged for him to receive a $50 scholarship,
that he was able to attend college. Despite
the discrimination he faced as an Italian im-
migrant, Judge Alito’s father eventu-
ally became a teacher, served in the Pacific
during World War II, and held a nonpartisan
position for the New Jersey Legislature.
Judge Alito put it best when he said:
“‘my parents taught me through the stories of
their lives . . . 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 perse-
verance and the power of a small good deed.”
I have participated in the confirmation
hearings for the past eleven nominees to the
Supreme Court. Although judgments may
differ, I think that Judge Alito went farther in
answering questions than most other nominees
in the past. The Senate Judiciary Committee
reported, “you have been very gracious. I appreciate
you being responsive.” By one reckoning,
Judge Alito was asked 677 questions and an-
swered some 859—97%. That is far more than
Justice Ginsburg, who answered only 397 out
of 384 questions, or 80%, or Justice Breyer,
who answered out of 355 questions, or 82%. Judge Alito did not refuse to respond
because a similar case might come before the
Court. He ultimately stopped short of mak-
ing clear how he would rule on the question of
electronic surveillance. When I asked him about
these laws conflicted with a federal regula-
tion a prior precedent. The fact is that, notwithstanding Sen-
conclusions of stare decisis.’’ Moreover, both Chief Justice
Roberts and Judge Samuel Alito testified that
the Constitution itself doesn’t change, but the
principles, and then leaves it for each gen-
ration to apply those to the particular fac-
tual circumstances. The genius of it is that it is not terribly specific
sense that matters, and that is . . . it sets up
the Constitution is a living thing in the
Souter or women will die.” Yet, on the Su-
preme Court, Justice O’Connor explained that he “was brought
up to think of abortion as a great evil. He
denounced the Roe decision as the Dred
Scott of our time, a reference to the infa-
ramous 1857 ruling that sanctioned slavery
and distributed flyers proclaiming “Stop
Souter or women will die.” Yet, on the
Supreme Court, Justice Souter has consistently
voted to uphold a woman’s right to choose.
Similarly, there have been dire predictions
about Judge Samuel Alito. The National
Organization for Women has released another
flyer—this one declaring “Save Women’s Lives. Vote No on Alito.” The rule is that
there is no rule.
Judge Alito was also questioned exten-
sively on Executive power and whether the
resolution for the authorization of use of
force gave the President authority to engage
in war without a formal declaration of war.
I asked Judge Alito whether he agreed with Justice
O’Connor’s statement in 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,” Judge Alito responded, “Abso-
lutely. That’s a very important principle.
So, the Constitution applies in times of peace
and in times of war, and it protects the
rights of Americans under all cir-
cumstances.” Judge Alito went somewhat
beyond the question, answering many more
questions than most other nominees. He
fully explained his methods of reasoning. For
example, when questioned by me and other
Senators about how he would decide questions dealing with the limits of executive power, he responded that he would apply Justice Jackson’s framework from the Youngstown Sheet & Tube Co. v. Sawyer case. He said: “[A]s I said, the President has to follow the Constitution and the laws and, in fact, one of the most solemn responsibilities of the President is to make a determination to use force if the Constitution— is that the President is to take care that the laws are faithfully executed, and that means the Constitution, it means its laws, treaties. It means all of the laws of the United States.”

“But what I am saying is that sometimes issues come up and the answer may 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—that is the executive’s function to decide what I think everyone would agree is a core function of taking care that the laws are faithfully executed, and that means the Constitution, it means the laws, it means treaties. It means all of the laws of the United States.”

“The current Chief Judge of the Third Circuit, Judge Edward Becker, confirmed this view of Judge Alito, as did Judge Maryanne Trump Barry, and all the other current and retired judges who testified.”

“I thought that the testimony of Judge Timothy Lewis was particularly influential, given his background. He is an African American who described himself at the hearing: “When I have a case involving civil rights, I have to think of Thomas v. Commissioner of Social Security, the case in which civil-rights plaintiffs would have to demonstrate a bias against any class of litigation or litigants.”

“Still, based on his personal knowledge of Judge Alito, he thought that the testimony of Judge Alito was so persuasive that he would be his first choice for a Supreme Court seat.”

Judge Edward Becker, the former Chief Judge of the Third Circuit, confirmed this view of Judge Alito, as did Judge Maryanne Trump Barry, and all the other current and retired judges who testified.

“I think it is important that the Supreme Court’s view on an issue where the Supreme Court’s view is clear is reinforced, by the decision in Morrison.”

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“I think that the testimony of Judge Timothy Lewis was particularly influential, given his background. He is an African American who described himself at the hearing: “When I have a case involving civil rights, I have to think of Thomas v. Commissioner of Social Security, the case in which civil-rights plaintiffs would have to demonstrate a bias against any class of litigation or litigants.”
Thomas is only one example of Judge Alito’s strong record on disability rights. He has ruled in favor of numerous workers, students, customers, and disability advocacy groups in a wide range of disability-related claims. Over the years, he has reversed the rulings of lower courts to do so. Other examples include:

Shapiro v. Township of Lakewood, where Judge Alito reversed the majority opinion in favor of an EMT technician who became disabled on the job and was denied an interdepartmental transfer to a position as a police dispatcher.

Piscus v. Wal-Mart Stores, Inc., where Judge Alito ruled in favor of a meat cutter who became injured on the job and could not return full-time to the job. The court’s ruling in favor of the plaintiff was reversed by Judge Alito.

Mondzelweski v. Pathmark Stores Inc., where Judge Alito ruled in favor of a meat cutter who became injured on the job and could no longer lift heavy objects. He overturned the decision of a lower court that refused to consider his disability in light of his low education and skill level. Judge Alito ruled that the impact of a disability had an individual skill level take into account his particular background and skills.

Shore Regional High School Board of Education v. P.S., where Judge Alito reversed a lower court’s decision to find in favor of a student with disabilities. The plaintiff in that case was a child with disabilities who had suffered severe harassment from bullies at his school. Because an Administrative Law Judge had not found that the student could not get an appropriate education in the public school environment, Judge Alito ruled that the student’s providers should be reimbursed for tuition at a neighboring public school.

Pennsylvania Protection & Advocacy, Inc. v. Houston, where Judge Alito sided with a group advocating for the rights of the mentally ill and ordered a state hospital to release internal reports on the death of a patient who attempted suicide and later died under hospital care. He rejected the state of Pennsylvania’s arguments that these documents were protected from release under state law.

Judge Alito has authored a number of other important, progressive opinions that focus on protecting the rights of the most vulnerable. For example, in Fatin v. INS, Judge Alito authored the majority opinion in a case decided by the court’s Third Circuit reversed the jury’s awarded substantial damages. The majority presented from the court’s ruling in favor of a football player who suffered from end-stage renal disease and sought permission from her employer to self-administer dialysis every four to six hours during the workday. The worker voted to reverse the lower court’s ruling that kidney failure was not covered by the Americans with Disabilities Act.

These cases are just a few examples from Judge Alito’s lengthy record. My staff has identified and analyzed scores of cases where Judge Alito has ruled for minorities, immigrants, people with disabilities, prisoners, and other disadvantaged plaintiffs. It is this record that has won him the enthusiastic support of his fellow judges on the Third Circuit.

Judge Alito is anything but a “stealth” candidate. Those who opposed Chief Justice Roberts’ nomination asked for a nominee with a deeper record to analyze. In Judge Alito’s case, the Senate Judiciary Committee had the opportunity to review literally thousands of decisions and some 461 written opinions. It also had the opportunity to hear directly from Judge Alito as he gave lengthy testimony. In three days of intense questioning in which he spent over 18 hours in the witness chair, Judge Alito was asked roughly 677 questions. By comparison, Justice Ginsburg was asked 384 questions and Justice Breyer was asked only 355 questions. Clearly, Judge Alito’s record has been vetted as thoroughly as any nominee’s possibly could be.

It is on the basis of this record that I reached my conclusion to vote aye on the nomination of Judge Alito to be an Associate Justice of the United States Supreme Court.

I thank the Chair and I now yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, I thank Senator LIEBERMAN for his excellent leadership of the Judiciary Committee during both the Roberts and Alito hearings. He squarely addressed the tough issues in the first questioning. He made sure every member of the committee had full and ample opportunity to ask any question they wanted. We had 30-minute rounds. We had opening statements. We had the opportunity to have multiple rounds. Basically, I think the people could have asked questioned these nominees for as long as they wanted.

Of course, both Roberts and Alito were magnificent in their testimony, superb in their knowledge of the Constitution and the rule of a judge in every possible scenario. They have been favorably received by the American public which is why Chief Justice Roberts was confirmed, and why Alito will be confirmed.

We have the greatest legal system in the world. It is the foundation of our liberty, the foundation of our economic prosperity. But the focus and the key ingredient of our legal system is an independent judge who makes decisions every day based on the law and the facts, not on their personal, political, religious, moral or social views. If we descend to that level, if we allow those social, political views to affect or infect the decision-making process, justice has been eroded. That is consistent with the very ideal of the American rule of law.

What is important today is Judge Alito’s legal philosophy. It is not his political philosophy that is important. What is his legal philosophy? The core of his beliefs as a judge is that a judge should be careful, fair, restrained, and honest in analyzing the facts of the case and applying the relevant law to those facts. For what purpose? To decide that dispute, that discrete issue that is before the Court at that time and not to indulge, as he indicated, in great theories. That is not what a judge is about.

So this is what American judges must do for our entire legal system to work. That is why I say that President Bush has given us two nominees who can explain, articulate that role of a judge in a way every American can understand, relate to, and affirm.

My colleagues, I am afraid, lack a proper understanding of this concept. It goes to the core of our differences over judges. They want judges, I am afraid, who will impose their own views, their personal views, on political issues in the guise of deciding discrete cases before them. Oftentimes, these are views that cannot be passed in the political, legislative process but can only be imposed by a judge who simply redefines or reinterprets the meaning of words in our Constitution, and they declare that the Constitution says that same-sex marriage must be the law of the land. They just declare that to be so. It only takes five unelected, lifetime appointed judges to set that kind of new standard for America.

Where any wise people are worried about that? It erodes democracy at its most fundamental level when political decisions are being set by judges with lifetime appointments, accountable to the public.

That is what we are worried about in so many different ways. There has been a trend in that regard, no doubt about it, by our courts. I think they have abused their authority by taking an extremely hostile view toward the expression of religious conviction in public life.

They have struck down Christmas displays. Our courts have declared our Pledge of Allegiance to the Government unconstitutional because it has “under God.” It is for the day, for those of you who can see the words over this door, “In God We Trust,” it is part of our heritage, written right on the wall of this Chamber.

This is an extreme interpretation of the separation of church and state. It is not consistent with our classical understanding of law in America. We had the Supreme Court, in this past year,
redefining the takings clause. The takings clause says you can take private property for public use.

It does not say you can take it for any purpose, like a private mall. They redefined the meaning because they thought, perhaps, better policy. But we don't appoint judges to set policy. As legislators, we have that responsibility. We are the people who will be voted out of office if we set bad policy. We are the ones meeting people every day and campaigning, trying to understand what the American people care about. That is not what judges do, at 80 years old, sitting over there reading briefs every day.

This is an important issue. They declared that illegal aliens, despite State laws to the contrary, are entitled to benefits. They struck down every partial-birth abortion law. They have declared that morality—this is hard to believe but true in recent years—cannot be a basis for congressional legislation. I certainly understand that the judges decide opinions and redefine the meaning of words and the understanding of words over hundreds of years based on what they declare to be evolving standards of decency.

Is that a standard or is that just a license for a judge to do whatever they feel like doing at a given time? Evolving standards of decency, who can define that? Do they have hearings on what these standards are?

These are important issues. The American people are concerned about it. President Bush was concerned about it. He promised he would appoint judges who show restraint, judges of great ability and integrity but who would show restraint and be more modest in the way they handle these cases.

That is a fair standard. It is a legitimate issue for the American people to decide. He talked about it in almost every speech he made. That is what he promised to do, and that is what he has done.

If we were to name judges, there is a legitimate concern that we would appoint judges who would promote some conservative agenda. I don't favor that. I oppose that. We don't want a judge to promote a liberal or a conservative agenda, although the plain fact is, if anybody looks at it squarely, they will see that the Court has actually been promoting a more liberal agenda. But we also want to see that a conservative agenda be promoted. We are asking that the courts maintain their role as a neutral umpire to decide cases based on the law passed by the legislative branch or State legislatures or passed by the people through the adoption of the U.S. Constitution.

I don't understand the opposition to Judge Alito. He is such a fabulous nominee. It does appear, according to the New York Times last week, the 19th of January, that our Democratic leader, Senator Harry Reid, has urged his colleagues to vote no so they can, for political reasons, make it a political issue. We need to be careful about that. I am afraid there has been an attempt to change the ground rules of confirmations, to set standards we have never set before for nominees. That knife cuts both ways. If this is affirmed, then there will be more difficulty in the future for Democratic Presidents to have their nominees confirmed.

Judge Alito has a remarkable record. He is the son of immigrants in New Jersey. His father was an immigrant to this country. He went off to Princeton, gets his degree with honors, accepts an invitation to join an eating club that excludes women and others. I guess that was beneath the members of that club. He decided while he was there that he would just dine with everybody else, the scruff and the sorum that you find at Princeton. Then he went to Yale Law School where he finished at the top of his class, served as editor of the Yale Law Journal, participated in the ROTC at a time when that was unusual and served in the Army Reserve for 8 years, and was offended that Princeton would kick the ROTC from their campus. I am sure he was not pleased when the rioters bombed the ROTC building at Princeton.

He is an American. He believes in his country. He was prepared to serve his country, go where he was asked to go, if called upon in that fashion.

He was chosen to clerk for the Third Circuit after he graduated, the court on which he now sits with Judge Garth. That is quite an honor. For 3 years he served as assistant U.S. attorney in that great large New Jersey law office for the U.S. attorney where he argued appellate cases. He did the appellate work. That is what he will be as a Supreme Court judge, an appellate judge, not a trial judge. That is what he did when he started out his practice. Then he went to the Solicitor General's Office of the Department of Justice, which is often referred to as the greatest job for an attorney in the world, to be able to stand up in the courts of the United States of America, particularly the Supreme Court, and to represent the United States in that court. He argued 12 cases before the Supreme Court. Not one-half of 1 percent of the lawyers in America have probably argued any case before the Supreme Court. He argued 12. That is a reflection of his strength and capability.

Then he became in New Jersey, which is one of the largest U.S. attorney offices in America, where he prosecuted the Mafia and drug organizations and was highly successful in that office and won great plaudits for his performance. He then was placed, 15 years ago, on the Third Circuit Court of Appeals. He has served as a circuit judge in the Third Circuit Court of Appeals for 15 years, writing some 350 opinions and participating in many others.

He has had his record exposed to the world. What does it look like? Without question, it is a record of fairness and decency. Some of us on the conservative side have questioned the bar association. They are pro-abortion in their positions. They take liberal positions on a lot of issues, and some people have criticized them for that. They declare their ratings of judges are based on their views sometimes and they have been accused of allowing their personal views to infect that rating process.

How did the American Bar Association rate Judge Alito? They gave him their highest possible rating. They declared that he was qualified unanimously, by the 15-member committee that meets to decide that issue. They interviewed 300 people, people who have litigated against Judge Alito as a private lawyer, people who have been his supervisors, people who have worked for him, people who had their cases decided by him.

They go out and talk to these people. They will share with the American Bar Association privately what they might not say publicly. So they interviewed 300 people, and the American Bar Association declared that Judge Alito has established a record of both proper judicial conduct and evenhanded application in seeking to do what is fundamentally fair.

They declare that Judge Alito was held "in incredibly high regard." That was said by attorney John Payton, an African American who argued the University of Michigan quota case before the U.S. Supreme Court, not a right-winger. He said they found the people they interviewed held Judge Alito in incredibly high regard. I asked him if he chose that word carefully. He said: I did; yes, sir.

Judge Alito represents that neutral magistrate that we look for in our judges in America. His academic record is superb. His proven intelligence is unsurpassed. The experience he brings to the U.S. Supreme Court is extraordinary, including 15 years as an appellate judge doing in a lower court basically the same thing one would do at the Supreme Court level.

This is what he said at the hearing: The PRESSING OFFICER (Mr. Graham). The majority's time has expired. Mr. SESSIONS, Mr. President. I ask unanimous consent for 30 seconds to wrap up.

The PRESSING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. I understand our side will also get an additional 30 seconds.

Mr. SESSIONS. This is what he said: I had the good fortune to begin my legal career as a law clerk for a judge who really epitomized openmindedness and fairness. He read the record in detail in every single case. He insisted on following precedent, both the precedent of the Supreme Court and his own decisions. He taught all of his law clerks that every case had to be decided on an individual basis. He really didn't have a real axe to grind there.

That is what we need on the bench today. I think it would restore the public confidence. I am proud to support this nomination.
Mr. President, I respect Senator LEAHY. He is an excellent advocate for the Democratic side. I was pleased he supported Judge Roberts, and I am not as thrilled he is not supporting Judge Alito. It was a process that was a bit rough at times, but fundamentally I think the Senate was able to have his day in court.

I yield the floor.

Mr. LEAHY. Mr. President, I ask unanimous consent that we may go a couple of minutes beyond 12 o'clock.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. Mr. President, I appreciate the compliment of the Senator from Alabama. I have spent 31 years in the Senate, I take my role in the Senate very seriously. I believe we should be the conscience of the Nation. As I have said many times, only 18 people get to publicly ask questions of the Supreme Court nominees. They are the 18 Members of the Senate Judiciary Committee. We are asking those questions on behalf of almost 300 million Americans, and then 100 of us get a chance to vote on it.

While the Senator from Alabama is still on the floor, I note that there see to be talking points going around that the Democratic leader, Senator REID, has been lobbying to make this a party-line vote. I don't know where those talking points came from. I have heard them in different places. The Democratic leader was asked about that yesterday by the press in open session. He said it is absolutely not so. I am the ranking member of the Senate Judiciary Committee. Just as nobody from leadership has lobbied me on now-Chief Justice Roberts when I voted for him, nobody has lobbied me on Judge Alito; nor have I lobbied anybody else, and nor have I heard of anybody who has been lobbied.

What the distinguished senior Senator from Nevada, the Democratic leader, has said over and over again is that this is a vote of conscience. Every Senator has to search his or her own conscience. In fact, I was also concerned when the distinguished Republican Senators raised serious concerns with Judge Alito. His record, his treatment of Harriet Miers, is critical. It is critical to be probing inquiry in light of their concerns about her record.

The same groups on the right immediately embraced Samuel Alito after they had forced Harriet Miers to be withdrawn. The Republican Senators who said they needed to learn more about Harriet Miers' judicial philosophy before they could vote to confirm her are now doing an about face and criticizing Democrats for saying they want to do the same type of inquiry for Judge Alito. President Bush buckled to pressure and withdrew the nomination for Harriet Miers because she didn't pass the litmus test and because there were those who said they were not sure that that was by The third nomination—Judge Alito's—people applauded, implying that here we have somebody who we know how he will vote, so he is fine.

Democratic Senators are taking their constitutional role and responsibility very seriously. We have a single fundamental question: Will the Senate serve its constitutional role and preserve the Supreme Court as a constitutional check on the expansion of presidential power?

A nomination is made. Executive power and the checks and balances built by the Framers into our constitutional framework should always weigh heavily in hearings for those nominated to the Supreme Court. Executive power issues were the first issues I raised with Chief Justice Roberts at his confirmation hearing, and they were the first issues I raised with Judge Alito.

The reason presidential power issues have come to dominate this confirmation process is that we have clearly arrived now at a crucial juncture in our Nation, and on our highest court, over the question of whether a President of the United States is above the law. The Framers knew that unchecked power leads to abuses and corruption, and the Supreme Court is the ultimate check and balance in our system. Vibrant checks and balances are instruments in protecting both the security and the liberty of the American people.

This is a time that I fear threatens the fundamental rights and liberties of all Americans, now and for generations to come. One need only look to the White House to see the practical effects of such an erosion of those rights and liberties. This President is prone to unilateralism and assertions of Executive power that extend all the way to illegal spying on Americans.

This President is in the midst of a radical realignment of the powers of the Government and its intrusiveness into the private lives of all Americans, Republicans and Democrats. Frankly, this nomination is part of that plan for the intrusion into our private lives. I am concerned that if we confirm this nominee, it will further erode checks and balances that have protected our constitutional rights for more than 200 years. It is not overstating the case to say that this one will tip the balance on the Supreme Court radically away from the constitutional checks and balances and the protection of Americans' fundamental rights.

Just as last week, I introduced a resolution to clarify what we all know, that the congressional authorization for the use of military force against Osama bin Laden did not authorize warrantless spying on Americans, as the administration has now claimed. I thought—we all thought—that when we as Democrats joined in the bipartisan authorization of military action against Osama bin Laden more than 4 years ago, our action would have been more effective and that the vote by the Democratic leader was asked about those talking points came from. I have heard them in different places. The Democratic leader was asked about that yesterday by the press in open session. He said it is absolutely not so. I am the ranking member of the Senate Judiciary Committee. Just as nobody from leadership has lobbied me on now-Chief Justice Roberts when I voted for him, nobody has lobbied me on Judge Alito; nor have I lobbied anybody else, and nor have I heard of anybody who has been lobbied.

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Now we find the administration, instead of saying sorry we didn't catch Osama bin Laden, even though you gave us the authority, we now want to use that authority as legal justification for a covert, illegal spying program on Americans.

As Justice O'Connor underscored very recently, even war "is not a blank check for the President when it comes to the rights of the citizens."

Now that the illegal spying on Americans has become public, the Bush administration's lawyers are contending that Congress authorized it. The September 2001 authorization to use military force did no such thing. It did not authorize illegal spying on Americans. Republican Senators know it, and some have been courageous to say so publicly. The fact is, we all know it. The liberties and rights that define us as Americans and the checks and balances that serve to preserve them should not be sacrificed to threats of terrorism or to the expanding power of the Government. Security and liberty are not mutually exclusive values in America. We should have both, and we can have both, so long as we have adequate checks and balances and with the extra effort it takes to chart the right course to preserve our liberties as we preserve our security.

I am constantly reminded of what Benjamin Franklin said: People who give up their liberties for security deserve neither. The terrorists win if they frighten us into sacrificing our
freedoms—something I said in the days following 9/11, and I believe it just as strongly today.

Just after 9/11, I joined with Republicans and Democrats—I was at that time chairman of the Judiciary Committee, in round-the-clock efforts to update and adapt our law enforcement powers, and we did. The law became known as the USA PATRIOT Act. It is obvious they missed a lot of the signals that are there. It is obvious that they had ignored the evidence that was before them that might have stopped the terrorists from striking us, but we didn’t make those accusations, we didn’t say then—and I’m not saying all the things that allowed us to be hit on your watch. During those days, we asked the Bush administration, what do you need, tell us what you need so it doesn’t happen again, whether it is on your watch or anybody else’s.

In answering that question, they never asked us to amend the Foreign Intelligence Surveillance Act to accommodate spying on Americans they now claim to undertake even though the law doesn’t allow it. The law does contain an expressed reservation for the 15 days following a declaration of war. But neither Attorney General Ashcroft nor anyone else in the Bush administration at that time or any time afterward sought congressional authorization for this illegal NSA spying program.

Actually, Attorney General Gonzales admitted in a recent press conference that the Bush administration did not seek legal authorization for this kind of spying on Americans because “it was not something we could likely get.” We don’t know: he never asked. But consider that damning admission. It is utterly inconsistent with the Bush administration’s current argument that Congress authorized warrantless spying on Americans, when they now are saying they didn’t ask for it because they couldn’t get it. They can’t have it both ways. Lord knows they are trying as hard as they can to have it both ways.

The Bush administration’s after-the-fact claims about the breadth of that 2001 resolution are the latest in a long line of manipulations and another affront to the rule of law. American values, and traditions. We have also seen such overreaching in the Justice Department’s twisted interpretation of the rule of evidence, in the detention of suspects without charges, the denial of access to counsel, and in the misapplication of the material witness statute as a sort of general preventive detention law. Such abuses serve to harm our security and to abuse our civil liberties. In fact, sources at the FBI reportedly said that much of what was forwarded to them to investigate from the NSA spying program was worthless and led to dead ends. That is a dangerous diversion of our investigative resources.

When they talk about thousands of al-Qaeda conversations they have to monitor going to Americans—thousands? Interesting. So how many people have been arrested because of those thousands? Two thousand people? Fifteen hundred people? One thousand? Five hundred? Four hundred? Three hundred? Thirteen? Seven? Five, three, four, two, none? This must be a check on the presidency. It is, a crucial check in maintaining the right balance so that all Americans can have both security and liberty.

It is worth taking a few moments to remember the facts of these cases, because I am concerned that Judge Alito has too little regard for the consequences arising from allowing these kinds of invasive searches beyond those authorized by warrants.

In the Doe case, the 10-year-old girl and her mother were subjected to what the Third Circuit termed an “intrusive” strip search, even though they were not suspected of nor charged with any wrongdoing. The warrant that the Government agents had obtained from a federal judge authorized a search for a man living at a certain address. Yet when they arrived at the address they encountered only the 10-year-old and her mother and proceeded to strip search them. There was no contention that they posed a risk to the agents.

Similarly, in Baker v. Monroe Township, a mother and her three teen-aged children were detained and searched as they arrived at the home of the mother’s adult son. The woman and her teen-aged children did not live at the house, were not suspected of any wrongdoing, were not named in the warrant, and were not even inside the premises when the officers arrived on the scene. They were nevertheless all ordered at gunpoint to lie on the ground. They were subsequently handcuffed, taken into the house, further detained, and their property and persons were searched.

In both cases, the Third Circuit held that the Government agents had acted inappropriately and had violated the Fourth Amendment when they conducted these invasive searches of innocent persons who were not named in the search warrants. When I asked him why he, in contrast, looked beyond the “four corners” of the warrant that was actually signed by the magistrate in Doe, Judge Alito replied that the issue was a “technical” one. Repeatedly when pressed about this case, Judge Alito insisted that the issue was merely “technical.”

The illegal strip search was not “technical” for the 10-year-old girl. Then-Judge Chertoff understood that this issue is far from technical, but, rather, embedded in the core protections of our individual privacy and dignity from governmental intrusion. In the court’s opinion, rejecting the rationale of Judge Alito’s dissent, Judge Chertoff wrote: “This is not an arcane or legalistic distinction, but a fundamental right of the constitutional requirement that judges, and not police, authorize warrants.”
Judge Alito tried to find “technical” ways to excuse the illegality. Judge Alito’s dissent relied on the affidavit accompanying the warrant. To the extent the affidavit had requested a search of “all occupants” of the home, it did not concern about the concealment of drugs by “frequent visitors” or by “persons who do not actually reside or own/rent the premises”—not by a 10-year-old girl living in the home. Judge Alito ignored the language in the affidavit in order to misconstrue the affidavit more broadly and to then substitute it for the magistrate’s warrant.

Judge Alito’s rationale was that because the officers’ initial request was broad, it could be assumed that the magistrate intended to grant broader search authority than that set forth in the warrant. The Supreme Court had specifically rejected this type of reasoning in the case of Ramirez v. Groh, which was decided a month before Judge Alito’s opinion in the dissent in the Fourth Amendment. The other judges hearing the case found fault with the use of excessive force as is troubling. It goes back at least as far as his time in the Meese Justice Department. I find particularly troubling a 1984 memorandum he wrote in General regarding a case called Tennessee & Memphis Police Department v. Garner. In a long memo in which he repeatedly wrote in the first person proclaiming his own beliefs, Samuel Alito argued that there were no constitutional problems with a police officer shooting and killing an unarmed teenager who was fleeing after apparently stealing $10 from a home. A year later, the Supreme Court ruled 6–3 against Judge Alito’s position in that court majority’s deliberation on the use of “deadly force” if a suspect presents no danger. In contrast to Justice O’Connor’s dissent on federalism grounds, Samuel Alito’s emphasis on the human tragedy of the events nor did he think the Constitution even applied since he argued that the unjustified shooting was not technically a “seizure.” Most troubling is Judge Alito’s statement in his legal memo endorsing “the general principle that the state is justified in using whatever force is necessary to enforce its laws.” I fear that this deference to the Government, which he has continued on the bench, makes him an ineffective check on the Government or protector of individual liberties and rights.

The Supreme Court is the ultimate check and balance in our system. The independence of the Court and its members is the democracy and way of life. The Senate should never be allowed to become a rubberstamp, and neither should the Supreme Court.

And so we owe it to the American people of today, and the Americans of generations to come, to ask and answer several essential questions: Can this President, or any President, order illegal spying on Americans? Can this President, or any President, authorizing torture, in defiance of our criminal statutes and our international agreements? Can this President, or any President, defy our laws and Constitution to hold American citizens in custody indefinitely? Any court review? Can this President, or any President, choose which laws he will follow and which he will not, by quietly writing a side statement when he signs a bill into law? These are some of the most important questions, and these are among the most vital questions that confront the Senate in considering this nomination to our highest court. Judge Alito’s record, and his responses—and his failure to adequately answer some of these issues—are deeply troubling.

No President should be allowed to pack the courts, and especially the Supreme Court, with nominees selected to enshrine presidential claims of government power. Our system was designed to ensure a balance and to protect against overreaching by any branch.

A Democratic Senate stood up to one of the most powerful Presidents of all time when it rejected President Franklin Roosevelt’s court packing scheme. The Senate should not be a rubber stamp to this President’s effort to pack the court with those who would give him unlimited leeway to legislate. I cannot lend my support to an effort by this President to move the Supreme Court and the law radically to the right and to remove the final check within our democracy.

I voted for President Reagan’s nomination of Justice Sandra Day O’Connor, for President Reagan’s nomination of Justice Anthony Kennedy, for President Bush’s nomination of Justice Souter, and for this President’s recent nominations because I believe, as a former chairman of the Judiciary Committee and one whose protection of the civil liberties of all of us is unparalleled in the history of this body.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I thank my friend and colleague, the Senator from Vermont. Again, we do many important things in the Judiciary Committee, but none are more important than the selection of our Supreme Court Justices. I again thank the Senator from Vermont for his leadership in ensuring we’re going to have a fair, open, appropriate, and a probing, probing hearing and for the leadership he provides for our committee on so many different matters of importance to the American people.

The stakes in this nomination could not be higher. This is the vote of a generation. If confirmed, Judge Alito will be a supermajority of five on the Supreme Court, with nominees selected to the right and to re-engineer the Supreme Court. That is with those who would give him unprecedented power, the Supreme Court is the guardian of our most cherished rights and freedoms, and they are symbolized in the four eloquent words inscribed above the entrance of the Supreme Court of the United States: “Equal justice under law.”

Those words are meant to guarantee our courts will be an independent check on abuses of power by the other two branches of Government. They are a commitment that every court will always be a place where the poor and the powerless can stand on equal footing with the wealthy and the privileged.
Each of us in the Senate has a constitutional duty to ensure that anyone confirmed to the Court will uphold that clear ideal.

Contrary to what a number of my Republican colleagues have argued, the Senate is not limited to ensuring that the nominee is ethical. The Senate possesses a certain level of legal skill and professional experience. To end the inquiry there would be a shameful abdication of our historic responsibility. The most important subject for the Court is of great importance to every man and woman in America because the decisions rendered by the Court affect their lives every day. Because of the enormous authority a successful nominee to the High Court will have for decades to come, it is the responsibility of the Senate to determine what constitutional values the nominee holds before he or she is confirmed.

Has the nominee learned the great lessons of our Nation’s history? Will the nominee be fair and openminded or will his judgments be tainted by rigid ideology? Is he genuinely committed to the principles of equal justice under law?

The American people will have no second chance to decide whether this person should be trusted with such awesome responsibility. As their representatives, it is our responsibility to ask the tough questions and demand meaningful answers.

For the Senate to become a rubberstamp for the judicial nominees of any President would be a betrayal of our sworn duty to the American people. Taking our responsibility seriously and doing the job we were sent here to do is not being partisan, as some Republicans have charged. In fact, it is those Republicans who are being partisan by defending a nominee’s right to remain silent when Senators ask him highly relevant questions about his constitutional views. To ask a nominee for a candid statement of his current belief about what a provision of the Constitution means is not asking for a guarantee of how he will rule in the future. It is every bit as appropriate as reading a Law Review article or a case he wrote last year or a speech he gave as a judge.

Unfortunately, on issue after issue, instead of answering candidly, Judge Alito merely recited the existing law but never his view of major constitutional issues. That is a disservice to the American people, and Senators on both sides of the aisle should find his evasiveness unacceptable. The confirmation process should not be reduced to a game of hide the ball. The stakes for our country are too high.

One of the most important of all responsibilities of the Supreme Court is to enforce constitutional limitations on Presidential power. A Justice must have the courage and the wisdom to speak truth to power, to tell even the President he has gone too far. Chief Justice John Marshall was that kind of Justice when he told President Jefferson he had exceeded his war-making powers under the Constitution. Justice Robert Jackson was that kind of Justice when he told President Truman he could not misuse the Korean war as an excuse to take over the Nation’s steel mills. Chief Justice Burger was that kind of Justice when he told President Nixon to turn over the White House tapes on Watergate. Justice Sandra Day O’Connor was that kind of Justice when she told President Bush that “a state of war does not give him a blank check for the President when it comes to the rights of the Nation’s citizens.”

We need that kind of Justice on the Court more than ever. It is our duty to ensure that only that kind of Justice is confirmed.

Today, we have a President who believes torture can be an acceptable practice despite laws and treaties that explicitly prohibit it. We have a President who claims the power to arrest an American citizen on foreign soil and jail them for years without access to counsel or the courts. We have a President who claims he has the authority to spy on Americans without the court order required by law.

The record shows we cannot count on Judge Alito to blow the whistle when the President is out of bounds. He is a longstanding advocate of expanding Executive power even at the expense of core individual liberties. On Executive power Judge Alito’s view of the balance of powers is inconsistent with the Supreme Court’s historic role of enforcing constitutional limits on Presidential power.

His consistent advocacy of what he calls the gospel of the unitary executive is troubling. As Steven Calabresi, one of the originators of the unitary executive theory, has said, “The practical consequence of this theory is Dra- matic: It renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power.”

But this bizarre theory goes much further. Its supporters concede that without the unitary executive as a foundation, the Bush administration cannot even hope to justify its constitutional abuses in the name of fighting terrorism.

Judge Alito refused to discuss his current view of the constitutional limits on Presidential authority at his confirmation hearing. But in his speech Judge Alito gave in 2004 to the Federalist Society, he stated that he believed “the theory of the unitary executive best captures the meaning of the Constitution’s text and structure.”

Under this radical view, all current independent agencies would be subject to the President’s control. This would destroy the independence of agencies such as the Federal Election Commission, the Securities and Exchange Commission, the Consumer Product Safety Commission, and the Federal Reserve Board.

He strongly criticized the Supreme Court’s ruling rejecting the theory of unitary executive and outlined a strategy for bypassing it.

When Judge Alito made that speech, he had already been serving as appellate judge for 10 years, and he was describing his own view of the Constitution.

Similarly, Judge Alito had written earlier that “the President’s understanding of a bill should be just as important as that of Congress,” and that Presidents should not issue interpretative signing statements announcing their own legal interpretations in the hope of influencing the way the courts would construe the law.

On Executive power, “Protective of the Executive Branch, the issuance of interpretative signing statements would have two chief advantages. First, it would increase the power of the executive to shape the law.”

This is his view. But as Justice Hugo Black noted in the important case, “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”

This is not just a theoretical case. As we all now know, President Bush issued such signing statements on a bill that contained Senator McCain’s ban on torture. In that statement, the President reserved the right to ignore the McCain requirements and even asserted that in certain circumstances his actions are beyond the reach of the courts.

I think many of us remember that meeting Senator McCain had with the President down in the White House, and the Senator from Arizona thanked the President for working out the language that would be inserted in the appropriations bill to include the Defense appropriations bill and the President thanked him for his help and assistance in working that out. They both shook hands. This picture was on all three networks the next morning.

Four or five days later, the President signed the bill, and he issued an executive signing statement that said he continued to retain all of his constitutional power, and that he was effectively taking any question of his Executive power out of the hands of any courts in this country. That is a complete reversal to what was agreed to, a complete reversal to what was said, a complete reversal to the understanding that had been reached. The Senator from Arizona has spoken about that. That is Executive power.

We learned in high school there are two branches of Government, the House and the Senate. They pass the laws. The President signs the laws. The President enforces the law. If he vetoes it, it is not the law. That is not Judge Alito’s view. He believes the President, by signing it, has an independent voice and that voice is a voice that should be listened to and he believes the Constitution’s text must be interpreted by the judiciary, the executive authority and Executive power.

In cases involving claims of privacy and freedom from unjustified searches
and seizures under the Bill of Rights, Judge Alito has consistently deferred to the Government at the expense of core individual rights. In the Doe v. Groody case, Judge Alito issued a dissent defending the strip search of a 10-year-old autistic student—denied Judge Alito’s view as threatening to turn the requirement of a search warrant into little more than a rubber stamp. This is not Democrats saying this; this is President Bush’s Secretary of Homeland Security, sharply criticizing Judge Alito’s view.

In Mellott v. Heemer, Judge Alito reported it was reasonable for marshals to pump a sawed-off shotgun at a family sitting in their living room. The family committed no crime. Seven marshals had detained and terrorized a family and friends, ransacked their home while carrying out an unresisted civil eviction. Yet Judge Alito’s decision meant the family never got a trial before a jury of their peers.

In In re: The Groody case, Judge Alito dissented from a ruling prohibiting the removal of African-American jurors because of their race. It is unbelievable in today’s America, in a case involving a minority defendant, that any judge would deny the individual about constitutional law—all nineteen of the Third Circuit who heard the case on appeal agreed. Only Judge Alito argued that she had not provided adequate proof of discrimination. Who is out of step? Who is out of the mainstream?

In the Riley v. Taylor case, Judge Alito dissented from a ruling prohibiting the removal of African-American jurors because of their race. It is unbelievable in today’s America, in a case involving a minority defendant, that any judge would deny the individual her chance to prove her case. His colleagues on the court—not the Democrats on the committee—his colleagues on the court wrote that his dissent would have evaporated key provisions of the landmark Civil Rights Act of 1964.

His record in other areas of civil rights is also troubling. In the case in which a disabled person sought physical access to a medical school under the Rehabilitation Act of 1973, the court’s majority wrote that few, if any, Rehabilitation Act cases would survive if Judge Alito’s view prevailed. That is the majority, not Members of the Democratic Party. That is the majority of the court members, looking at his view.

There it is—issues on race, issues on disability, individual rights and liberties, those individuals, farmers, and others in a home involving a civil action, who committed no crime, where marshals used unconstitutional tactics. They were denied an opportunity for a court to give a hearing. Judge Alito said no. That is why many Members wonder what kind of an opportunity the average American is going to have. Does Judge Alito tip more to the powerful and the entrenched interests and the Executive authority? Does he give those individuals—women, minorities, dear God, serious mental illness? Judge Alito said, let’s look at the record. We have looked at the record. We looked at primarily the dissents, as pointed out in the previous discussions.

Ruth Bader Ginsburg, who is considered to be a very progressive figure on the Court, Judge Bork, a conservative figure who was proposed for the court, agreed 91 percent of the time. It is in the dissent that we understand whether an individual and individual rights are protected. Those are the indicators. As we have seen from studies—not just from the members of the Judiciary Committee but by independent sources—Knight Ridder, Yale Law School Study Group, even the Washington Post, distinguished authority and thoughtful individuals about constitutional law—all have reached a very similar conclusion that I have outlined here. We will hear on the other side: Well, they are only finding a few cases. We have suggested that more than a majority of the Third Circuit who sit with that and with their inclusion of detention of Americans on American soil without access to counsel or the court, and eavesdropping on Americans in violation of Federal law.

The Court will decide new issues in America’s struggle against prejudice and discrimination. It must remain a fair and impartial decisionmaker for ordinary Americans seeking justice.

Judge Alito’s record shows he should not be entrusted with these extraordinary powers, including detention of Americans on American soil without access to counsel or the court, and eavesdropping on Americans in violation of Federal law.

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The Court will decide new issues in America’s struggle against prejudice and discrimination. It must remain a fair and impartial decisionmaker for ordinary Americans seeking justice.

Those who are following this debate—my colleagues and those in the executive branch—individuals sitting on the Court, and I urge my colleagues to join me in opposing Judge Alito’s nomination.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Thank you, Mr. President. I thank my colleague from the Commonwealth of Massachusetts for his statement.

Those who are following this debate—my colleagues and those in the executive branch—individuals sitting on the Court, and I urge my colleagues to join me in opposing Judge Alito’s nomination.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Thank you, Mr. President. I thank my colleague from the Commonwealth of Massachusetts for his statement.

Those who are following this debate—my colleagues and those in the executive branch—individuals sitting on the Court, and I urge my colleagues to join me in opposing Judge Alito’s nomination.
is there for the rest of their natural life. For 10, 20, or 30 years, that person will be making critical decisions on the highest Court in the land, the Court which is the refuge for our freedoms and our liberties.

The Court, across the street from this Capitol Building, has made momentous and historic decisions which have literally changed America. In the 1950s, nine members of the Supreme Court made the decision that we would no longer have segregated public education in America. It was not the leadership of a President or the Congress, but it was the Court.

Similarly, that same Court, in the 1960s, established a new right under our Constitution, a word which you cannot find within the confines of that document, the right of privacy. That Court—nine Justices across the street—said that when it came to the most personal and basic decisions in our lives, they were reserved to us as individuals and not the Government. That was not a finding by a President. It was not a law passed by Congress. It was a decision of the Supreme Court.

And time and again, whether we are speaking of the rights of minorities in America, women in America, those who are disabled, that Court and the nine Justices who sit on the bench make decisions which change America for generations to come. That is why the selection of a nominee to the Supreme Court is so important and so historic. It is made even more so by the fact that the vacancy we are filling on the Supreme Court is not another run-of-the-mill vacancy. It is the vacancy of Sandra Day O'Connor, the first woman ever appointed to the U.S. Supreme Court.

As important as her gender is, the fact is, she brought unique leadership to the Court. You see, over the last 10 years, there have been 193 decisions in that Court that were decided 5 to 4. One Justice's vote made the difference. If one Justice had voted the other way, the decision would have been the opposite—193 times in 10 years. And in 48 of 193 cases, Justice Sandra Day O'Connor was the deciding vote.

So we are not only faced with a historic and constitutional challenge in filling this vacancy, we have a special responsibility because the vacancy that is being filled is a vacancy that will be occupied by a woman in America one way or the other way.

What kind of cases did Sandra Day O'Connor provide the decisive vote on? Cases which safeguarded Americans' right to privacy in the area of reproductive freedom, the rights of women; cases that required courtrooms to be accessible to people with disabilities, decided 5 to 4; preserving the rights of universities to use affirmative action programs, decided 5 to 4; affirming the right of State legislatures to protect the right of privacy, decided 5 to 4; upholding State laws giving individuals the right to a second doctor's opinion if their HMO denied them treatment, decided 5 to 4; reaffirming the Federal Government's authority to protect the environment that we live in, a 5-to-4 case; and reaffirming America's time-honored principle of the separation of church and State, 5 to 4. In every case, the fifth vote was Sandra Day O'Connor. And now she leaves, after many years of service to America, with an extraordinary record of public service. Many of us are listening to you now, and understanding that certain persons replacing her can rise to the challenge, and not only the challenge of serving in the Court but the challenge of fighting for the same values she fought for. Sandra Day O'Connor came to the Supreme Court with the support of Barry Goldwater, the preeminent conservative in American politics in the 1960s and beyond. Many expected her to be of the same stripe, that she would follow his basic philosophy. In many ways, she did believe in Goldwater's contribution to American politics, you will find him starting in a very conservative position and, over the years, moving to a more libertarian position, a position that valued personal freedom more.

The same thing happened to Sandra Day O'Connor. Starting as a conservative, over the years she moved toward a more libertarian position, a position which, in many instances, was critical for protecting our basic rights. It has been said she was the most important woman in America. And it is easy to see why. Time and again, Sandra Day O'Connor was the crucial fifth vote on civil rights, human rights, women's rights, and workers' rights. That is why we have looked so closely and so carefully at Judge Sam Alito.

And there is more. His was not the first name to be suggested by the President for this vacancy. The first name mentioned was Harriet Miers, a person he obviously respects very much. Do you recall what happened to her nomination? Her name was brought forward, and there was a firestorm of criticism about Harriet Miers' nomination. Did it come from the Democrats? Did it come from liberals? No. It came from the other side. Time and again, the most rightwing on the American political scene said Harriet Miers was not acceptable, and they raised questions whether she could be trusted to be on the Supreme Court to advance their rightwing agenda.

Their opposition to her nomination grew to levels and reached a point people did not think could happen. President Bush withdrew Harriet Miers' name as a nominee. In the wake of withdrawing Harriet Miers' name, in sailed Judge Sam Alito—not the best circumstance for someone who is coming to the Court with a position arguing they have no political agenda.

Well, we looked carefully to see what the same rightwing organizations would say about Sam Alito. They had rejected Harriet Miers. They gave Harriet Miers the back of a hand. They gave Sam Alito their blessing. They said: He is fine. We support him. He is the right person for the job.

The question that raises a question in your mind as to whether Judge Alito will come to this position without an agenda, without professing some allegiance to extreme views these organizations hold? Will it raise the question in the minds of many of us?

And then, during the course of his nomination, there emerged a document, a document he had personally written. In 1985, Sam Alito wrote a document to the Justice Department of the Reagan administration, then headed by Attorney General Ed Meese, looking for a job. In the course of that document he was supposed to lay out why he, Sam Alito, was in step with the Reagan administration's thinking and philosophy. And, in 1985, that was an amazing document. It went through page after page of the things he felt qualified him to serve in that administration.

Some have said: Wait a minute, that was 20 years ago. People change. And it is true. But we have obligations on some issues. It is well known and documented. It happens. But to say it was a document given without conviction overrules the obvious. Sam Alito, at that moment in 1985, was 10 years out of Yale Law School. He had served in the military. He served a year as a clerk to a Federal judge. He had served 4 years as an assistant U.S. attorney, prosecuting cases, and 4 years as an assistant to the Solicitor General of the United States.

So rather than suggesting that document reflected the casual observations of someone looking for a job at a very early age, I think that document told us much more.

As he told us was that he questioned some very fundamental things about law in America. In his essay, he wrote that "the Constitution does not protect a right to an abortion." He said he was proud of his work in the Justice Department, fighting abortion rights and affirmative action. He wrote that he was skeptical of Warren court decisions which embraced the principle of "one person, one vote" and the separation of church and state. And he pointed to his support for two very conservative organizations: The Federalist Society and the Concerned Alumni of Princeton.

His listing of the Concerned Alumni of Princeton, of which he was a graduate, was troubling because that organization was once dedicated to establishing a quota at Princeton that each year they would accept no fewer than 800 men, and the Concerned Alumni of Princeton wanted to stop what they considered to be the infiltration of the student body by women and minorities. Some of the things they wrote and said were outrageous. In fairness, Judge Alito at the hearing...
said he would not associate himself with their remarks, but it is interesting that he would identify this organization as one of his memberships that would qualify him to serve in the Justice Department.

At an examination of Judge Alito’s 15-year track record on the U.S. Court of Appeals evidences, there are other elements that suggest a very conservative judge. University of Chicago law professor Cass Sunstein examined his dissenting opinions over 15 years and concluded:

When they touch on issues that split people along political lines, Alito’s dissent show a remarkable pattern: They are almost uniformly conservative.

People say to me: If he was found “well qualified” by the American Bar Association, what is wrong with that? Why don’t you just go ahead and approve the man? The bar association is an important part of this process, but they only look to three main things. They look to whether he has legal skills. That is important. They look to whether he is an honest person. That is equally important. And they look to his temperament. They said he is well qualified by those three standards. But the American Bar Association doesn’t look to his values. It doesn’t look to his philosophy, how he is likely to rule in critical cases for America.

I wanted to ask Judge Alito at the hearing: Where is your heart? What do you feel about the power you will have as a Supreme Court Justice? I asked him an obvious question in the lead-up to my inquiry: I asked if he was a fan of Bruce Springsteen. You might wonder why that would come up in this case. Judge Alito is from New Jersey, as is Bruce Springsteen. He said to me in his answer:

I am—to some degree.

That is a qualified answer, but I took it and went on. The reason I raised it was this: Many people have asked Judge Alito whether he is a liberal or conservative. He asked me an obvious question in the lead-up to my inquiry: I asked if he was a fan of Bruce Springsteen. You might wonder why that would come up in this case. Judge Alito is from New Jersey, as is Bruce Springsteen. He said to me in his answer:

I am—to some degree.

An African American, charged with murder, facing the possibility of the death penalty, argues on appeal that his verdict was unfair because the prosecutor had used race to exclude every African American from the jury. He pointed out that in three other murder trials, one involving an African American, the other two White defendants, the prosecutor had done the same thing—left the Blacks off the jury systematically.

The Third Circuit Court on which Judge Alito served said that defendant was right; that is not something we accept in America; we are going to send this case back to be retried by a jury of this defendant’s peers. They saw the importance of a justice system that is blind to race.

But not Judge Alito. He said establishing the fact that four murder trials came before the same prosecutor with all White juries is like establishing that five out of six of the last Presidents were left handed. I thought that was a rather casual dismissal of an important principle. When I asked Judge Alito about it, he seemed more committed to the principles of statistics than the principles of racial justice which the majority in his court applied.

Another case involved an individual who was the subject of harassment in the workplace. This person had been assaulted by fellow employees. He was a mentally retarded individual. He was so brutally assaulted in a physical manner that he was taken to the record of the hearing, nor will I today, the details. Trust me, they are gruesome and grisly. His case was dismissed by a trial court, and it came before Judge Alito to decide whether to give him a chance to go to trial. Judge Alito said no, the man should not have a day in court. Why? Not because he didn’t have a case to argue, but Judge Alito believed that his attorney had written a poorly prepared legal document. Was there any justice in that decision? Did the crushing hand of fate come down on an individual who was looking for a day in court who happened to have an attorney without the appropriate skills?

When it came to health and safety questions involving coal mines, a topic we see in the news every day, Judge Alito was the sole dissenter in a case as to whether a coal mining operation would be subject to Federal mine and safety inspections in the committee hearing that he just read the law a little differently.

What we find in all these cases is a consistent pattern. Time and again, it is the poor person, the dispossessed person, the one who is powerless who has finally made it to his court, who is shown the door. That troubles me. It troubles me because what we are looking for in Justice is wisdom.

If you are a student of the Bible—and I am—it is a person who embodies the virtue of wisdom was a man named Solomon. In the Bible, the Lord came to Solomon and said: I will give you a gift. What gift would you have? And Solomon said: I want a caring heart. He didn’t ask for riches or knowledge; he asked for a caring heart. This wise man wanted that as part of who he was.

That is what I looked for with Judge Alito. Sadly, in case after case, I couldn’t find it. Every time that if Judge Alito goes to the Highest Court in the land for a lifetime appointment, he will tip the balance of the scales of justice. He will tip the balance against protecting our basic privacy and personal freedoms. He will tip the balance in favor of Presidential power, even when it violates the law. He will tip the balance when it comes to recognizing the rights of the powerful over the powerless. He will tip the balance on workers’ rights and civil rights and human rights and women’s rights and protecting the environment. That is why I cannot support his nomination.

I call on the President to send to us a person creative like Sandra Day O’Connor. She was a woman who demonstrated, in a lifetime of service, that she understands the values of this country and committed her life to protecting them. I am sorry that Judge Sam Alito does not live up to her standard.

I yield the floor.

The PRESIDING OFFICER (Ms. Murkowski). The Senator from Texas.

Mr. CORNYN. Madam President, before I make the remarks I’ve prepared about Judge Alito, I extend my gratitude to members of my staff who, as a member of the Judiciary Committee, have been so instrumental in my ability to prepare for this confirmation process.

In particular, I note the contribution of Brian Fitzpatrick, who has been a member of my staff and worked on both the Roberts and Alito Supreme Court nominations. He is leaving next week after Judge Alito was confirmed to the U.S. Supreme Court, as he will be, to go teach at NYU, New York University. NYU’s gain is our loss. I certainly wish Brian well in his new career. I put him on notice that the next vacancy that President Bush gets to the U.S. Supreme Court, I am going to be calling him and asking him to come back for another gig.

Madam President, I rise today to explain why I intend to vote to confirm Judge Alito to the Supreme Court.

Those who were just listening to the eloquent words of the distinguished Democratic whip might wonder how in the world anybody could ever vote for this nominee; how Judge Alito survived for the last 15 years as a member of the circuit court of appeals in Philadelphia without getting impeached; how in the world his former law clerks, the people who have worked most closely with the judge, and who happened to be Democrats and have a different political world view, a different world view, a different perspective on the qualifications and temperament of this fine public servant and this fine human being; how, possibly, in listening to the criticisms we have heard of this nominee and of the President for having the temerity to nominate him, you can reconcile that impression with the fact that we heard on the Senate Judiciary Committee virtually all of the qualifications and temperament of this fine up and down day in and day out, who to a person...
came in and said this is exactly the kind of judge we would want and we think the American people would have a right to expect, and urged us to favorably vote on his confirmation.

It is clear to me, though, during the course of the confirmation process, that the reason I support Judge Alito his philosophy of judicial restraint is exactly the reason his detractors oppose his nomination. The sad fact is that there are some in this country who believe judges who respect the legislative choices made by the American people. Rather, they want judges who will substitute their own personal ideological or political agenda for those choices made in the Halls of Congress by the elected representatives of the American people.

There are some in this country who have views that are so out of the mainstream that they don’t have any chance to persuade the American people to accept them. For example, there are some who want to end traditional marriage between one man and one woman. There are some who want to continue the barbaric practice of partial-birth abortion. Some even want to abolish the Pledge of Allegiance. But they have brought these issues to the floor of the Senate and to the floor of the U.S. House of Representatives, these are not the views that would be expressed through the elected representatives of the American people because the American people themselves don’t agree with these far left, out-of-the-mainstream views.

For these advocates of these out-of-the-mainstream views, the only way they will ever see their views enacted into law is to circumvent the American people and pack the courts with judges who will impose their agenda on the American people. They believe in judicial activism because judicial activism is all they have. Of course, Judge Alito’s detractors will never say they believe in judicial activism. They know the American people don’t favor it. They know the American people believe fervently in democracy and self-determination, and they don’t want unelected judges making the laws of this country. So Judge Alito’s detractors are forced to oppose his nomination on the basis of certain pretexts. They are forced to grasp for any pretext to try to defeat his nomination. As one of Judge Alito’s detractors put it, “you name it, we will do it” to defeat Judge Alito.

One of their favorite pretexts—and we have heard some of it this morning—is that Judge Alito embraces this view of an omnipotent executive branch; that he believes the President’s powers are without limitation. This pretext is a complete canard. It is based on the claim that Judge Alito once endorsed an academic theory called unitary executive. But, unitary executive is not the same as an all-powerful executive. It is, after all, a theory that says there are three co-equal branches of Government—executive, legislative, and judicial. And each official within that branch is accountable to the people for the power they exercise and is delegated to them by the Constitution and laws of the country.

But to show how misplaced this criticism is, according to Judge Alito’s opponents, the father of the unitary executive theory is Justice Scalia on the U.S. Supreme Court. The problem they have is that the facts show that Justice Scalia does not favor an all-powerful President. No one does. We know this in particular from the decision he wrote in the Hamdi case 2 years ago. This was a case where the detention status of some of the terrorists who are kept at Guantanamo Bay was being reviewed by the Supreme Court. In that case, in the opinion written by Justice Sandra Day O’Connor, the Supreme Court held that the President had the power as Commander-in-Chief during a time of war, to indefinitely detain even American citizens who were suspected of terrorism without filing criminal charges against them. Justice Scalia, perhaps one of the most conservative members of the Court, dissented from that opinion. He thought that if the President had so much power; that it was unconstitutional for him to do so. His views did not carry the day, but indeed of all of the Justices, Justice Scalia, the father of this unitary executive theory, was least if any, in favor of an all-powerful President. Judge Alito doesn’t believe the President’s powers are unlimited any more than Justice Scalia does.

Now, one of the witnesses we had during the course of the hearing—I mentioned several former and current members of the Third Circuit Court of Appeals. One of them who testified interestingly and relevant to the point was Judge John Gibbons who has since left the judiciary and has a law practice where he represents the detainees at Guantanamo Bay. He said:

The committee members should not think for a moment that I support Judge Alito’s nomination because I am a dedicated defender of the Bush administration. On the contrary, I and my firm have been litigating with that administration over its treatment of detainees held at Guantanamo Bay.

He said:

I am confident that as an able legal scholar and a fair-minded justice, Judge Alito will give the arguments, legal and factual, that may be presented on behalf of our clients and I will be a fair-minded judge and will not be unduly influenced by the President, the executive branch, or anyone else for that matter, and that he will faithfully discharge his responsibilities under the Constitution and laws.

That is another example of how those who know this man best simply believe that he will be a fair-minded judge and he will not be influenced by the President, the executive branch, or anyone else for that matter, and that he will faithfully discharge his responsibilities under the Constitution and laws.

Another favorite pretext of the opponents of this nomination is that as a replacement for Justice O’Connor, this nominee, Judge Alito, will shift the Supreme Court radically to the right. But in order to believe this or support this supposed theory, they have to radically rewrite history. It requires them to paint Justice O’Connor as some sort of liberal. The truth is different. For example, according to the Harvard Law Review, over the last decade, the Justice on the Court with whom Justice O’Connor agreed most frequently—over 80 percent of the time—was former Chief Justice William Rehnquist. I think we will all agree that Chief Justice Rehnquist was no liberal. Yet Sandra Day O’Connor and Chief Justice William Rehnquist agreed with each other more than 80 percent of the time.

Indeed, in subject matter after subject matter, Justice O’Connor sees eye to eye with what Judge Alito has demonstrated on the bench and said how he will approach his job on the Supreme Court. Both believe in federalism, that Congress is not above the law and its powers are not unlimited but, rather, they are, under the Constitution, limited and enumerated, and that some powers are still reserved to the States and the people.

This is not an out-of-the-mainstream view. Justice O’Connor shares that view. The Founders of this country shared that view, and I believe the American people believe that the people have retained some rights and the States have retained some rights against an all-powerful Federal Government. Judge Alito happens to believe that as well.

Justice O’Connor and Judge Alito both struck down some affirmative action programs that resulted in reverse discrimination based on strict numerical quotas. And yes, both have even criticized Roe v. Wade. The truth is that if Justice O’Connor were the nominee today, she would meet with just as much opposition as Judge Alito has. The confirmation process has simply become a no-win situation.

Another favorite pretext of the opponents of this nominee is that he is somehow biased against the mythical little guy. That he always rules against the mythical sympathetic plaintiff. Anyone who has looked at these cases and focus only on the cases where he represented the detainees at Guantanamo Bay. He said:

The committee members should not think for a moment that I support Judge Alito’s nomination because I am a dedicated defender of the Bush administration. On the contrary, I and my firm have been litigating with that administration over its treatment of detainees held at Guantanamo Bay.

He said:

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That is another example of how those who know this man best simply believe that he will be a fair-minded judge and he will not be influenced by the President, the executive branch, or anyone else for that matter, and that he will faithfully discharge his responsibilities under the Constitution and laws.

Another favorite pretext of the opponents of this nomination is that as a replacement for Justice O’Connor, this nominee, Judge Alito, will shift the Supreme Court radically to the right. But, indeed, including the Washington Post. The Washington Post did an analysis of
Judge Alito’s entire record and found he is no more likely than the average appeals court judge to rule for businesses, for example, over individuals. And, yes, I said the Washington Post and not the Wall Street Journal.

Moreover, any notion that Judge Alito has a personal bias against victims of racial discrimination is as false as it is demeaning. The people who know Judge Alito best testified at length that he applies the law in a fair and evenhanded manner without fear or favor. And the most instructive and relevant authority is the evidence from the late Judge Leon Higginbotham. He has passed on, but his comments are part of the record.

Judge Higginbotham was something of a civil rights hero, as many people know. He was president of the Philadelphia chapter of the NAACP, was awarded the Presidential Medal of Freedom, and was appointed to the U.S. Civil Rights Commission by President Clinton. This is what he had to say about Judge Alito:

Sam Alito is my favorite judge to sit with on this 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 ideologue.

Judge Higginbotham, a hero to the civil rights movement in this country, would never have made such glowing remarks if he believed for an instant that Sam Alito was guilty of some of the false charges being made against him.

More fundamentally, however, the claims that Judge Alito is biased against the little guy are based on a misconception of how judges are supposed to behave. Judges are not supposed to decide cases on sympathy. Just as we ask jurors when they come into our courtrooms all across this great land to put aside their sympathies, biases, and prejudices and decide the cases based on the evidence they hear in court and the law as given to them by the judges—and they do it, day in and day out, faithfully and to really an exceptional degree—of course, we expect judges not to decide cases on sympathy. The kind of arguments we are hearing suggest that judges ought to pick out the party they like best, the most sympathetic, and rule in their favor without regard to the facts and without regard to the law.

One would not know by listening to some of Judge Alito’s opponents that he is a fairminded judge. In the America of his opponents, no plaintiff ever loses a case—nor does an entrepreneur ever win no matter how frivolous the claim of employment discrimination; police departments never win a case no matter how desperate the claim of a criminal defendant; Government agencies, including the Environmental Protection Agency and the Social Security Administration, could never win a case no matter how outlandish the request for Government benefits. In their utopia, the economy is wrecked by frivolous litigation, criminals run free on technicalities, and the public Treasury is plundered.

This admittedly, and thankfully, is not Judge Alito’s America. He believes that the law—not the President, not the Congress, not even the little guy. That is why Lady Justice has always been blindfolded.

America is a nation of laws, not of men and women, not of little guys, not of big guys, but a nation of laws. It doesn’t matter if you are Sam Alito. How you pronounce your last name, what your country of origin is, your race, or any other extraneous consideration when you enter the halls of justice. We are all guaranteed, under the words that are etched over the marble leading into the Supreme Court, “equal justice under the law.”

Everything in his record shows that these extraneous considerations don’t matter to Judge Alito. This is why people of faith from all across the political spectrum have testified and given testimonials in support of his work as a judge and on behalf of his nomination to the Supreme Court. This is also why I believe he will be confirmed by the Senate.

Madam President, I could not be happier to throw my support behind this good man, this good judge, and this public servant.

I yield to the PRESIDING OFFICER, the Senator from Virginia.

Mr. ALLEN. Madam President, I rise to echo and add to the remarks of the Senator from Texas, Mr. CORNYN. On the day Judge Alito’s name is before this body, I wish to express my strong support for the confirmation of Judge Samuel Alito to be a Justice on the Supreme Court of the United States of America.

There has been much discussion, advertising on the radio, in newspapers, and on the Internet about any comment about Judge Alito, and that is fine. That is the way it should be. Federal judges are appointed for life. This is the only time that the people’s representatives—those of us in the Senate—have an opportunity to scrutinize an individual who has been nominated for the Federal bench in a lifetime appointment. So that scrutiny is appropriate. I am hopeful that this scrutiny and this discussion will be of a civil nature. Sometimes it has not been, over the last several years in this body.

I do believe, though, that all nominees who are reported out of a committee, whether the Judiciary Committee—or that matter, any committee—Foreign Relations, or other committees, ought to be accorded the fairness of an up-or-down vote at the end of this gauntlet. If you are going to make someone go through all of this, have all these slings and arrows, some relevant, some tangential, and some completely irrelevant. If they are going to go through all of this, they ought to be accorded the fairness of an up-or-down vote.

I believe if the approaches taken over the last several years for certain nominees continue, as a threat or as an actual practical impediment to someone receiving a vote, it will make it much more difficult for any President to be able to recruit from the private sector qualified men and women. It will blur the experience, the personality, the insight, the leadership, and the ability to serve our Government. That might be in a variety of different fields. That is why I think it is important that we as senators change and stop this practice of holding up nominees and not accord them the fairness of an up-or-down vote.

With John Roberts to be Chief Justice of the Supreme Court, we allowed a lot of commentary and a vote. I hope the same will occur for Judge Alito.

There have been indications from those on the other side of the aisle that they are reserving the right to filibuster, or require a 60-vote majority to vote on the nomination of Judge Alito. My reaction is if they move forward with such a filibuster, “make my day.” We will enjoy pulling the constitutional trigger to allow Judge Alito a fair or up-or-down vote.

I believe the American people want this nomination to come to a vote. I also think it doesn’t make any sense for the Senate to come here when the nomination is called forth to get off these cushy seats, stand up straight, and vote yes or vote no. That is a matter of fairness. It is also our constitutional responsibility in advice and consent.

When analyzing or determining whether I am going to support a particular judicial nominee, what matters most to me for these lifetime appointments is trying to discern that nominee’s judicial philosophy. Trying to determine whether they believe what they are saying as to what they think the proper role of a judge will be.

We have seen through the years that certain individuals get appointed for a lifetime to the bench and turn to being completely different than what they have said in the hearings, in interviews with the President, or interviews with the Senators. Past performance is, in my view, usually a reliable indicator of future action.

In my view, regarding this particular nomination of Judge Alito, the best way to determine what kind of Justice Samuel Alito will be on the Supreme Court is to look at his 15 years of service as a circuit court judge. In his words on the bench, he has embodied the philosophy I like to see in judges. I believe the proper role of a judge is to apply the law, not invent the law. Judges are to uphold the Constitution, not amend it by judicial decree.

The proper role of a judge is to protect and indeed defend our God-given rights, not to create or deny rights out of thin air. They are not to act as a legislator.

In Judge Alito’s case, no matter the issue, whether or not they are politically charged issues in the realm of electoral politics, he seems, from my reading and review, to have followed a
consistent, thoughtful, deliberative process to decide cases.

This is what judges are supposed to do. They are not supposed to be issuing cases based on predetermined ideology, or an eye toward future confirmation hearings. They should faithfully apply the law to decide the evidence before the court to the law in that particular case before the court.

As he stated in his opening statement before the Judiciary Committee, Judge Alito recognized a judge’s only obligation is to the rule of law. And in every single case, the judge has to do what the law requires. In my opinion, that is the essence of the fair adjudication of disputes. There is credibility, there is reliability, and there is integrity in that approach. Judge Alito has exemplary, scholarly, and experienced qualifications—and especially the proper judicial philosophy—to serve honorably as a Justice on the Supreme Court of the United States.

In events the last 15 years on the Third Circuit Court of Appeals, he has demonstrated his understanding of the proper role of a judge in our constitutional system of Government, and will apply the law fairly and equally.

Judge Alito, in my view, genuinely respects the rule of law in our representative democracy. In recognition of Judge Alito’s outstanding service on the Federal bench, the American Bar Association has given him his highest rating of well qualified. The American Bar Association’s criteria for their evaluation are integrity, professionalism, competence, and judicial temperament.

Let me share with my colleagues what Stephen Tober, the chairman of the American Bar Association Standing Committee, had to say. He said:

On The Federal Judiciary: “Needless to say, to merit an evaluation of well-qualified, the nominee must possess professional qualifications and achievements of the highest standing. . . . We are ultimately persuaded that Judge Alito has, throughout his 15 years on the bench, established a record of both proper judicial conduct and even-handed application in seeking to do what is fundamentally fair. . . . His integrity, his professional competence and his judicial temperament are, indeed, found to be of the highest standard.”

That came from Chairman Tober on January 12 of this year.

Judge Alito provided to all of us an indication of his temperament and qualifications during his confirmation hearings, which went on for several days and many hours of hearings. He answered over 700 questions, explaining his thought processes, judicial philosophy, and thinking very credibly dispelling some of the misstatements about his record of service.

Judge Alito was even forced to defend the statements of others when he was questioned about the Concerned Alumni of Princeton. That is a group that apparently Judge Alito joined when he was a member of the Armed Services because he didn’t agree with the way the military was treated on the Princeton campus. As a result, some of the Democratic Senators tried to diminish Judge Alito. The Wall Street Journal had an editorial on January 12 of this year where they said they are trying to find him guilty of "ancient association"... His integrity, his pro-

a permanent are, indeed, found to be of the fundamentally fair.... His integrity, his pro-

perfications and achievements of the highest standard."

Court decisions have been changed over the years because they have proven to be unworkable. The Court has overruled many decisions. Of course, Brown vs. Board of Education overruled Plessy v. Ferguson. Probably the prime example and illustrates that no precedent is untouchable. The Court should not be required to stick to bad law—in that case, separate but equal.

Judges do not run for office. They cannot and should not make campaign promises that are, in fact, prohibited. They are prohibited from doing so by the Code of Judicial Conduct of the American Bar Association. They also should not be judged on the basis of political beliefs they are working for elected public servants in the legislative or executive branches of Government. They should be judged by their record of service.

Again, with Judge Alito, we see a person with 15 years of judicial experience. We have seen, in too many cases, with the lifetime-appointed Federal judges, a complete disregard for the will of the people and their elected representatives who are supposed to be making the laws reflecting the will and the values of the people in particular States or maybe the Nation in our representative democracy.

People wonder: Why do we care about the activist judges? Why does judicial philosophy matter? I will go through recent decisions by activist judges who forget their role is to apply the law, not invent the law.

In California, certain counties thought it was a good idea to have children, schools say the Pledge of Allegiance. When I was Governor of Virginia, we passed such a law. But someone out there in the Ninth Circuit thought, no, we cannot have the Pledge of Allegiance in public schools in California because of the words “under God.” That is an example of judges completely ignoring the will of the people in those regions of California and striking down the Pledge of Allegiance because of the words “under God.” This is a judicious decision.

We also see judges ignoring the will of the people in a variety of other ways. They struck down some laws in Virginia within the last 2 years because of international standards. Friens, colleagues, we make the laws. Why represent the people of this country. It is our Constitution. It is not the U.N. constitution or various conglomera-

tions or what confederations of other countries may think our laws should be. The laws are made by the people of this country.

A continuing debate has to do with parental notification. People in Virginia, when I was Governor, and other
to being back in law school, learning laws, he gave a thoughtful answer. He asked Judge Alito about his role, his student of our Constitution. When I cere and deep commitment of being a deep knowledge of the law and his sin-
cision, he felt very strongly that judges or panel of judges to communicate with the law, but it may be appropriate aside his personal view and followed the law.

I asked: What do you do if you do not like a law? He said: You have to apply the law, but it may be appropriate after the decision is made, for a judge or panel of judges, to communicate with the legislature and advise them they may wish to revisit a certain issue. However, when it came to issuing a decision, he felt very strongly that judges would follow their duty and should in corporate the law as written.

Another quality of Judge Alito is his deep knowledge of the law and his sincere and deep commitment of being a student of our Constitution. When I asked Judge Alito about his role, his view on the role of the States to the laws, he gave a thoughtful answer. He had a considered analysis of the dormant commerce clause. It was similar to being back in law school, learning some of these things again. His answer shows most importantly a deep under-
standing not only of the Constitution but also a commitment to the funda-
mental principles upon which this country was founded, that Government power should remain closest to the people.

In our system of government, it is es-
sential the people in the States be free to experiment in public policy and that Washington, the Federal Government, should not be used to preempt or dictate policy through the use of Federal funds that are reserved to the States or to the people.

Opponents of this nomination have referenced half a dozen cases out of the more than 1,500 he has been involved in while serving on the Third Circuit Court of Appeals. The fact is, no mat-
ter how Judge Alito answered the ques-
tions posed to him, his detractors would continue to oppose his nomina-
tion. On the particularly important charge that he favors an expansive view of the Constitution, Judge Alito reiterated his view that no branch of Government has more power and that no person in this country, no matter how high or powerful, is above the law; no person in this country is benevolent.

Aside from this very unambiguous answer, one can point to a litany of cases where Judge Alito came down against the authority of the Govern-
ment, or for the little guy as some peo-
ple like to call him.

Another criticism of this nomination has been that Judge Alito, if con-
formed, will replace a moderate on the Court, retiring Justice Sandra Day O’Connor. Sandra Day O’Connor by the way, in Kelo v. New London, CT, “commissar taking of homes” case, ruled on the side of the Constitution, so there will be no change there. We will need to get another Justice if the States are not able to rein in such taking of homes.

Justice O’Connor is a person for whom I have a great deal of respect. She served with great distinction on the Court, retiring Justice Sandra Day O’Connor. Sandra Day O’Connor by the way, in Kelo v. New London, CT, “commissar taking of homes” case, ruled on the side of the Constitution, so there will be no change there. We will need to get another Justice if the States are not able to rein in such taking of homes.

They will say that we have to have someone who has the exact same phi-
losophy as whoever was being replaced. We ought to remember the Founders, in drafting article III of the Constitu-
tion that creates the Supreme Court, provides no requirement there must be an ideological balance in the Court. For example, the Senate has re-
spected the prerogative of the Presi-
dent and performed their advice-and-consent function and ultimately voted for qualified judges, despite their political orientation.

So, therefore, let me conclude in this statement to my colleagues that if you look at Judge Alito’s 15 years of exemp-
trial judicial experience, his incred-
ibly well-reasoned answers in the con-
firmation hearings. If you look at this individual, who has the qualifications, the judicial philosophy, the knowledge of the law, the respect for the law and, indeed, the respect for the people, the owners of this Government, and those of us in the Senate and the House of Representatives, and other bodies, Judge Alito is a perfect person to be an Associate Justice on the Supreme Court of the United States. I respect-
fully urge my colleagues to vote af-
firmatively for Judge Alito to serve this country on the Supreme Court.

I thank you for your attention, Madam President. I yield the floor.

The PRESIDING OFFICER. The Sen-
ator from Florida.

Mr. MARTINEZ, Madam President, I also rise today to express my support for the confirmation of Judge Samuel Alito as an Associate Justice of the U.S. Supreme Court.

The Constitution demands that the President’s nominees to the Supreme Court receive the advice and consent of a majority of Senators. The standard to be used is not spelled out in the Con-
stitution, but 200 years of tradition of-
fers a guide. That guide, that standard, whose nominees to the Supreme Court we are considering today, is the very same standard we should apply today to Judge Samuel Alito. By that standard, Judge Alito is well-qualified.

Since graduating from Yale Law School in 1975, Judge Alito has had an exemplary legal career, serving as U.S. attorney, Assistant U.S. Solicitor Gen-
eral, and 15 years as a member of the Third Circuit Court of Appeals. During that lengthy tenure in court, we have seen the benefit of Alito’s commitment to the rule of law and his commitment to an impartial review of the law and the facts of any given case.

As Alexander Hamilton noted in Fed-
eralist No. 78, if the courts are to be truly independent, judges cannot sub-
stitute their own preferences to the constitutional intentions of the [leg-
sislative branch].

Judge Alito clearly expressed during his confirmation hearings, and his judi-
cial opinions, that he would not impose his personal views over the demands of the law and preced-
tent. I find that refreshing, I find that encouraging, and I find that a strong reason for supporting the nomination of Judge Alito.

I take great comfort in the fact that Judge Alito has received the unani-
mous approval of the American Bar As-
sociation’s committee that reviews ju-
dicial candidates. This is a committee that is greatly respected by the legal profession, as well as the general pub-
lic, for their impartiality and demand and insistence on and careful watch over a quality judiciary. The American
Bar Association’s committee that reviews judicial candidates is interested and committed to a quality judiciary.

Judge Alito not only received their unanimous approval, but he received their most qualified rating. That means more than 90% of the members of that committee gave Judge Alito their highest, most qualified rating. This should weigh heavily in favor of the confirmation of Judge Alito.

What we know—after the confirmation vote, we have a Justice who has interacted with Members of the Senate, after 3 days of testimony before the Judiciary Committee, and responses to a wide range of written questions by Senators after the hearings—is that Judge Alito is a humble and dispassionate judge, with a deep understanding and modest view of his judicial role in the governance of our Nation and respect for the limitations of precedent.

He has an awareness of the dangers of looking to foreign jurisdictions for guidance in shaping the laws of our land and a commitment to respecting the proper role of the courts in the interpretation of the law.

I am persuaded that Judge Alito will look to establish precedent, be respectful of the doctrine of stare decisis, and will use the Constitution and the law as his guideposts as opposed to any personal whim or political agenda.

There are those who say they are troubled by what they perceive, that Judge Alito would not side with the “little guy” when deciding cases. Let my tell you, I am someone who, for 25 years, took clients’ matters to court, more often than not representing the little guy. But even with that experience, I am more committed than ever to the belief I had when I took a client to court, whether a little guy or a big guy. My hope, my prayer, was that my client would find an impartial judge.

It is understandable to me to suggest this standard today should be that we should look for whether a judge will purposely lean in favor of one side of the litigation or another before selecting who our judges ought to be. Our judges must be impartial. Our judges must not be there for the little guy or for the big guy. Judges need to take the facts and the law, interpret them and utilize them to reach a fair and just verdict, as dictated by the laws of our Nation, not because they favor a little guy, but not because they favor a big guy. If the law and the facts happen to be on the side of the little guy, the little guy should prevail. If the law and the facts happen to be on the side of the big guy, then our system of justice demands that the big guy should prevail.

I love the analogy that Chief Justice Roberts used during the course of his confirmation. In selecting a Justice to the Supreme Court, he said we are looking for a pitcher. We are not looking for a batter. We are looking for the umpire—the guy who will call the balls and strikes fairly and impartially to all litigants before the Court.

Our long-held traditions in our system of justice demand fairness, demand integrity, demand judicial temperance. Judge Alito fulfills all of those requirements, and I am satisfied he will make an exceptional Justice of the Supreme Court.

Judge Alito has made it abundantly clear that his personal views have absolutely no place in performing his judicial role in our constitutional structure. Rather, the Constitution, statutes, and controlling prior decisions, as applied to the facts of the case at hand, are the sole basis for his judicial determinations. I find that, as it should be, the correct standard to apply to a judicial nominee for determining his fitness for this high office.

At the end of the day, we know that elections have consequences. The fact that President Bush in the office of President now for a second term has also been an indication that the Constitution and the law and the facts happen to be on the side of the little guy, the litigants, and will use the Constitution and the laws to guide them in shaping the laws of our Nation, not because they favor a big guy or a little guy. My hope, my prayer, is that my client would find an impartial judge.

I believe and counsel is that Judge Alito is one of the select few Hamilton had in mind as having the character, intelligence, and temperament to guard the liberties extended by our Constitution. I strongly urge my colleagues to support his nomination to the Supreme Court.

Thank you, Madam President. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BYRD. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

COAL MINING TRAGEDIES IN WEST VIRGINIA

January 25, 2006

Mr. BYRD. Madam President, while the Senate was in recess, the State of West Virginia lost 14 proud sons.

On January 2, 13 hard-working, God-fearing men were simply earning their daily bread at the mine in Upshur County, WV, when an explosion killed 1 man and trapped 12 others 260 feet below its surface. For 41 long hours, these men waited for help. They waited, they waited, they waited, and they prayed. They wrote farewell messages to their loved ones. How gripping. They waited as the air they breathed gave out and their lungs filled with toxic gases.

Above the ground, we all prayed for a miracle such as we had enjoyed with the nine miners who had been trapped at the mine at Quecreek, PA, in 2002 and were found alive. But this time, there was only one miracle. My wife Erma and I, like many others in my great State of West Virginia, continue to rest our hope on the sole survivor of the Sago explosion, Mr. Randal McCoy, Jr. But tragically, there were no miracles for Tom Anderson, Alva Bennett, Jim Bennett, Jerry Groves, George “Junior” Hammer, Terry Helms, Jesse Jones, Damion Martin, Toler, Jr., Fred Ware, Jr., Jackie Weaver, and Marshall Winans. Once again, a small coal-mining town in West Virginia went into deep mourning, and an entire State wept with them.

And then, incredibly, 17 days later, a mine fire broke out on a conveyor belt at the Aracoma Alma Mine No. 1 in Logan County, WV, trapping two miners underground. In shock and disbelief, the State once again fell to its knees and prayed and pleaded for a miracle. Forty hours later, we learned that two more miners—Don Bragg and Ellery Hatfield—had perished. Another small coal-mining town in West Virginia went into deep mourning, and again an entire State wept with them.

Once again, the national media rushed in to report the disaster to the world. Once again, editorials filled newspapers across the country decrying the dangers of mining coal, denouncing the callousness of coal companies, and questioning the commitment of State and Federal officials to mine safety.

Madam President, as a child of the Appalachian coalfields, as the son of a West Virginia coal miner, as a U.S. Senator representing one of the most important coal-producing States in the Nation, let me say I have seen it all before. Yes, I have seen it all before.

First, the disaster. Then the weeping. Then the outrage. And we are all too familiar with what comes next. After a few weeks, when the cameras are gone, when the ink on the editorials has dried, everything returns to business as usual. The health and the safety of America’s coal miners and women upon whom the Nation depends so much, is once again forgotten until the next disaster. But not this time.
Let me say that this U.S. Senator and the West Virginia delegation in the House and in the Senate will do all that we can to prevent that. There is blame to be assessed in the wake of these tragedies and plenty of it to go around.

Let us begin with the coal company that operated the Sago mine, which had been issued 276 safety and health violations in 2004 and 2005. Let me try to put that into perspective. Could any automation drive or any technology rack up 276 tickets for reckless driving and still keep a license? What if someone had 276 mistakes on a tax return? One can bet that taxpayer would be looking at serious penalties and possibly time in a Federal prison. But here was a coal company with 276 Federal mine safety violations still operating. While some of these were minor transgressions, too many of them were “significant and substantial” or, simply, put, very serious, and yet business went on as usual. It is quite probable that not one of these specific violations contributed to the explosion at Sago. But 276 violations is certainly indicative of a company’s sloppy attention toward the well-being of its employees. That was the Sago mine.

What about the agency that is responsible for making sure that coal operators comply with the spirit and the letter of the law—the Mine Safety and Health Administration. Let me be clear that I am not suggesting the coal company was at fault, but praise is due for the brave rescue teams that went into the Sago and Alma mines. Anybody who has been around a mine explosion knows the dangers that still lurk not just hours but days after such an accident. To go into a mine after a disaster, after an explosion, and to risk one’s own life in an effort to save other lives, as these rescuers do, takes guts. It takes a love for one’s fellow man.

Coal miners are a special breed. I have seen miners go into a mine after an explosion, risking their own lives, realizing that another explosion might occur and another tragedy would follow in the wake of the first tragedy.

Yes, MSHA is filled with good, well-intentioned, and dedicated professionals, but something is terribly wrong with the leadership at MSHA.

Consider that for 4 straight years, President Bush has proposed to cut the budget for coal safety enforcement below what was enacted by Congress the previous year, and for 4 straight years the Congress has had to struggle to partially restore those cuts. Some 190 coal enforcement personnel have been lost over the last 4 years through attrition, and they have not been replaced. The priorities reflected by the Bush administration through MSHA’s budget certainly are not indicative of a proper concern for the health and safety of miners.

On the day of the Sago disaster, 2 hours, 45 minutes—2 hours, with 60 golden minutes each, went by—before MSHA even knew about the explosion. It took another 2 hours before MSHA personnel arrived at the scene. It took 1½ hours before the rescue teams arrived. Another 5 hours passed before the first team entered the mine. The Mine Act requires that rescue teams be available to mines in the event of an emergency, and yet it took 10½ hours before the West Virginia rescue team began its effort at Sago.

A short 2 weeks later, similar horrors emerged from a second tragedy at the Aracoma Alma mine and, again, MSHA did not know about it for 2½ hours. Something is incredibly wrong. It is obvious something is very, very wrong at MSHA. The rescue procedures for miners are woefully inadequate.

The Sago mine had been cited for 276 violations over the past 2 years, and yet the mine operator never paid a fine larger than $440 and often only paid a minimal $60 fine. Few people realize that even when a fine is assessed, the coal operator can negotiate the fine to a piddling amount.

Consider that a long time ago that mine safety and health depends on financial penalties that “make it more economical for an operator to comply” with the law “than it is to pay the penalties assessed and continue to operate.” While some of these were minor transgressions, too many of them were “significant and substantial” or, simply, 276 penalties assessed—whatever the amount of the fine—weren’t enough to convince this company to take a hard look at safety for its employees.

The Sago mine was a habitual violator—a habitual violator was being assessed only the minimum penalties allowed by the law. The maximum penalty could be $220,000 or $1 million, but it makes no difference unless MSHA is willing to impose and collect that maximum amount. Habitual violators must be brought to a state of fearing the consequences of a heavy fine to be paid when assessed. We have to get tough about enforcing the law.

At MSHA, complacent attitudes and arrogant rules at the top. At the Senate Appropriations Labor-HHS Subcommittee hearing on Monday, Acting MSHA Secretary David Dye was asked directly about the issue of communications technology: Why are the miners trapped underground not able to communicate with the rescue teams, and can rescue teams better locate trapped miners? Dye was asked directly if technology exists to correct these problems, and he stated for the record that such technology did not exist.

Now get that. Let me say that again. At this hearing, conducted by one of the finest Senators on either side of the aisle here, Republican Senator SPECTER of Pennsylvania, at that record hearing, Acting MSHA Secretary David Dye was asked directly about the issue of communications technology: Why are the miners trapped underground not able to communicate with the rescue teams, and can rescue teams better locate trapped miners? Dye was asked directly if technology exists to correct these problems, and he stated for the record that such technology did not exist.

How about that. That statement proved to be utterly, utterly, utterly false. Minutes later, after Dye was asked if such technology existed, the subcommittee heard from a former MSHA Secretary, Davitt McAteer, who testified that such communications technology certifies and Mr. McAteer put tracking and communications devices on the table—on the table—right in front of the subcommittee.

Now get that. Let me say that again. Does that say about the people leading this agency when they don’t even know about the existence of lifesaving technology that ought to be in the mines? What does that say? Shame, shame on them. I am talking about the people leading the agency when they testified that they don’t even know about the existence of lifesaving technology that ought to be in the mines.

Why is the Acting Administrator of MSHA, charged with protecting the health and safety of coal miners, so abysmally ignorant of these technologies? The families of these miners and the Members of this Congress are owed an explanation.

In this day and age of cell phones, BlackBerrys, and text messaging, it is absolutely unacceptable that safe telecommunications technology was not available to the Sago and Alma miners. These weaknesses in mine emergency preparedness are unacceptable. Where is MSHA? Repeating the first question was ever asked in the history of mankind when God sought Adam in the Garden of Eden in the cool of the day. God said: Adam, where art thou? Well, where was MSHA? Where was MSHA? What is that agency waiting for?

Ask the leadership at MSHA. At Sago and Alma, we have seen the disastrous results of complacent attitudes at the top—at the top. A quick look at the list of rules approved and scuttled at MSHA in recent years—from regulations governing mine rescue teams to the use of belt entries for ventilation to inspection procedures to emergency breathing equipment to escape routes, any one of which might figure into the deaths and disasters at the Sago and Alma mines—suggest that something, something, something is terribly wrong. Something is terribly, terribly, terribly wrong, and it ought to be fixed.

In 1995, labor and industry jointly pointed out a number of problems on mine emergency preparedness to improve mine rescue technology and communications. Perhaps one of the most important was to address the dwindling number of mine rescue teams. MSHA has ignored the report and its recommendation. In 2003, the General Accountability Office made a list of recommendations to the Secretary of Labor to help MSHA protect the safety and health of the miners. What happened? MSHA ignored the recommendations. Shame, shame.

Our Nation’s coal miners are vital to our national economy. During World War I, coal miners put in long, brutal
hours to make sure that the Nation had coal to heat our homes, power our factories, and fuel our battleships. In World War II, American coal miners again provided the energy to replace the oil that was lost with the outbreak of that global conflict. During the oil boycotts and crises of the 1970s, our Nation once again called upon—yes, our Nation once again turned, yes, to the coal miners to bail the Nation out of trouble, and the coal miners did.

Coal produces over half of the electricity we use every day in these United States. Here is an example of it all around the ceiling here, the lights that are burning making it bright as day right here in this Chamber. That is coal. That is energy that comes from coal, burning coal—coal that is produced by hard, backbreaking labor in the dangerous mines. Coal is dug out, scratched out by the coal miner.

So today America's coal miners provide electricity—the electricity right here—the electricity that lights the streets of Washington, New York City, Sacramento, and all over this country, and it heats our homes in winter, lights our homes in summer.

There could provide the key to our Nation’s future energy security. You can bet on those coal miners—and they are of a different breed, a special breed. If we made better use of this abundant natural resource, coal, we could reduce our country’s dangerous dependency on foreign oil.

We could make ourselves less dependent on the rule of despots, and less of a dangerous dependency on foreign oil. This abundant natural resource, coal, burning coal—coal that is produced by the hard, backbreaking labor in the dangerous mines. Coal is dug out, scratched out by the coal miner.

As this unfolded, the national media kept asking me: Who are these men? And why are they coal miners? And what kind of men would still mine the deep coal?

One answer came early after the miners were recovered. It was revealed that, as his life dwindled, Martin Toler had written this: It wasn’t bad. I just went to sleep. Tell all I’ll see them on the other side. I love you.

In all the written, I have never captured in so few words a message so powerful or eloquent: It wasn’t bad. I just went to sleep. I’ll see them on the other side. I love you.

I believe Mr. Toler was writing for all of the men who were with him that day. These were obviously not ordinary men. But what made these men so extraordinary? And how did they become the men they were? Men of honor. Men you could trust. Men not just our generation’s perspiration. Men who dug coal from beneath a jealous ground and one could never tell them. Men who practiced a dangerous profession. Men who worked in the dangerous mines. Coal is dug out, scratched out by the coal miner.

The test of a great country such as ours is how serious we are about protecting those among us who are most at risk, whether it be innocent children who need guarding from hunger and disease or our elderly and sick who cannot afford medication. Those men and women who bravely labor in such dangerous occupations as coal mining to provide our country with critical energy should be protected from exploitation by private companies with callous disregard for the health and safety. That is why MSHA exists. That is why we created MSHA. That is why I was here when that agency was created.

But MSHA is just a paper tiger without aggressive leadership. If we are truly a moral nation, and I believe that we should be, moral values must be reflected in government agencies that are charged with protecting the lives of our citizens. The last thing that we need is the arrogant attitudes from this administration and its officials. Such callousness abuses the public trust and results in the kind of loss of life that so grieves families today in Upshur and Logan Counties and all throughout my home State of West Virginia.

Madam President, in memory of the Sago and Alma Miners, and all those who labor and have labored in our nation’s coal mines, I ask unanimous consent that the eulogy of Homer Hickam, from the Sago Memorial Service on January 15, 2006, be printed in the CONGRESSIONAL RECORD.

There being no objection, the material was ordered to be printed in the CONGRESSIONAL RECORD.

Families of the Sago miners, Governor Manchin, Mrs. Manchin, Senator Byrd, Senator Rockefeller, West Virginians, friends, neighbors, all who have come here today to remember and to commemorate, have done gone on before us, who ventured into the darkness but instead showed us the light, a light that shines on all West Virginians and the nation today:

It is a great honor to be here. I am accompanied by three men I grew up with, the rocket boys of Coalwood: Roy Lee Cooke, Roy Lee Cookie, Emmett Shumate, Born in a hollow. My wife Linda, an Alabama girl, is here with me as well.

As this tragedy unfolded, the national media kept asking me: Who are these men? And why are they coal miners? And what kind of men would still mine the deep coal?

One answer came early after the miners were recovered. It was revealed that, as his life dwindled, Martin Toler had written this: It wasn’t bad. I just went to sleep. Tell all I’ll see them on the other side. I love you.

I believe Mr. Toler was writing for all of the men who were with him that day. These were obviously not ordinary men. But what made these men so extraordinary? And how did they become the men they were? Men of honor. Men you could trust. Men not just our generation’s perspiration. Men who dug coal from beneath a jealous mountain.

Part of the answer is where they lived. Look around you. This is the place where many lessons are learned, of true things that shape people as surely as rivers carve valleys, or rain melts mountains, or currents push apart. The miners still walk with a trudging grace to and from vast, deep mines. And in the schools, the children still learn and the teachers teach, and, in snowy white churches built on hillside cuts, the preachers still preach, and God, who we have no doubt is also a West Virginian, still does his work, too. The people endure here as they always have understood that God has determined that there is no joy greater than hard work, and that there is no water holier than the sweat off a man’s brow.

In such a place, a dozen men may go to sleep. Tell all I’ll see them on the other side. I love you.

As I watched the events of this tragedy unfold, I kept being reminded of Coalwood, the mining town where I grew up. Back then, I thought life in that little town was pretty tough, even though some men who lived there worked in the mine and, all too often, some of them died or was hurt. My grandfather lost both his legs in the mine and died in 1936. I was four years old when he died. My father lost the sight in an eye while trying to rescue trapped miners. After that he worked in the mine for fifteen more years. He died of black lung.

When I began to write my books about growing up in West Virginia, I was surprised to discover, upon reading where it wasn’t such an ordinary place at all. I realized that in a place where everybody should be afraid after all, every day the men went to work it wasn’t so they were doing it. They were doing it, I was pretty impressed. But what I recall most of all was what he said to me while we were down there. He put his spot of light in my face and explained to me what mining meant to him. He said, "Every day, I ride the elevator down the mine shaft and walk back into the gob and feel the air pressure on my face. I know the mine like I know a man, I can sense things about it that aren’t right. When everyone else says it’s okay, I know it isn’t. Every day there's something that needs to be done, because men will be hurt if it isn't done, or the coal the company's promised to load won't get loaded. Coal is the life blood of this country. If we fail, the country fails.

And then he said, "There's no men in the world like miners. Sonny. They're good men, strong men. The best there is. I think no matter what you do with your life, no matter how much money you make, you will never know such good and strong men."

Over time, though I would meet many famous people from astronauts to actors to Presidents, I came to realize my father was right. There are no better men than coal miners. And he was right about something else, too.

If coal fails, our country fails.

The American economy rests on the back of the coal miner. We could not prosper without him. God in His wisdom provided this country with an abundance of coal, and he also gave us the American coal miner who glories in his work. A television interviewer asked me to describe work in a coal mine and I called it “beautiful.” He was astonished that I would say such a thing so I went on to explain that, yes, it’s hard work but, when all comes together, it’s like watching and listening to a great symphony: the continuous mining machines, the shuttle cars, the roof bolters, the ventilation fans and the conveyor belts, all in concert, all accomplishing their great task. Yes, it is a beautiful thing to see.

There is a beauty in anything well done, and that goes for a life well lived.

How and why these men died will be studied now and in the future. Many lessons will be learned and we will live because of what is learned. This is right and proper.
January 25, 2006

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But how and why these men lived, that is perhaps the more important thing to be studied. We know this much for certain: They were men who loved their families. They were men who worked hard. They were men of integrity, and honor. And they were also men who laughed and knew how to tell a good story. Of course they could. They were West Virginians!

And so we come together on this day to recall these men, and to glory in their presence among us only for a little while. We also come in hope that this service will help the families with their great loss and to know the honor we wish to accord them.

There are those now in the world who would turn our nation into a land of fear and the frightened. It’s laughable, really. How little they understand who we are, that we are still the home of the brave. They need look no further than right here in this state for proof.

For in this place, this old place, this ancient and glorious and sometimes fearsome place of mountains and mines, there still lives a people like the miners of Sago and their families, people who yet honor the old ways, the old virtues, the old truths; who still lift their heads from the darkness to the light, and say for the nation and all the world to hear:

We are proud of who we are.

We stand up for what we believe.

We are West Virginians!

We keep our families together.

We are a good story. Of course they could. They were men who worked hard. They were men who loved their families. They were men who studied. We know this much for certain: Perhaps the more important thing to be remembered.

Mr. BUNNING. Mr. President, I yield the floor. I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. THUNE). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. VIRTE). Without objection, it is so ordered.

Mr. KERRY. Mr. President, could we have an agreement on the time? I apologize, I was supposed to have the time between 1:30 and 2. Since the Senator and the Member is waiting—I wanted, obviously, to be able to complete my statement—we have agreed to switch times. He will speak for 15 minutes, with the agreement that I would then speak after.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KERRY. I thank the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. BUNNING. Mr. President, I rise to speak in support of Samuel Alito’s nomination to the United States Supreme Court.

Judge Alito is supremely qualified. He has a record of fairness and judicial restraint. He will do a fine job on the Supreme Court.

I will vote for his nomination and any procedural measures necessary to confirm him on the Senate floor.

Confirmation of a Supreme CourtJustice is one of the most important jobs we have as Senators.
They are also insulated from the political process to prevent undue influence from Congress or the President.

Does anyone here actually believe the framers of our Constitution insulated judges so they could enact policies without any political consequences?

In fact, the framers rejected proposals to give the courts any policymaking powers.

But that is not good enough for some who oppose Judge Alito. They argue that he will make broad policy decrees from the bench.

They want liberal judges who will rule by dictating policies that fail at the ballot box. They want activist judges. And Judge Alito is not an activist judge.

Judge Alito will stand up to the activists on the Supreme Court and help make sure the Court follows its proper and vital role.

The confidence of the citizens in the courts is harmed when the courts overstep their bounds.

Like Chief Justice Roberts, I am confident Judge Alito will only act within the Senate’s proper role.

And I am confident he will help restore the American people’s faith in our court system.

I press upon my colleagues to support this nomination.

I will vote for Judge Alito and whatever measures and procedures necessary to ensure he gets a final vote up or down.

I am proud to support him.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mrs. HUTCHISON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mrs. HUTCHISON. Mr. President, I rise today to support Judge Samuel Alito’s confirmation to the Supreme Court of the United States. Judge Alito’s 15 years of experience on the Third Circuit Court of Appeals and his 15 years serving the Justice Department, including his position as U.S. attorney for the District of New Jersey, make him well prepared to be an Associate Justice on our Highest Court.

One of the best insights into Judge Alito’s judicial ability is gained from listening to his colleagues on the Third Circuit. Colleagues from both sides of the political aisle praise him for his judicial excellence. Judge Aldisert, a nominee of President Lyndon Johnson, stated before the committee:

We who have heard his probing questions during oral argument, who have been privy to his wise and insightful comments in our private deliberative conferences, we who have observed first hand his approach to decision-making and his thoughtful judicial temperament and know his carefully crafted opinions, I am convinced that he will also be a great Justice.

Moreover, after an exhaustive investigation, Mr. Steve Tober, chairman of the ABA Standing Committee on the Federal Judiciary, declared that Judge Alito’s “integrity, his professional competence and his judicial temperament are indeed found to be of the highest standard.”

Mr. President, I have to say that anyone who watched Judge Alito at his Senate hearing would agree that his professional competence and judicial temperament were certainly on display. I believe that showed very well why he will be confirmed as a Supreme Court Justice.

The American Bar Association gave Judge Alito its highest rating. Most important, Judge Alito has a firm belief in the rule of law upon which our country is based. As he stated on the first day of his hearings, “No person in this country, no matter how high or how powerful, is above the law, and no person is beneath the law.” Judge Alito recognizes that, in our system, judges interpret the law, but should not create policy. Judges should not decide what they would like to have the law be; rather, they simply should determine what the law states.

He said on his second day of hearings: ‘...it is not our job to try to produce particular public policies. We are not policymakers and we shouldn’t be implementing any sort of policy agenda or policy preferences that we have.’

During the 2004 Presidential campaign, the President clearly stated that he planned to nominate to the bench judges who would respect the rule of law, judges who would interpret but not legislate. In particular, he drew attention to his desire to nominate people who would strictly interpret the Constitution. Knowing Supreme Court nominations were on the horizon and knowing the President’s views, the American people re-elected President Bush.

With the previous nomination of Chief Justice John Roberts and now with the nomination of Judge Alito, the President is fulfilling his promise to the American people. Now it is time for the Senate to play its constitutional role in the nomination process to ensure the President’s nominee meets the high standards we set for members of the Supreme Court of our land. Judge Alito is extremely capable, he is highly qualified, and he deserves the support of this body.

I wish to reiterate one statement that was made earlier today. I believe Judge Alito was unfairly criticized for his opinion in Pirolli v. World Flavors, Inc. This was a case involving a mentally disabled man who claimed he was sexually harassed at work. They have alleged that by ruling against the plaintiff in the appellate court, Judge Alito showed he is “results-oriented.” Their criticisms are unfair and misleading. Judge Alito was not even able to form an opinion on the merits of the case because the plaintiff’s lawyer presented an incomplete brief.

Judge Alito made clear in his dissent that had the plaintiff’s lawyer raised the argument in a minimally adequate fashion, he might well agree and join the majority in voting to reverse. He continued to say:

I would overlook many technical violations of the Federal Rules of Appellate Procedure and our local rules, but I do not think it is too much to insist that Pirolli’s brief at least state the ground on which reversal is sought.

It is very important to understand that an appellate judge cannot create the facts. The appellate judge cannot argue the lawyer’s case when he is not equipped with the facts or the reason for the request for a reversal. So I believe it is important that we set the record straight on that.

Judge Alito has shown by his manner during the hearing and his 15 years on the bench that he is fully qualified under the constitutional requirements and from every neutral observer with whom I have talked for this position. I hope there will not be further delay.

I am so hopeful that the people who would vote against him would at least let us have the vote. He has been thoroughly vetted. He has been thoroughly questioned. The Senate has fulfilled its constitutional role. I think by the end of this week we should allow Judge Alito to be able to start preparing for the very important cases that are going to come before the Court right away. Let him have the chance to be fully prepared and do his job.

It is the least we should expect of the Senate. It is the responsible approach for the U.S. Senate. The Supreme Court and the people of America deserve no less.

Thank you, Mr. President. I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. MCALPIN. Mr. President, I thank the Senator from Texas for her remarks and her strong support of this very decent American and the continued leadership she exercises in our party and in our caucus.

We know that elections have consequences. When President Bush ran for reelection, he stated plainly and often that if given the opportunity, he would nominate judges to the U.S. Supreme Court who strictly interpret the Constitution of the United States.

True to his promise, the President nominated John Roberts to become the 18th Chief Justice of the United States. Just as true to his promise, he nominated Samuel Alito to serve as Associate Justice of the Supreme Court.

I was pleased that President Bush nominated Judge Alito, as were many other Members of this body. I reserved final judgment, as most of us did, until we saw the confirmation process proceed. I don’t take the Senate’s advice and consent role lightly. I didn’t want to encourage a rush to judgment.

The hearings have occurred, as I believe Judge Alito has handled admirably. There were 18 hours and 700 questions, and there probably would have been a lot more questions if there...
had not been the length of the questions, sometimes lasting as long as a half hour.

Anyway, I believe he is worthy of our support. As has been stated time after time on the floor, he earned the highest ratings of the American Bar Association.

Let me tell you what impresses me. President, probably as much as anything else. It is the strong endorsement Judge Alito got from the people who work for him. There is nobody who knows people better than those who work for you. There is a very impressive list of former law clerks of Judge Alito writing to urge the Senate to confirm him. As they state in their letter:

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.

And they go on to say in their letter:

What unites us is our strong support for Judge Alito and our deep belief that he will be an outstanding Supreme Court Justice.

That impresses me. When the clerk's, the people who work alongside these judges every single day—and it is a very long list; it looks to me like there are 60 to 75 names on there—are all supporting him. As they state, they are of all beliefs and party affiliations. There is no person who knows a judge better than those who clerked for him.

Finally, they go on to say:

It never once appeared to us that Judge Alito had prejudged 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 a 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.

That is what Judge Alito is all about from the people who know him best, other than his family. Frankly, that has a significant effect on my view of him.

I will make one other comment. We are dragging out this process for no good reason. We all know what the outcome of the vote is going to be. We have other pressing business, including lobbying reform, which needs to be taken up by this body. We have pending the issue of the PATRIOT Act. We have other pressing business, including lobbying reform, which needs to be taken up by this body. We have pending the issue of the PATRIOT Act.

I hope we can finish this debate as soon as possible, vote on Judge Alito, and then move forward.

I thank my colleagues, and I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina is recognized.

Mr. GRAHAM. Mr. President, I suggest the absence of a quorum.

The assistant legislative clerk proceeded to call the roll.

Mr. GRAHAM. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. The clerk will call the roll.

Mr. GRAHAM. Mr. President, I would like to pick up where Senator McCAN left off about the Alito nomination and what has changed between the Clinton administration and the President Bush 2 administration regarding judges.

The question I ask the body and really the country is, have the qualifications changed or are the people President Bush has chosen to nominate for the Supreme Court more inferior in terms of qualifications, temperament, and character than the people President Clinton nominated? As individuals, is there a major difference in their legal experience? Are there any character flaws with these two nominees that did not exist with President Clinton's nominees? If you can find an answer to the question other than no, I would like to hear about it. I would like someone to come to the floor and talk about how Justice Roberts and Judge Alito are not in the ball park as to qualifications, character, and disposition with Justice Breyer and Justice Ginsburg.

It is clear to me that President Bush picked two very well qualified people to serve on the Supreme Court when it came his time to choose a Supreme Court nominee. You don't have to take my word for it. Seven judges testified before the committee who served on the Third Circuit with Judge Alito. They were nominated by Lyndon Johnson, Richard Nixon, Ronald Reagan, George H.W. Bush, and Clinton, really a hodgepodge of nominees in terms of their source. These judges had a universal belief regarding Judge Alito, and that belief was that he is a great colleague, a good man, a judge's judge. They came before our committee to his defense.

I ask unanimous consent to print in the RECORD excerpts of these judges' comments. Even try to proselytize. Rather, he expresses his views in measured and temperate tones. Judge Becker on working with Judge Alito up close: "There is an aspex 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 appellate judging. In hundreds of conferences, I had never once heard Sam raise his voice, express anger or sarcasm, or fail to give the kind of thoughtful, fair-mindedness: "Like a good judge, he considers
and deliberates before drawing a conclusion. I have never seen signs of a predetermined outcome or view, nor have I seen him express impatience with litigants or with colleagues with whom he happens to 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 in people’s lives."

Judge Barry on Judge Alito’s service as U.S. Attorney: “The tone of a United States Attorney’s Office comes from the top. The standard for 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 facts, taking a firm stand on what is right, his emphasis on first-rate work, his fundamental decency.”

Judge Alisder on Judge Alito’s judicial independence: “Judicial independence is simply incompatible with political loyalties, and Judge Alito’s judicial record on our court bears witness to this fundamental truth.”

Judge Alisder on working with Judge Alito for 15 years: We have heard his probing oral argument and we have been privy to his wise and insightful comments in our private decisional conferences, we who have observed at first hand his impartiality in 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 good United States Supreme Court Justice.”

Judge Garth on Judge Alito’s lack of an agenda: “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 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.”

Judge Garth on Judge Alito’s personality: “Sam is always and 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 so evident in someone of such extraordinary ability.”

Judge Gibbons on Judge Alito’s independence from the executive: “The committee members have thought for a moment that I support Judge Alito’s nomination because I am a dedicated defender of the Bush 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 charged at the position that is being taken by the administration with respect to those detainees.”

"It is 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, factual—that may be presented on behalf of our clients careful and thoughtful consideration, without any predisposition in favor of the particular branches of law.”

Judge Lewis on his own liberal politics: “I son who took the law and applied it to the real world, where he favors one class of Americans over another? Why would so many law clerks, as Senator MCCAIN mentioned, come to the judge’s aid if he was a person who exhibited a hard heart, for lack of a better way of saying it, a person who applied his principles to individuals in this country coming before him in a statistical manner, not a human manner?”

I would argue that of all the records that have ever been amassed for a nominee Judge Alito’s record is on par with Ginsburg, Breyer, and anyone else who has ever been nominated, in terms of being highly qualified—15 years on the bench and a good person.

Who is in the mainstream of America when it comes to judging? And who is to determine what the mainstream is? If you would ask me to judge a Democratic nominee as to whether they were in the mainstream of legal thought I would try to give you an honest answer. But if you wanted to ask some one other than me—I am a Republican—I would probably understand why you want to ask somebody other than me.

How do we determine if a person is in the mainstream of being a judge? Rather than asking a politician, maybe we should go to a source outside the political mainstream, outside the body, who believes that this is a hugely important decision not only for the country but has political consequences.

The reason this is an important political decision is because special interest groups are watching our every move. Millions of dollars have been spent on advertising for and against Judge Alito. There are groups out there that have made it their reason for existing to deny this man a vote or to defeat him. There are groups out there that are bent on supporting him.

What do nonpolitical people say? What do people who have no political ax to grind say? What do the people who have sat with him a decade plus know? What do the people who worked with him as a prosecutor, who have been his clerks, all have nothing but admiration for this man.

What does the American Bar Association say? That he has a temperament—over 2,000 people were interviewed, I think it was; some amazing amount of interviews conducted—a temperament beyond question; that he approaches each case without a bias, but he tries to find the best he can, looking through his philosophy of judging, to get the right answer. That is a person who worked with him as a prosecutor, who have been his clerks, all have nothing but admiration for this man.

So why will he get, at best, five or six Democratic votes? Why did Justice Ginsburg get 96 votes? I would argue she deserved 96 votes, but she was no better qualified than Judge Alito. The same things that were said about Justice Ginsburg, in terms of her temperament and her legal abilities, are being said about Judge Alito.

What do nonpolitical people say? Some members of our committee openly said things are different now than they were then. This is replacing Justice O’Connor. The
country is more divided. All I can say is, don’t start down a road that you will regret because Justice Ginsburg replaced Justice White, and if we are going to base our vote on Roe v. Wade, what somebody might do, then a pro-life Senator would have a very difficult time casting a vote for Justice Ginsburg because she openly embraced a constitutional right to abortion and supported public funding of abortion. That is a view held by many Americans. It is a legitimate view to have. But that is a view of many who was clear that she was going to probably be different than Justice White because Justice White dissented in Roe v. Wade.

If that is the only reason you were voting for Justice Ginsburg, you knew with a high degree of certainty the balance of power on the Court would change when it came to that one issue.

Somehow back then people of a pro-life persuasion set that aside and looked at other qualifications. She was never attacked, that I can find in the RECORD, for being the general counsel for the American Civil Liberties Union, a left of center organization, from a conservative’s point of view, that embraces with which I personally disagree. But people understood there was a difference between lawyering and judging.

I would argue forcefully that the unpopular cause needs the best lawyer. Instead of holding it against her for representing politically unpopular causes, causes with which I completely disagree, I would give her credit as a lawyer because the unpopular cause needs the best lawyers in the country. The more popular it is, the worse lawyer you can have because you are likely to win.

Something has changed, and I would argue that change is being driven by the political moment, not by the record and it has huge consequences for this country.

The Presidency is a political office. To become President, you have to go through a lot—a lot of commercials are run and a lot of scrutiny. To become a Senator, you have to go through a lot—a lot of commercials are run against you, and you go through a lot of scrutiny. We sign up for the process knowing what we are getting into.

Traditionally, judges who come before the United States Senate, do not have to mount political campaigns and have traditionally not been subject to political campaigns. The reason being there has to be one place in America where politics is parked at the door. How many people want their case decided by a lawyer? I don’t; even if they agree with me I don’t because that is dangerous. We are running with warp speed toward a day when the judiciary is politics in another form. There is plenty of that happening around. How saying the Republican Party is blameless, but when it comes to evaluating Supreme Court nominees, I would argue there has been a change from President Clinton’s term to the current time and that the model that Senator HATCH used with Justices Breyer and Ginsburg would be a good model for your vote on qualifications and where you do not have to use political attacks as the way to try to undermine the nominee.

I honestly challenge anyone in this body to say that in terms of legal ability, legal character, there is a dime’s worth of difference between Roberts, Alito, Ginsburg, and Breyer. There is not. The record in Judge Alito’s case and in Judge Roberts’ cases show beyond any doubt that they are well-qualified lawyers who have practiced before the Supreme Court, who have the admiration of their colleagues, their associates, and those they have opposed in court, and that they are without any doubt historically well qualified. You can take a record and make it whatever you want to make it for political reasons. You can take anyone’s life and snip and cut and cut and paste and make that life anything you want it to be in a political campaign. It can happen to me, it can happen to you. Mr. President, it can happen to any American because if you have been involved in the law as long as Judge Alito, you can cut and paste his life as a lawyer, as a judge, and as a person. I just ask that we reject the politics of cut and paste and we look at the entire record and the complete person.

If we look at the complete person, we find a good husband, a good father, a good man who comes from a humble background and who has ascended to the highest levels of the law known in our country. If we look at his time as a judge, we will find someone respected by his colleagues who is serious as a judge, who is analytical in his thought process, who is, by no means, an ideologue. If we step back, we see in Judge Alito one of the most qualified conservative judges in the land.

I end with this. Elections do matter. President Clinton earned the right from the American people to make two selections. He picked people of known liberal philosophies and inclination to be on the Court. These are legitimate philosophies to embrace and to have. He picked extremely well-qualified people to be on the Court. They are on the Court now with an unprecedented bipartisan support.

He has been a good judge. He is a good man. His record, his colleagues, and everything he has done as a lawyer, judge, and person needs to be considered in its entirety—not for political ends for the moment.

This vote we are about to take in the next few days is going to be the way the Senate works for a long time to come. My belief is it is going to change it for the worse. I yield the floor.

The PRESIDING OFFICER. The Senator from Maryland is recognized.

Mr. MUKILSKI. Mr. President, as I am here I am here because of the Democratic leader. I ask unanimous consent that the hour of Democratic time be controlled as follows:

MUKILSKI, CLINTON, and KERRY up to 20 minutes each, and Senator Nelson of Florida up to 5 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Ms. MUKILSKI. Mr. President, I rise to voice my opinion on the nomination of Judge Alito. I view this process with enormous seriousness. It is not like a political campaign. She is a Supreme Court. She is a lifetime appointment.

Senators are called upon to make two decisions that are irrevocable and irretrievable. One is the decision to go to war and put our troops in harm’s way. A very serious decision. You can’t say the next day, Whoops, I made a mistake. The other is the confirmation of a Justice of the Supreme Court. When that person goes on the Court, he or she is there for a lifetime unless they commit an impeachable offense.

This vote will have an immense impact on future generations. Judge Alito is 55 years old. We can presume that he will be blessed with good health and will serve if confirmed for at least another 20 years. He will rule on thousands of cases, which themselves will be around for decades after he is gone. He will be around for decades after he is left on the court. His decisions will affect the lives of virtually all Americans for generations.

This vote will have an immense impact because of who the judge is replacing. Justice Sandra Day O’Connor, the very first female ever appointed to the Supreme Court. Wow. She has been a terrific Justice of the Supreme Court, a historical figure indeed. She broke the glass ceiling of the highest Court in our land to become the first female justice on the United States Supreme Court. She has been a true pioneer in helping to pave the way for women in the legal profession. Justice O’Connor’s impact on women in America reached beyond being a mentor and a role model. Because she was a woman who did for women—it was the outstanding Justice she was. She brought new perspectives to the Court, a great intellectual ability, and she brought a strong sense of independence. That is why I think she was picked by Ronald Reagan. She brought to the mainstream, and often a critical swing vote, which determined which way a key case was decided. She brought the
“I” word to the Court—not ego but intellectual rigor and integrity and independence. That is why she was such a key vote, and often her vote determined whether fundamental rights were protected or not often depended on Justice O'Connor’s vote.

When we pick the nominee to replace Justice Sandra Day O'Connor, I hope the President would have picked another woman. When he nominated Harriet Miers, I was shocked, stunned, and even repulsed by the vitriolic, vicious attacks on Harriet Miers.

After Harriet Miers was withdrawn, who did they give us? Certainly, I think in all of the United States of America there was a qualified woman who could have been nominated to serve on the Court. It would have been nice if we had taken the time to find one, but I don’t know if they were really looking because if you seek you shall find.

Who did the President nominate? Judge Alito.

I want to be very clear at the outset: I am going to vote to oppose the confirmation of Judge Alito, and I do so for a variety of reasons.

One, I don’t know who the real Judge Alito is. Is this the Judge Alito who, when he applied for a job at the Reagan Justice Department, pandered to every right-wing cliche, message-driven focus group identified cause, attack affirmative action, one person, one vote, and all of that? Is that the Judge Alito we will have serving on the Supreme Court? He says, No, I wrote that because I was applying for a job. Hey, what is he doing here right now in the confirmation process? He is applying for a job.

The process has occurred in the public and transparent arena.

But who is he? Is he a so-called new, moderate, mainstream, “Gee, I have always been in the middle” kind of guy or is he the person who applied to work at Reagan Justice Department whose writings validate his pattern of thinking?

Judge Alito failed to answer too many questions during the confirmation hearing. Judge Alito refused to clarify his views and his philosophy. He has written many, many decisions as a Circuit Court Judge which are clearly outside of the mainstream. He failed to clarify his positions on the constitutional prerogatives of the executive branch. His answers suggest he will continue to be. We need a member of the Supreme Court who is part of the Court and not part of the executive branch. We can’t afford to have the Supreme Court duplicate the responsibilities of the executive branch.

Then he didn’t clear up uncertainties. He didn’t clarify his record. He didn’t candidly and completely answer the key questions that would tell the American people where he stands on critical issues. With the hearings over I am still asking who is the real Judge Alito?

First, let’s take the issue of civil rights. One of the most important civil rights is the right to vote. Yet Alito left me with serious doubts on what his true views are. When applying for a job at the Justice Department, Alito said he strongly disagreed with the Warren Court on legislative reapportionment which became the bedrock principle of one person, one vote. That Supreme Court decision changed the face of America. It changed the face of America. It changed the area of the constitutionally protected right to vote. Yet Alito argued that the right to vote is the right to privacy. In so doing, he was experienced, but he was incorrect. When his or her rights are violated. An open courthouse door is fundamental to our democracy. Yet Judge Alito’s record is troubling. In one case involving race discrimination, a woman sued her employer for racial discrimination. Yet Judge Alito argued that the woman shouldn’t be allowed to present her case to the jury. The majority disagreed with Alito and allowed the woman to have her trial. In fact, the majorly stated if they had applied Alito’s analysis Title VII of the Civil Rights Act would have been eviscerated.

Then there is this issue of unchecked Executive power. The Supreme Court is the critical check on the other branches of government by making sure that the checks and balances in the Constitution are maintained. Increasing Presidential power has been a hallmark of this administration—not just the recent discovery about spying on Americans without warrants but also secret meetings with energy company CEOs, preventing disclosure of how executive decisions are made and so on.

When asked about whether or not this President could ignore laws passed by Congress, Alito would only say no one is above the law. That was not an answer—that is an empty slogan. We want to know how he would interpret the scope of executive branch power.

During his time on the bench, Judge Alito has been very deferential to the executive branch. His answers suggest he will continue to be. We need a member of the Supreme Court who is part of the Court and not part of the executive branch. We can’t afford to have the Supreme Court duplicate the responsibilities of the executive branch.

I am troubled about his position. We are at a benchmark in our society and this is the time when we have to be very clear on the executive powers and prerogatives.

Then there is the right to privacy. In the area of the constitutionally protected right of privacy, it is unclear what Judge Alito believes the Constitution protects. Again, I go back to the statements he made when he applied to work in the Reagan administration. He was 35 years old, so he wasn’t some kid who wasn’t sure about himself. He was exploring big theories and big ideas. In his job application, he was applying for a job at the Justice Department. You have to be a pretty experienced professional to even think you are qualified to apply for a job at the Justice Department. He was seasoned, and he was experienced, but he also stated in that application that he was proud he would have argued that the Constitution does not protect the right to an abortion.
Let me say these are his words, not Senator Mikulski’s. Not only did he take the position to eliminate the rights in Roe v. Wade, he thought it was important that he emphasized it in his job application.

Now what does he mean by "fundamental right"? He is presenting a different view. The key question for Judge Alito on the constitutionally protected right to privacy was whether he considered Roe to be settled law.

Judge Roberts at his confirmation hearing made it clear that Roe was settled law. Repeatedly, Alito was also asked at the hearings if he considered Roe to be settled law and if he agreed with Judge Roberts. Alito refused to say. He repeatedly refused to answer how he would protect the fundamental and explicit right of privacy—implicit right of privacy—in our Constitution.

He himself refused to clarify his previous dismissal of Roe v. Wade.

He refused to clarify also his position on why a woman should have to notify her husband in order to get an abortion. The Constitution, a requirement Justice O’Connor ruled was clearly unconstitutional. Nor would he elaborate on what the right of privacy actually includes over and above reproductive rights.

What is this in general? Our Constitution is a living and breathing document. Twenty years ago when we talked about the rights of privacy, we didn’t know about the Internet, we didn’t know about data mining, we didn’t know about the fact that we would have to have a national debate on national security and the right to privacy. Was it overreaching? When does the U.S. Government become the Grim Reaper, or what do they need to do to protect us? These are real issues. They require real debate. They require independence in the judiciary to help set the boundaries and the parameters on what other branches of government can and can’t do.

Does a citizen want to be protected, when going to a library to borrow a book, from somebody snooping on you? If a citizen checks out a paper or a book because you want to know what the enemies of the United States think about our way of life or philosophy, for example, you check out books like “Mein Kampf” or “Das Kapital” because you want to know what our enemies thought, so you could be prepared to refute them with your own ideas on democracy, you don’t want the government spying on you. Yet, what happens if something gets triggered and something is sent over to the peepers at a Government agency about what you are reading.

Sure, we have to look out for terrorists, but should every book checked out of a library trigger the government spying on you? Do you want them listening while you talk to your girlfriend? Do you want them monitoring you and what church you go to? These questions are facing us as a nation. We need to have mindful judges who help set the appropriate parameters to protect citizens against the predators in our society, to be sure our Government itself does not become a predator on the ordinary citizen’s privacy. These are big issues.

So we are left to ask, Where was Alito on the right to privacy? We do not know. His answers clearly suggest that he will not protect this fundamental right. Issue after issue leaves me with great concern.

One last area of concern I want to talk about is Judge Alito’s apparent predisposition to rule against ordinary Americans. I look at the seat Judge Alito has been nominated to replace. It is a seat of moderation. Justice O’Connor represented mainstream America. She understood as a justice for the highest court in the land that her decisions impacted real people and their lives. Her decisions were not made in the abstract. Judge Alito has stated he looks at the facts of each case. Yet time and time again his decisions show support for big business, for the executive branch, with the not so much for everyday Americans. A justice of the Supreme Court must be able see through abstractions and understand the role of the law in the lives of all Americans not just the powerful and influential. A justice must be able to make just the right call over the Supreme Court “Equal Justice Under the Law” a reality for all Americans. That is also an important role for every Supreme Court justice. Judge Alito’s opinions, writings and answers suggest to me that he does not understand this role either.

I have given careful consideration to this nomination. I have carefully watched the Judiciary Committee hearings. I may not be a member of the Judiciary Committee, but I have paid close attention to the hearings and watched them on C-SPAN. I went over his past writings, his decisions as a judge and the testimony of others.

In the end, I have too many doubts about what his opinions mean on the Supreme Court, what he will mean for civil rights, our civil liberties, checks and balances on executive power, caused by what he said—and even more by what he refused to say. I am concerned he is out of the mainstream, that he is willing to say what he needs to say to get a job, that he is an ideologue and that his personal views will influence his decisions. It is not acceptable that Judge Alito has expressed a predisposition to rule against ordinary Americans, but it is not enough. The Constitution commands this judicial nomination. The Senate has a constitutional charge very seriously. I have carefully reviewed the committee’s hearings and Judge Alito’s extensive record. I have met with the judge. I have spoken with people who have blogs and have all of his writings. I have read his opinions on both sides of this nomination. I have concluded I cannot give my consent to his nomination to the Supreme Court.

I say this vote we are going to take in the Senate will end up having a great deal to do with how they live their lives, to be sure the predators in our society, to be sure the problems that we are facing. That was the ever-expanding circle of freedom and opportunity that has been the common thread through all periods of our history—greater rights and greater responsibilities of citizenship and equality.

Each time we have made strides forward, there have been vocal voices of opposition. There have been those who have wanted to go back. At those moments of profound importance to our
country, the Federal courts have been the guardians of our liberties, have stood on the side of greater freedom and opportunity. We all know the famous cases cited as representing this forward march of progress: Brown v. Board of Education, which struck down the notion of separate but equal; Baker v. Carr, which invalidated discriminatory State voting apportionment schemes and paved the way for the concept of one man, one vote; and Roe v. Wade, which recognized a right to privacy in the Constitution; Roe v. Wade, which established that women have a right to choose.

We need judges who will maintain that forward progress. Despite his distinguished academic credentials, Judge Alito has not shown himself to be that kind of judge. He does not have the dedication to civil rights or women’s rights or the right to privacy that I believe we need in the next Supreme Court Justice.

Time and again, when given the choice, he has voted to narrow the circle, to restrict the rights Americans hold dear. Now is not the time to go backward. Without the progress we have made in the past 230 years, without that expansion of the circle of equality and freedom and opportunity, I certainly would not be standing here, nor would a number of my colleagues. There would be no opportunities for women in public life.

But mine is hardly the only example. Voting rights would be restricted. Equal opportunities in education and in the workplace would not exist. And none of us would have a constitutional right to privacy. Simply put, our Nation would not be what it is today.

Our greatest strength has always been our commitment, generation after generation, with some fits and starts, to enlarging the circle of rights and equality. That great American commitment has made us a beacon of freedom and democracy around the world. This nomination could well be the tipping point against constitutionally based freedoms and protections we cherish as individuals and as a nation. I fear Judge Alito will roll back decades of progress and roll over when confronted with an administration too willing to flout the rules and looking for a rubberstamp. The stakes could not be higher.

To be sure, Roe v. Wade is at risk, the privacy of Americans is at risk, environmental safeguards, laws that protect workers from abuse or negligence, laws even that keep machine guns off the streets—all these and many others are in peril.

I don’t believe millions of Americans are aware of that yet. This debate is carried on in Washington. It is at a high level of legalisms and debates about jurisprudence and the meaning of the Constitution. But I am confident the Supreme Court will have a dramatic effect on our Nation and on what we believe America stands for.

When I ran for the Senate, I told New Yorkers that I would only vote for judges who would affirm constitutional precedents, such as Roe and Brown and other landmark achievements and expanding rights and the reach of equality for all Americans. This is about more than words on paper. The American people are counting on us not to be a rubberstamp but counting on us to make sure the President’s nominee will not take us backward.

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Reagan administration, he made the argument that Cabinet officials who are charged with authorizing illegal wiretaps of Americans in this country should be entitled to absolute immunity. At a time when this President and his political party stand accused of politicizing and abusing the awesome powers of the executive branch, we must demand from our judiciary a respect for the proper role of each of our three branches of Government. But Judge Alito’s excessive deference to Presidential authority, coupled with his restrictive view of congressional authority, tells me he does not have the proper reverence for separation of powers.

What is worse is that by supporting the expansion of the reach of Presidential power, Judge Alito also holds a harshly limited view of what the Government can or should do to help ordinary Americans. Judge Alito said it all in 1986, when he was a young lawyer with the Reagan administration. He wrote, in an opinion consistent with the Supreme Court’s decision in United States v. grads. In another case, Judge Alito has aggressively voted to invalidate parts of our Federal gun laws, arguing there was no evidence in the record to determine that Congress had the power under the Constitution’s commerce clause to enact legislation that regulated the sale of machine guns. In one another case, Judge Alito wrote an opinion striking down Congress’s right to make a State agency comply with the Family and Medical Leave Act. And just 3 years later, the Sixth Circuit, with a similar view of facts, reached precisely the opposite conclusion. The PRESIDING OFFICER. The Senator’s time has expired. Mrs. CLINTON. Mr. President, I ask unanimous consent for 5 more minutes. The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered. Mrs. CLINTON. In several criminal cases, Judge Alito has shown blatant disregard for an constitutional right to be tried by an impartial jury—what any one of us would want if we or a loved one were ever in this position—chosen free of racial or gender prejudice. He has also narrowly construed other constitutional criminal procedure protections, arguing often in favor of granting law enforcement officials the greatest of latitude to conduct unauthorized searches and seizures.

Judge Alito’s opinions on these and many other topics remind us that judicial activism comes in many guises. Adopting an unnecessarily narrow view of the Constitution or of our laws to reach a desired outcome is a form of judicial activism that is no less offensive than subscribing to an overboard interpretation of the law in order to reach a specific result.

Judge Alito, if confirmed, may hold a seat on the Supreme Court for a generation—long after this President has left office. Perhaps through 8 to 10 Presidential elections, decades of progress would fall prey to his radical vision of civil rights, civil liberties, health and safety and environmental protections, but also fundamental rights such as the right to privacy. Our Federal Government could be transformed into one where Congress is largely irrelevant and the President is permitted to make up the rules as he goes. I do not believe Judge Alito’s vision of that America is what our Founders intended for us. He would take us backward, when it has never been more important to move forward together.

I sincerely hope my concerns about Judge Alito are unfounded, but I suspect they are not, and our children and grandchildren will pay the price. He has not demonstrated a proper respect for the rule of law, our Constitution, and the principles, freedoms, rights, and privileges that Americans hold most dear. I, therefore, cannot give my consent to his confirmation. Mr. President, I enclose a copy of the unanimous consent that letters written to Senators SPECTER and LEAHY opposing this nomination be printed in the RECORD. There being no objection, the material was ordered to be printed in the RECORD, as follows:

NATIONAL ORGANIZATION FOR WOMEN, Washington, DC, 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 foundation will be undermined at a 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 commitment are limits 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 grant 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, 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 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 a just system and workplace policies as well as affirmative action and job benefits issues that disproportionately affect women? How will Judge Alito deal with challenges to federal legislation guaranteeing disability rights, lesbian and gay rights, and reproductive rights? How will Judge Alito resolve the tension between the role of the Federal Government to protect the health, safety and welfare of the American people. Well, I guess that explains the inept, slow, and dangerous response to Hurricane Katrina. If you are not responsible to protect the health, safety, and welfare, why should you be held accountable when people suffer, when their Government leaves them neglected without any help?

Judge Alito has long advocated a limited congressional authority view. Now, if that were adhered to, it would undermine a whole host of civil rights protections, health and safety regulations, standards for protecting our air and water, food and drug quality regulations, laws regulating firearms as well as vital programs such as Social Security, Medicare, and Medicaid.

Since his appointment to the Third Circuit, Judge Alito has aggressively sought to promote this theory of limited power. In 1986, he voted to invalidate parts of our Federal gun laws, arguing there was no evidence in the record to determine that Congress had the power under the Constitution’s commerce clause to enact legislation that regulated the sale of machine guns. In another case, Judge Alito wrote an opinion striking down Congress’s right to make a State agency comply with the Family and Medical Leave Act. And just 3 years later, the Sixth Circuit, with a similar view of facts, reached precisely the opposite conclusion. The PRESIDING OFFICER. The Senator’s time has expired. Mrs. CLINTON. Mr. President, I ask unanimous consent for 5 more minutes. The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered. Mrs. CLINTON. In several criminal cases, Judge Alito has shown blatant disregard for a constitutional right to be tried by an impartial jury—what any one of us would want if we or a loved one were ever in this position—chosen free of racial or gender prejudice. He has also narrowly construed other constitutional criminal procedure protections, arguing often in favor of granting law enforcement officials the greatest of latitude to conduct unauthorized searches and seizures.

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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. The rights, he believed, need for judicial restraint and discouraging judges from legislating from the bench, he has used these themes as a means to limit access of individuals to 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 into their lawsuit. But it is that individuals, courts, and Congress have less ability to hold states accountable to ensure compliance with their own legal violations.

Judge Alito has taken a very restrictive approach in employment discrimination cases, resulting in few successes for plaintiffs. In a Pennsylvania abortion regulation, he upheld the Supreme Court's amicus brief in a pending case in 1986, discussing the strategy for the government's amicus brief. He authored a Third Circuit panel that he would question the constitutional validity of a woman's ability to make her own reproductive health decisions.

Judge Samuel Alito's rulings on America's privacy laws have furthered 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—an argument rejected by the Supreme Court. In contrast, Justice O'Connor, writing for an 8–1 majority in the case of American-born detainees Yaser Esam Hamdi (Hamdi v. Rumsfeld), in which the court ruled that an American citizen seized overseas as an "enemy combatant" did not have the factual basis of his or her detention, said the Court had "slammed 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 right of workers to access medical leave from their employer. 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 eviscerate 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 person 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 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.

Alito's work against affirmative action during the Reagan administration opposing certain affirmative action programs as something he believed would not truly serve the purpose of eliminating racism and empowering women. Over the past 50 years the Supreme Court's jurisprudence has often served to restrain the power of the courts and the power of Congress, with regard to binding states into their lawsuit. But it is that individuals, courts, and Congress have less ability to hold states accountable to ensure compliance with their own legal violations.
January 25, 2006

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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 is limited to only “victims of discrimination” and “disgruntled employees, rather than victims of discrimination cases are manufactured by claims.” He closed his dissent with the disclaimer that he would not replace on the bench. Justice O’Connor has added an important, independent 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 issues that concern women and girls.

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 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 issues that concern women and girls.

In addition to a restrictive approach towards affirmative action, Judge Alito issued opinions that made it far more difficult for victims of discrimination to get to court. His 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. Again, this is an area where Justice O’Connor has often been the swing vote in protecting and advancing civil rights. Alito has ruled against three of the four women who claimed to have been victims of discrimination.

In one such gender discrimination case, the 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. The 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 stand up 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,

Prisca Sanchez Mills,
YWCA USA CEO,
American Association of University Women,

Hon. Arlen Specter,
Chai n, Senate Judiciary Committee, Dirksen Senate Office Building, Washington, DC.

Hon. Patrick Leahy,
Ranking Member, Senate Judiciary Committee, Dirksen Senate Office Building, Washington, DC.

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 Judge Samuel A. Alito, Jr. to be associate justice of the United States Supreme Court.

As Dean and Director of the University of Chicago’s law school, Alito authored more than 100 published law reviews and several books on law and legal theory. In his tenure on the Third Circuit—illustrate a judicial philosophy at odds with AAUW’s Public Policy Program. For all these reasons, AAUW urges judges to reject Alito’s nomination.

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’s record has a troubling record on a range of civil rights issues, revealing a philosophy that would weaken workplace protections that are central to the lives of women and people of color.

Women’s reproductive rights. In contrast, Alito has demonstrated opposition to the strategic constitutional protections against sexual harassment in schools, and aggressively sought to curb congressional authority to protect people from 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 set doctrine in this matter would be at odds with Judge Alito’s record. The nation’s highest court is supposed to help develop the strategy for undermining women’s reproductive rights, 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 and consent 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 thorough review of Judge Alito’s record, advisory organizations, including AAUW, urge senators to reject Alito’s nomination. 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.

Sincerely,

Lisa M. Maatz,
Director, Public Policy and Government Relations.
Ranking Member, Committee on the Judiciary, U.S. Senate.

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 Justice Sandra Day O’Connor.

In nominating Samuel Alito after Harriet Miers 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. Miers because, as conservative as she is, she fell short in the 10 percent of her Senate’s 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 attorney for the government, he supported a Pennsylvania statute requiring women to notify their husbands before having an abortion—a position rejected by Justice O’Connor 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 the right to decide whether or not to have an unwanted pregnancy. 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 1995, as a Justice Department attorney, he wrote that some forms of birth control are “abortionists,” and saw no constitutional problem with a state law restricting women’s access to contraceptives. These extreme anti-abortion organizations have long argued that the IUD and some birth control pills are “abortion-like,” and are 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 in 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 like Dobbs v. Dunlop and Groody 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 persecution by her male co-workers in the city of Pittsburgh. He has repeatedly criticized affirmative action policies, and struck down a school district’s affirmative action plan. He is friendly to police corruption. He ruled, in Chittister v. Department 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, tambémhados, to fend off fundamental legal 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.

NATIONAL WOMEN’S LAW CENTER

Hon. Arlen Specter,
Chair

Hon. Patrick Leahy,
Ranking Member, Senate Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

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 concern of Senator’s 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 nomination of Samuel Alito to the Supreme Court would endanger core legal rights for women, with profound and harmful consequences across the country and for decades to come. This letter summarizes the basis for the Center’s conclusions, which are set forth more fully in the Center’s December 8, 2005 letter and detailed report.

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 overturning 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 arguments. The Court also downplayed the plaintiff’s evidence. 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 views in other sex 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. Alito downplayed the plaintiff’s evidence, Alito also dissented in Bray v. Marriott Hotels, a racial discrimination case in which the plaintiff 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 its approach, “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 1965 job application he expressed support for at least some of the central legal tenets of the Reagan Administration, and the Justice Department favored the “originalist” approach to constitutional interpretation advocated by Robert Bork, which would permit almost any gender-specific district 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 its 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; his dissent in a sex discrimination case in which the plaintiff would have prevailed under his approach; 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 asylum to an Iranian woman who asserted that if she returned to Iran she would be persecuted for her political beliefs.

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 majorities. For example, San- dra Day O’Connor, the first woman on the Supreme Court, often has cast the decisive vote...
in those 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 ideological balance of power in a female-injurious 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,
MARCIA D. GREENBERGER,
THIRD WAVE INC.

MRS. CLINTON. Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. MARTINEZ). The Senator from Massachusetts.

Mr. KERRY. Mr. President, obviously, today we face one of the most important choices we make as Senators. This is a choice, as colleagues have said, that is going to affect the country for the next several decades.

To replace Justice Sandra Day O'Connor, the President has nominated a man who has consistently deferred to Government action regardless of how egregious that action may be. He has nominated a man whose pattern of decisions erects rather than breaks down barriers in the area of civil rights; a man who, to this day, has never retreated from his declaration that the Constitution does not protect a woman's right to privacy; a man who has demonstrated a persistent insensitivity to the history of racial discrimination in this country and was even, at the Government's request, willing to ignore overwhelming evidence that African Americans were intentionally stricken from an all-White jury in a Black defendant's capital case.

Judge Alito has been nominated to fill the seat, as we know, of an individual who has been the Court's swing vote; a woman who has upheld affirmative action programs; a woman who upheld the right to choose; a woman who upheld State employees' rights to the protections of the Family Medical Leave Act; a woman who recognizes that a declaration of war is not a blank check for the President's actions; a woman who decides each case narrowly on the facts presented, keenly aware of the greater impact that her decisions have.

So this is the contrast. We are being asked to confirm a nominee who will shift the ideological balance of the Court dramatically to the right. And many people are cheering for that.

We are being asked to confirm a nominee whose views will undermine a balance of power that I believe, and many others believe, literally keeps our country strong, a balance of power that helps to bring people together rather than divide them, that helps to apply the Constitution to people in all walks of life and simply those with power and privilege.

For the reasons of this track record: the of his writings in the Justice De-

partment, the questions unanswered in the hearings, the cases he has decided, where studies have shown a pattern of willingness to ignore our Constitutional rights and deny people access to our court system, for all of these and for other compelling reasons, I oppose this nomination.

In the past, in the 22 years I have been here, like many of my colleagues, I have voted for Federal court nominees despite the fact I disagreed with them ideologically. I have voted, I am confident, hundreds of times. In fact, I voted for Justice Scalia because despite our ideological differences, in the confirmation process he promised to be openmindedness that we have not seen in the Court. So we have learned the hard way. The words of the confirmation hearings simply do not erase ideology, they do not erase a track record. And that ideology cannot be overlooked because a Justice's decisions can and will have a profound and lasting impact in the rights that we otherwise take for granted.

So something more is needed. A Supreme Court Justice needs to understand and have a record of respecting the constitutional rights and liberties that the Constitution created or she needs to recognize the importance of precedent and the limited situations in which overruling is acceptable.

He or she needs to appreciate the significant struggles that our Nation has endured in the context of racial, sexual, and disability discrimination and to be aware of the road still to be traveled. And that awareness of the road still to be traveled has to be evidenced in the decisions and writings of that nominee. In short, ideology does matter. The Supreme Court's ideologically driven decisions have been the most regrettable in our Nation's history, decisions such as Korematsu, Dred Scott, and Plessy, to name just a few. The fact is, he chose not to do this, which is his right. We all understand. We have heard the argument about the consequence of elections. The fact is, he chose not to do that.

The way in which this nomination came to us in the Senate tells us a huge amount what this nomination really means. The President was under fire from his conservative base for nominating Harriet Miers, a woman whose judicial philosophy was unmercifully attacked. President Bush, in the end, broke to those extreme rightwing demands. This was an ideological coup. Miers was removed and Alito was installed. The President didn't consult with the Senate, as required by the Constitution. He was one of the first to what the political needs were to what the country's needs were. Indeed, he made this nomination about his political base. He made it about an ideological shift in the Court. He made it about co-opting the religious right to rally around the flag. He made it about getting the religious right to rally around the flag to rally to his cause. He made it about his conservative judicial philosophy.

If you want proof of that, all you have to do is look at the comments of people such as Ms. Ann Coulter. We all know, Ms. Coulter is a firebrand, as inflammatory and conservative as anyone in the country, often engaging in character assassination. She denounced the nomination of John Roberts. She attacked the nomination of Harriet Miers, calling her completely unqualified and lamenting that President Bush had "thrown away a Supreme Court seat." Yet she celebrated the nomination of Sam Alito, stating that Bush gave the Democrats a "right hook" with this "stunningly qualified" nominee. This from a woman who said that the Republicans need to nominate a person who "wake[s] up every morning...[and] chant[s] about how much his latest opinion will tick off the left." Failed Supreme Court nominee Robert Bork had a similar reaction. He denounced the Miers nomination as "taking the heart out of a rising generation" of conservative constitutional scholars and "widening the fissures between the Court and the people." Yet he praised Alito's nomination as "substantially narrowing" that rift. In fact, he called the nomination something to "rejoice" because if Alito were confirmed, it would only take "one more Justice of the Roberts-Scalia-Thomas-Alito stripe to return the Court to so-called jurisprudential respectability."

Let's not forget conservative stalwart Pat Buchanan who denounced the Miers nomination as revealing the President's lack of desire "to engage the Senate in fierce combat to carry out his own suspect commitment to remake the Court in the image of Scalia.
apparent Mr. Buchanan believes that the Alito nomination demonstrates the President's change of heart. He heralded the nomination as one that would unite and rally the base, a nomination for the base.

They say you can tell a lot by somebody's friends. These three individuals are consistently on the furthest edge of the ideological spectrum. Their positions rarely advance the interests of average working folk in America. So perhaps it come as no surprise that these folks have jumped to support Judge Alito.

After reviewing more than 400 of Judge Alito's opinions, law school professors at Yale concluded:

in the area of civil rights laws, Judge Alito consistently has used procedural and evidentiary standards to rule against female, minority, age, and disability claimants... Judge Alito seems relatively willing to defer to the claims of employers and the government over those of advancing civil rights claims.

Similarly, a Knight Ridder review of Judge Alito's opinions concluded that Judge Alito "has worked quietly but resolutely to weave a conservative legal agenda into the fabric of the Nation's laws" and that he "seldom sided with a criminal defendant, a foreign national facing deportation, an employee alleging discrimination, or consumers suing big business..."

After reviewing 221 of Judge Alito's opinions in divided cases, the Washington Post concluded that Judge Alito is "clearly tough minded... having very little sympathy for those asserting rights against the government." The pattern is clear, and I think it is unacceptable.

don't think you should put somebody on the Court who makes access to justice in the United States harder and more elusive for people who already face incredible obstacles when trying to have their voices heard in court. I don't think we should put somebody on the Court who will fail to serve as an effective check on excessive Executive power.

If this pattern is not enough, as has been described by others, then all we can have to do is look at some individual cases. In Sheridan v. E.I. duPont de Nemours and Company, Judge Alito wrote a lone dissent opposed by all of the other judges on the court, eight of whom were Republicans. His opinion would have made it more difficult for victims of discrimination to sue their employers.

Applying a similarly high standard of proof, one-upping the majority believed would eviscerate the protections of title VII, Judge Alito dissented from a decision to allow a racial discrimination claim to go to trial in Bray v. Marriott Hotels.

These are cases where people were trying to have their rights adjudicated, and disagreeing with his colleagues, including Republican-appointed judges, Judge Alito said no.

What is the practical impact of these decisions? Simple: They keep victims of discrimination from having their day in court.

If it is not enough to see this kind of insensitivity toward the victims of discrimination, the clear pattern in those judicial opinions, in his 1985 job application to President Reagan's Justice Department, Judge Alito wrote that his interest in constitutional law was driven in part by a disagreement with Warren Court decisions. He wrote that those decisions which established the principle of one person, one vote. And he said that he was "particularly proud" of his work to end affirmative action programs.

Judge Alito's hostility to individual rights isn't limited to civil rights. He consistently excuses government intrusions into personal privacy, regardless of how egregious or excessive they are. In Doe v. Groody, for example, he disavowed to an opinion written by then-Judge Michael Chertoff because he thought that the strip search of a 10-year-old was reasonable. He also considered the government should not be held accountable for shooting a unarmed boy who was trying to escape with a stolen purse or even for forcibly evicting farmers from their land in a civil bankruptcy proceeding where there was no show of resistance from those farmers. He believed a show of force from the enforcers was reasonable.

This pattern of deference to power is reinforced by a speech he gave as a sitting judge to the Federalist Society just 5 years ago.

In that speech, Judge Alito "preached the gospel of the Reagan administration's Justice Department, the theory of a unitary executive. And though in the hearings Judge Alito attempted to downplay the significance of this theory by saying it didn't affect the role of the courts or the Executive branch but, rather, addressed the question of who controls the executive branch, don't be fooled. The unitary executive theory has everything to do with the scope of Executive power."

In fact, even Stephen Calabresi, one of the fathers of the theory, has stated that "[t]he practical consequences of the theory are dramatic. It removes constitutional independent agencies from the control of the courts and makes it possible for the President to act in a manner consistent with our Constitution's understanding of the unitary executive theory."

Last but certainly not least, I have grave concerns about Judge Alito's ability and willingness to protect a woman's right to choose. In his 1985 job application, Judge Alito wrote that he was "particularly proud" of his work and also his support for the right to ignore the ban on torture that Congress overwhelmingly passed. He also used signing statements to at attempt to apply the law restricting habeas corpus review of enemy combatants. And, his understanding in Congress that it would not affect cases pending before the Supreme Court at the time of passage. The signing statements have been used to specifically negate or make an executive policy around congressional intent. The implication of President Bush's signing statements are absolutely astounding. His administrative is reserving the right to ignore those laws it doesn't like. Only one thing can hold this President accountable, and it is called the Supreme Court. Given Judge Alito's endorsement of the unitary executive and his consistent deference to government power, I don't think Judge Alito is prepared to be the kind of check we need. Relining in excessive government power matters more today to the average American than perhaps at any recent time in our memory, as we work to try to provide a balance between protecting our rights and our responsibility. As Justice O'Connor said: The war on terror is not a blank slate for government action. We can and must fight that in a manner consistent with our Constitution.
hearings, Judge Alito stated these statements were accurate reflections of his views in 1985. But what is more disturbing is what he refused to say. He refused to say his views have changed, that he accepted Roe v. Wade as settled law. As Chief Justice Roberts did during his confirmation hearings. In other words, Judge Alito refused to give any assurances that his concept of the Constitution’s protected liberty is consistent with mainstream America’s. If the Senate confirms Alito, how is he going to keep an open mind, but I don’t think any of us can be reassured by those words. We heard those very same words before. Justice Thomas repeatedly told the Judiciary Committee he would keep an open mind on this issue. But we all know that once safely on the Supreme Court, Justice Thomas voted to overturn Roe v. Wade months later, writing a dissent in Casey that likened abortion to polygamy, sodomy, incest, and suicide. Given Justice Thomas’ record and you can almost imagine Karl Rove whispering to Judge Alito: Just say you have an open mind; say whatever it takes.

We cannot rely on these empty platitudes, and we certainly cannot rely on any promises of open-mindedness. We must rely on him. In Decker v. Vos, we were asked to consider Judge Alito’s claims about the proposed Alito’s confirmation to the Supreme Court. We must rely on him. In Decker v. Vos, we were asked to consider Judge Alito’s claims about the proposed Alito’s confirmation to the Supreme Court.

Therefore, I cannot and will not vote for the nomination of Judge Samuel Alito to the U.S. Supreme Court. As the next U.S. Supreme Court Justice, and oppose the confirmation of Judge Alito as the next U.S. Supreme Court Justice.

Sincerely,

CONGRESS OF THE UNITED STATES,
WASHINGTON, DC, January 6, 2006.

HON. ARLEN SPECTER,
Chairman, Committee on the Judiciary, U.S. Senate, Russell Senate Office Building, Washington, DC.

HON. PATRICK LEAHY,
Ranking Member, Committee on the Judiciary, U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR CHAIRMAN SPECTER AND RANKING MEMBER LEAHY: As you examine the nomination of Judge Samuel Alito to the United States Supreme Court, we consider the particulars. As we consider the particulars, 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 experience of Hispanics in the judiciary and the embargo of Hispanics qualified for appointment, it is difficult to comprehend the President’s decision. Further, 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. We hope you do not overlook the experience of Hispanics in the judiciary and the experience of Hispanics in the judiciary.

While Judge Alito’s background and on record on the bench have been discussed in the public forum, his opinions and philosophy will come through 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 understand his current, I 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 Sandra Day O’Connor will share the tradition of Justice Sandra Day O’Connor. We respectfully request that you review the attached memorandum which details many of the disturbing examples of Judge Alito’s extreme views on women’s rights. We consider that this lifetime appointment will have detrimental consequences for American women,
he is not willing to follow existing precedent
no claim to nondiscrimination with respect
legal analysis that ""illegal aliens have
of
sions that appear to be based on the 1976 case
prior to the Senate Judiciary Committee's
Supreme Court. We announced this decision
the Congressional Black Caucus (CBC) an-
dent?

tional as to the defendant per Batson prece-
isn't this unconstitutional as it relates to

vehicle for striking jurors based on ethnicity
ficial translations of tape recorded conversa-
Question: This holding would provide a ve-
hicle to even get access to the Federal courts

B. VOTING RIGHTS ACT: JENKINS V. MANNING, 116

DEAR SENATOR LEAHY: On December 8, 2005,

LIAM WEBSTER

CONGRESSIONAL RECORD — SENATE

December 8, 2005, the commerce clause (CBC) an-
nounced its opposition to the confirmation of
Judge Samuel Alito to the United States Supreme Court. We announced this decision prior to the Senate Judiciary Committee’s confirmation hearings after making an ex-
tensive review of his record as a judge and as
a high-level government official and after
Judge Alito and the Administration failed to
respond to our request for a meeting with
the nominee. Unfortunately, nothing tran-
sparent about the nomination case could
be more systematic, carrying over to claims against
the disabled as well, where the Third Circuit
criticized his dissent that would allow ""few
if any'' Rehabilitation Act plaintiffs access to the courts (Nathanson v. Medical College of Pennsylvania).

Mr. KERRY. I yield the floor and I

The assistance legislative clerk pro-
ceded to call the roll.

Mr. SANTORUM. Mr. President, I
ask unanimous consent that the order for the quorum call be rescinded.

Mr. SANTORUM. Mr. President, I
rise today on a point of order to support
Judge Alito to be an Associate Justice
of the Supreme Court. I am sure that
will be no great surprise to those who
have followed my career.

I want to lay out in brief why I be-
lieve Judge Alito is exactly the kind of
Justice this country needs at this time
and, candidly, is exactly the kind of
Justice this country, for the most part,
has had, in keeping with its constitu-
tional traditions over the last 220-plus
years.

Judge Alito is not from Pennsyl-
vania, although he claims to be a
Philie fan, which is fine by me. I some-
what prefer the Pirates, being from
Pittsburgh. I certainly respect him. He comes from the Third Circuit, which includes the Commonwealth of Pennsylvania. I have had an opportunity to talk to many of his colleagues on the court, Republicans and Democrats. Both Republican and Democratic colleagues have praised him. Everyone I have spoken to, and I have spoken to several—have praised him in the highest terms possible. Colleagues of his have stepped forward and have used terms of respect you don’t often hear. Unfortunately, you don’t often hear around this body—certainly not lately—but you certainly heard it from them both privately and publicly, saying how much integrity the man has, how much his legal acumen is right on, as are his demeanor, jurisprudence, and humility—all of the things one would want to see out of a judge, and they speak in glowing terms about him. So that was my introduction to him.

I had never met Judge Alito prior to his nomination. When he was nominated, one of the first things I did was call some of his colleagues. I did it to get a sense of the kind of man he was. The response I received was overwhelming.

One of the things I want to cover is how I believe that his view of the role of a judge is very similar to John Roberts’ view of the role of a judge. In fact, his record, in my opinion, and the way he approaches the law is remarkably similar to the way in which Chief Justice Roberts confirmed here in the Senate by 70-plus votes. I am somewhat at a loss to see how Judge Alito is not receiving similar support, because their records and their approach to the law are remarkably similar, in my mind. He is a judge who, when I met him, used very much the same terms as Justice Roberts—terms such as humility and modesty in dealing with the matters before them; that he was not to be a judge who was to impose his views on the case at hand. He looks at the law, looks at the facts of the case and does his best on the narrowest grounds possible to decide the cases before him. That is what a judge is supposed to do—not say, gee, here is my opinion, change the law in the way he or she sees fit, but let’s go to the record and decide the case based on whether you like the plaintiff, or you like the defendant, or what is a sympathetic figure on one side or the other—that is about the worst kind of justice you can possibly acknowledge.

My colleagues who say he rules for the big guys or the big corporations, or whoever it is, are you saying every action that comes before the Court where a little guy is in a case, he automatically should win? Is that what it is? If you don’t like the result for the little guy all the time, is it true that somehow you don’t have a proper view of the law? This is a remarkable discussion I keep hearing. I heard over and over again in the Judiciary Committee about the result of these cases and who he sides with. Is that somehow a point which is legitimate when it comes to a judge? The question is, is he an apellate jurist who was following the law? Was he properly applying the law to the case? It is not who won or lost the case. I find it very disturbing that we are reducing this confirmation process to whose side he ruled on and whether ideologically he fits a particular Senator’s view of a particular issue or particular issues. That is not how we have ever viewed judges in the Senate. We do not keep scorecards of whether you side with the little guy or big guy or how you came down on cases. We certainly have not had ideological litmus tests in the past on judicial nominations.

Those two things, I have to tell you, that have been some of the more frequent criticisms of Judge Alito trouble me as to how we are morphing the judicial process or the selection, approval, and confirmation process into a sort of campaign process, into a process of how we elect legislators and Presidents. We are not electing a legislator or a President, someone who we have a right to know their ideology or what side they are going to come down on.

Many have tried to claim that somehow or another he is ideological. I don’t think there is anything in the Record that would indicate Judge Alito applies his own personal viewpoints to the case at hand. He looks at the law, looks at the facts of the case and does his best on the narrowest grounds possible to decide the cases before him. That is what a judge is supposed to do—not say, gee, here is my opinion, change the law in the way he or she sees fit, but let’s go to the record and decide the case based on whether you like the plaintiff, or you like the defendant, or what is a sympathetic figure on one side or the other—that is about the worst kind of justice you can possibly acknowledge.

I am disturbed by the criticism, but I am very encouraged by Judge Alito and the way he has conducted himself and the way he has, in fact, laid out a very concise and well-reasoned approach to making decisions on the Court in the past.

He obviously has impeccable credentials. The Senator from Utah is in the Senate, and he’s going to take the responsibility to take the questions and the responsibility of the issues, using the Court as the place to bring the people’s Houses and go to the courts to get an extreme agenda passed and into law in this country.

The voices we have heard over the past couple of months during this nomination and which we heard somewhat more muted during the Roberts nomination were of those trying to hold onto power by holding onto a majority on the Supreme Court of the United States and continue to have the judiciary issue a far-left-of-center agenda on a variety of issues, using the Court as the place to silence the people in their collective judgments.

One of the reasons I think these nominations are so important and maybe so contentious is because we are at a point right now where there has been movement for a long time to bypass the democratic process, bypass the people’s Houses and go to the courts to have things these collective will be reflected in their laws.

So this is an important step. Do I believe that we are going to see, as a result of Judge Alito’s confirmation, which appears to be all but certain, a dramatic change in the precedents of the U.S. Supreme Court? I sort of doubt that we will see dramatic change, certainly not any time soon. But I think what we will see is a more
There is no place for the Court imposing its will and making laws. There is no place for that in our Constitution. That is not their role.

I am very pleased the President understands that and that he has put forth a judicial挑选 that point of view as a matter of the judiciary. I am hopeful that we will confirm Judge Alito and that we will continue this process of creating a better balance of powers among the Congress, the executive branch, and the judicial branch. The question is: what is good for the goose is good for the gander. There may, indeed, come a day—although I hope it will not happen time and again. It threatens the very foundation of our country.

Thomas Jefferson understood that. Jefferson in 1821—this was after he was President, 5 years before he died, obviously a great student of our Constitution, obviously a great student of the powers of the Congress and the judiciary and obviously of the Presidency—he said, in reflecting on this very delicate system and the balance of power among the executive, the judicial, and the legislative branch:

The separation of our Nation is in the power of the judiciary, an irresponsible body working like gravity by night and by day, gaining a little today and a little tomorrow, making noiseless steps like a thief over the field of jurisdiction until all shall render powerless the checks of one branch over the other and will become as venal and oppressive as the government from which we separated.

He saw the power of an immode, a brazen, a bold judiciary in its ability by using the ultimate law of the land, the Constitution, in grabbing power by day and by night, taking the power away from the people and cementing it to itself so that, to paraphrase Jefferson, they would be like the monarchs we left, ruling from their kings' benches.

This is a true threat, in my opinion, to the democracy in America today. Jefferson, as he did with many issues, had it right here too. There have been times in American history where the pendulum has swung in favor of one branch and advancing its noisiness step by step. I think this is such a time when we have seen that pendulum swing to the Supreme Court, and it is incumbent upon all of us to make sure that equilibrium is restored.

I know there are a lot of folks who are listening who say: I like the decisions the Supreme Court has made; this is why I am out here arguing, to make sure we can preserve that. I can say what is good for the goose is good for the gander. There may come a time when they take that same authority and make a whole host of decisions that you don't like.

Whether I am in the Senate or somewhere else at that point in time, I hope I will have the integrity and the ability to stand up and criticize that Court such as I am criticizing the courts over the last 30 years for their activities.

The second reason Judge Alito should be confirmed is that he is a man of character and integrity. Anybody watching those proceedings would have to conclude that. I have been struck, throughout this process, at the level of respect and praise for Judge Alito's character and integrity. It is directly related to how well people know him, how closely they have worked with him. Without exception, those sounding the most dire warnings, creating the most negative caricatures, are making the happiest picture of Judge Alito are those who know the least or who do not know him at all.

We have heard from those who worked with him at the Department of Justice and in the U.S. Attorney's Office in New Jersey. We have heard from Judge Alito's law clerks and fellow judges, and there were dozens of those law clerks from all across the ideological spectrum who were supportive of Judge Alito.

May no mistake, this is not a bunch of rightwing clones but a diverse group of men and women, liberals and conservatives of different religions and backgrounds. They do not agree with him on every issue or, in some cases, they don't agree with him on virtually any issue at all, but they all praise Judge Alito as a man of character and integrity. Judge Samuel Alito possesses the character and integrity necessary to serve on the Supreme Court of the United States.

The third reason Judge Alito should be confirmed is that he understands and is committed to the appropriately limited role of the judiciary. America's Founders established a system of limited Government containing three branches, each with its category of power and ability to check the others. The judicial branch is as much a part of this system of Government and must remain as limited as the legislative and executive branches.

The fight over judicial appointments is a fight over whether we should stick with the system America's Founders established.

Some want to change that system because, frankly, it does not give them everything they want.

Self-government, after all, can be a little messy and sometimes very frustrating.

Letting the people and their elected representatives make the law and define the culture means that, on any given day, certain political interests win and others lose.

Some who lose in the political process pick themselves up and try again another day.

Others leave the political process behind and go to the courts, trying to persuade judges to impose upon the American people policies and priorities that they would not choose for themselves, or they could never get through the elected representatives of the people.
The fight over judicial appointments is whether we should have judges willing to take such political bait. It is fashionable in some circles to put the Supreme Court on a pedestal, pretending that a few unelected judges are supposed to lead us to some kind of promised land.

During the debates about Chief Justice John Roberts’ nomination last fall and Judge Alito’s nomination now, we have heard all sorts of grand descriptions of the judiciary’s role and purpose.

The judiciary, we are told, is the engine of social progress, the protector of all our rights and liberties, even the savior of the environment.

Yesterday, in the Judiciary Committee’s business meeting, the ranking Democratic member said that the very reason the Supreme Court exists is to be “a constitutional check on the expansion of presidential power.”

The Senator from Massachusetts, Senator Kennedy, said the very same thing yesterday, that the Supreme Court’s historic role is “enforcing constitutional limits on presidential power.”

These grand descriptions give the impression that the Supreme Court alone polices our system of separated power, hands down decrees about issues, opines on abstract theories, and decides how best to order the universe.

It does no such thing. The last time I checked, most of the Supreme Court’s cases have nothing whatsoever to do with issues such as presidential power, abortion, religion, or the environment.

The Supreme Court does not exist to run the country, right all wrongs, and usher in peace and domestic tranquility.

The judiciary is part of our system of limited government; it is not a system unto itself. It is that whole system of government, not anyone part of it, that protects our rights and liberties, checks excessive government power, provides for social progress, and all the rest.

As a part of that system, judges who exceed their proper role and power are no less a threat to liberty than legislators or the president who do so.

In the famous case of Marbury v. Madison, Chief Justice John Marshall wrote that the Constitution was designed for the government of courts as much as it is for legislatures.

As Chief Justice Roberts put it last fall, judges are not politicians.

The tendency of some in this debate simply to look at the results judges deliver is, therefore, misguided because it suggests that judges, as politicians, are free to take whatever side they choose and the only thing that matters is whose side judges are on.

This politicized approach misleads our fellow citizens about the judiciary and its proper place in our system of government.

America’s founders had a very different view and, I am glad to say, Judge Alito sides with them.

As the Constitution puts it, judges exercise judicial power in the context of cases and controversies. Judges do not make the law they apply. Judges are neither school boards nor inspectors general. Judges are not legislative oversight commissions nor political appointees. Instead, judges settle legal disputes by applying already established law to cases that come before them.

Because that is what they do, it is impossible to properly evaluate judges or judicial nominees the way we evaluate politicians, by the results they can be expected to deliver.

Yet that is exactly what we see in this judicial confirmation process.

To hear some of my Democratic colleagues and their left-wing interest group friends talk, there is absolutely nothing that is not the judiciary’s job. That is ridiculous.

To hear them talk, everything is fair game for judges and the only thing that matters is who wins that game.

America’s founders rejected that view, and Judge Alito should be confirmed because he rejects that view.

I hope we find more qualified men and women who believe there is something, anything, that is not a judge’s job and appoint them to the judiciary right away.

While scorecards are familiar in the political process, they have no place in the judicial process.

Again, I quote Judge Alito: “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.”

Who can disagree with that? Yet, they seem to on the other side.

I hope that my fellow citizens are watching this debate, either live right now or when it is replayed later.

I ask my fellow citizens, do you agree with Judge Alito? Do your expect judges to do justice on an individual basis, to take each case on its own facts and its own merits, and to decide it solely according to the law? Or do you expect a judge to look at a case not as a legal dispute between real parties, but as a political issue, deciding it based on his opinion of the issue, practically before the case even comes before him?

Judge Alito rejects scorecards and tallies, he rejects percentages and patterns, and looks at each case based on its own facts and the law that applies.

I might add that at one time in the proceedings one of the Democratic Senators taunted Judge Alito in favor of labor. We immediately showed a number of cases where he did. You can find rulings by Judge Alito across the spectrum with respect to people who should have won those cases.

Let me read into the record another revolutionary idea. Let me read it.

At his hearing, Judge Alito said that “although the judiciary has a very important role to play, it’s a limited role. . . . Judges don’t have the authority to change the Constitution. . . . The Constitution is an enduring document and the Constitution doesn’t change.”

I let me speak again to my fellow citizens and the others who are watching.

The first three words of the Constitution are “we the people.” The Constitution belongs to the people. It does not belong to judges.

The Constitution is your Constitution—I am speaking to the people out there—already has a specific process for changing it, and the only branch of government involved in that process is this one, the legislative branch, the one you directly elect.

If America’s founders explicitly excluded the judiciary from the process of changing the Constitution, do you think instead that judges should now be able to change the Constitution?

Do you believe that the Constitution, your Constitution, is whatever judges say it is?

It is the Constitution that ultimately protects our rights and liberties.

If the Constitution means whatever judges say it means, then our rights and liberties are whatever judges say they are. They are not elected. They are nominated, appointed and confirmed for life.

If that is what my Democratic colleagues and their left-wing interest group allies mean for the judiciary protects us, then do not sign me up for that protection package.

Our rights and liberties, and particularly the rights and liberties of the minority, are secure only when the Constitution is solid.

Judge Alito is precisely the kind of judge who will protect our rights and liberties because he does not believe that he defines them.

So the case for Judge Alito’s confirmation is overwhelming. He is highly qualified, he is a man of character and integrity, and he understands and is committed to the properly limited role of judges in our system of government.

In the past, this would have been enough for confirmation by a wide bipartisan margin.

Perhaps because this case for confirmation is so strong, Judge Alito’s opponents have tried to host attacks that not only have failed, but have degraded this process along the way.

One is the familiar guilt-by-association tactic, trying to smear Judge Alito by attacking a group of conservative Princeton alumni to which he once belonged. Membership in this group, mind you, was nothing more than a magazine subscription. Imagine if someone tried to attribute to each of you everything published in every magazine or newsletter you receive.

Some Democratic Senators used this very legitimate tactic to try to make Judge Alito, selecting the most salacious or controversial articles which Judge Alito never read. One Senator even tried to
pass a parody of such outrageous views off as the real thing. That is how denigrating this process became.

Our staff spent hours pouring through boxes of documents related to this group and the name Samuel Alito never appeared on a single scrap of paper.

The disinformation was even worse in the media.

The group in question, or at least some of its members, wanted to preserve Princeton’s all-male tradition and opposed affirmative action—in other words, affirmative action.

On January 6, a well-known pundit claimed on the FOX News Channel that Judge Alito himself was personally “trying to keep women and minorities out of Princeton.”

I have been around for a long time, and I have seen a lot of bad journalism, but this goes beyond the pale. This goes beyond spin, beyond any reasonable characterization of the facts. In fact, it is ridiculous.

When I asked what the media characterized as a softball question, sarcastically asking it, are you really against women or minorities in colleges, anybody listening to that had to conclude I was being sarcastic. He said, Of course not.

When I said I thought that is what he thinks, I couldn’t have been more sarcastic. But apparently I am so serious on most matters that people thought I was serious. But it is ridiculous, this guilt by association that went on, even in the committee, in something as important as the Judiciary Committee of the Senate.

Let me address a few of the other arguments by Judge Alito’s opponents. Yesterday, at the Judiciary Committee markup, the Senator from New York, Mr. SCHUMER, tried once again to paint Judge Alito as an out-of-control judge, wantonly disregarding and seeking to disrupt his own court’s past decisions.

The political rhetorical value of the tacit is obvious. If Judge Alito played fast and loose with his present court’s precedent, the story goes he would certainly do so on the Supreme Court.

The problem is that this claim, this picture of Judge Alito as an activist judge out to remake precedent in his own image is patently wrong. It bears no relationship to reality.

At Judge Alito’s hearing, the Senator from New York, Mr. SCHUMER, tried once again to paint Judge Alito as an out-of-control judge, wantonly disregarding and seeking to disrupt his own court’s past decisions.

I have been very proud of him since and proud of him when he went to the Third Circuit Court of Appeals and has been very proud of him since and proud of the scholarship he has written. He knows he has been a good judge and a bad judge, and he has had a world of experience. I got very emotional when I saw him once again.

As I mentioned earlier, some of my Democrat colleagues are particularly fond of scorecards and tallies, thinking that tells anything useful about a judge’s approach to the law. Perhaps they can create something like a confirmation rate card listing the percentage of cases in different categories that he thought he should win. Plaintiffs should win this percentage of employment discrimination, the prosecution is allowed to win this percentage of criminal cases, and so on. Perhaps it can be a list titled “Whose Side Are You Supposed To Be On” as a judge. That is about the way it comes off. Before anyone dismisses this as ridiculous or farfetched, this is exactly what some of my Democrat colleagues and many of their left-wing interest groups have done to Judge Alito.

In his opening statement on January 9, the Senator from Massachusetts, Mr. KENNEDY, cited a so-called study by University of Chicago law professor Cass Sunstein claiming that Judge Alito voted against the individual in 84 percent of his dissents. The Senator from Massachusetts did not quote from Professor Sunstein’s letter that such statistics must be taken with “many grains of salt and with appropriate qualifications,” or Professor Sunstein’s letter that such statistics must be taken with “many grains of salt and with appropriate qualifications.”

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fair shake in [Judge Alito's] courtroom." That is an outrageous claim, one that would not be at all justified even if the supposed evidence behind it were more legitimate.

Let us be honest about this. Saying a pattern of past decisions shows an ideolog- ical bent of litigants will have a hard time getting a fair shake in the future is to accuse Judge Alito of bias.

Before the Senator from Massachusetts or anyone else using this tactic gets away with it, he should prepare himself for the response that he will hear. Alito serves on, but in particular the United States Supreme Court. If Judge Alito puts on a robe, no matter what court they serve on, I came to respect what I think are the most important qualities for anyone who will serve on, and always have been. I am openly and unapologetically pro-life. I am very, very much involved in a number of endeavors that one who is familiar with my record and my opinions will know. In all across the spectrum, who said Judge Alito has never demonstrated any bias toward anybody. I would much rather have their confirmation than any law professors in this country, especially those who would promote the idea that one who is familiar with my record and my opinions should follow Governor Rendell's lead. Finally, Mr. President, I am encouraged that Judge Alito will indeed be confirmed.

As Judge Becker and others have alluded to, it is in conference, after we have had oral argument and are not propped up by law clerks—we are alone as judges discussing the case—that one really gets to know, gets a sense of the thinking of our colleagues. I cannot recall one instance giving conference or doing any other experience that I had with Judge Alito, but in particular during conference discussion, with the clerks, remotely resembling an ideological bent.

He endorsed Judge Alito in no uncertain terms.

Let me close by noting a few things I find encouraging. First, I am encour-aged by the reality that some of the misleading claims about Judge Alito have not persuaded the American people. The leftwing interest groups have thrown everything they have against this nominee. It is shameful the way they act. One of the nominees said at the beginning of this campaign: You name it, we will do it. That is the type of opposition this man has had to endure.

They did it. We have seen millions of dollars spent week after week on petition drives, television ads, rallies, phone banks, and grassroots lobbying. The net result of that barrage of propa-ganda has been that support for Judge Alito has risen by about 10 percent since early December. This is particularly signifi-cant because Judge Alito's opponents have issued all sorts of apocalyptic warnings and predictions. They have cast Judge Alito as a radical extremist, a threat to the environment and individual rights.

The Senator from Vermont has repeatedly said that all by himself, Judge Alito is a threat to the rights and liberties of all Americans literally for generations to come. The critics have said that Judge Alito would give the executive branch a blank check to invade your privacy, strip search children, and tap your phones. According to the critics, if Judge Alito has his way, machine guns will flood our streets, big business will pollute the air and water, and the poor and down trodden will be unable to find justice.

I am pleased to say despite all of this propaganda, as CBS News found, the percentage of Americans having a favor-able impression of Judge Alito has risen 50 percent since the end of October. I am also encouraged that not all Democrat leaders have abandoned rea-sonable, traditional, judicial confirma-tion standards.

Pennsylvania governor Ed Rendell, a past general chairman of the Demo-crat National Committee, yesterday described a confirmation standard that I hope his fellow Democrats would once again embrace. He said that if a nominee is qualified and passes the test of integrity, elec-tions matter and disagreement with some of nominee's positions or deci-sions are not enough to deny the Presi-dent his appointment.

That was the standard that allowed President Clinton to appoint two liberal justices with minimal opposition. Well, the senior Senator from Florida came here not to speak about personalities but to talk about the substance of the issue in front of us.

In the Good Book, the Gospel promises all of us impartiality at judgment. And I would suggest impartiality—or justice for all—is a principle embed-ded deep in our constitutional democracy. I believe in an America where courts address injustice and correct it. I believe in an America where our judges serve the people by interpreting the Constitution, not agenda. I may have no greater responsibility in the Senate than to be charged by our Constitution with advising the President.
on his picks for the U.S. Supreme Court. And in assuming this awesome responsibility, I rise to oppose Judge Alito’s confirmation to the Supreme Court.

Soon, the Supreme Court likely will hear a case about protecting a personal privacy from Government and corporate intrusion and about the sharing of power between Congress and the President. These decisions will have an important effect on each of our lives and on the future of our nation.

In recent years, however, during the holidays, I had numerous townhall meetings all over my State of Florida. The residents shared with me their thoughts about Judge Alito. So I took all of that information, and that is why, then, I carefully studied his record over the past 15 years as a judge on the Third Circuit Court of Appeals.

During his time on the bench, Judge Alito ruled on cases ranging from the rights of individuals to the stewardship of the federal Government. After hearing testimony before the Judiciary Committee, and after studying his judicial record, I am concerned that he, more often than not, ruled in favor of big Government and big corporations over the ordinary American citizen’s trust in an authoritarian type of institution. That is a concern.

Following the hearings, I had the pleasure of personally meeting with Judge Alito to discuss my concerns. It was a very informal and friendly conversation. He seems to be a very nice gentleman. But I explained to him some of my concerns. I explained how a recent Supreme Court decision has frightened many of our constituents who fear their homes can now be seized by the Government to make way for a private developer’s project.

While he expressed sympathy for the parties whose homes had been seized, in this personal meeting with him, he offered no misgivings about the legal reasoning that led to that outcome.

I am concerned about his rulings in other cases putting the Government against individuals, in the area of the environment, workers’ rights, and racial discrimination.

In Public Interest Research Group of New Jersey v. Magnesium Elektron, he, Judge Alito, established high barriers to prevent individuals from being able to sue polluters for violations of the Clean Air Act. The U.S. Supreme Court later rejected this reasoning by a vote of 7 to 2.

In Chittister v. Department of Community and Economic Development, he ruled that State employees could not sue for damages to enforce their rights under the Federal Family and Medical Leave Act. The Supreme Court later reversed this ruling by a vote of 6 to 3. I might say that both of those acts under consideration by the Court I had the privilege of voting for when I was a Member of the House of Representatives.

And then in Riley v. Taylor, he ruled there was no basis for appeal in a death penalty case in which prosecutors had used their preemptory challenges to exclude Black jurors from the jury pool. The full Third Circuit later heard the case and overturned Judge Alito’s ruling.

These cases highlight the broader concerns I have with Judge Alito’s record.

During my years in the Senate, I have voted for almost all of President Bush’s judicial nominees. All told, I have voted for President Bush’s 226 judicial picks, including Chief Justice John Roberts. That is 96 percent.

I greeted Judge Alito’s nomination with an open mind. But his many legal writings, his judicial opinions and evaluations of his judicial philosophy, have convinced me that he would tilt the scales of justice ever so slightly against the average Joe. I do not want that outcome.

And because he is not the voice I believe this Nation needs to replace the retiring Justice Sandra Day O’Connor, who fiercely defended the rights and liberties of all Americans—because of this—I am going to vote no on his confirmation.

I yield the floor.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. REED. Mr. President, before I comment on the nomination, I would like to recognize and thank several people who have been very helpful in preparing my comments: Kara Stein, Justin Florence, and Sharon Rapport.

Mr. President, I also ask unanimous consent to have printed in the Record a series of letters from national organizations with respect to issues of church and state separation and the nomination of Judge Alito.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, DC, January 10, 2006.

Hon. ARLEN SPECTER, Chairman, Committee on the Judiciary, U.S. Senate, Hart Office Building, Washington, DC.

Hon. PATRICK LEAHY, Ranking Member, Committee on the Judiciary, U.S. Senate, Russell Office Building, Washington, DC.

DEAR CHAIRMAN SPECTER AND RANKING MEMBERS LEAHY: Americans United for Separation of Church and State urges you to oppose the confirmation of Judge Alito, Jr. to be Associate Justice of the Supreme Court of the United States. Americans United for Separation of Church and State urges you to oppose the confirmation of Judge Alito to the Supreme Court because his record demonstrates that he would fundamentally alter First Amendment law and would fundamentally undermine some 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 balances the sometimes competing interests of individuals’ freedom of conscience against the government’s interest in secular neutrality. 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 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 Justice O’Connor has recognized, it is vital that our constitutional 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 Constitution and Establishment Clause have protected us from similar travails, while allowing private religious exercise to flourish... Those who would renegotiate the boundaries of church and state must therefore answer a difficult question: Who would we trade a system that has served us so well for one that has served others so poorly?” (McCreey County, Kentucky v. ALCU of Kentucky, 123 S. Ct. 2722, 2746 (O’Connor, J., concurring).

In the Establishment Clause area, replacing Justice O’Connor with Judge Alito’s 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, the public schools. 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 minorities to use the public schools and other public resources 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 minorities, the Senate should concur in 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.

Sincerely,

RIVEREND BARRY W. LYNN, Executive Director.

B'NAI B'RITH INTERNATIONAL,

Hon. PATRICK LEAHY,
U.S. Senate,
Washington, DC.

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 you take hearings on 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. We would be interested 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 or 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.

UNITARIAN UNIVERSALIST ASSOCIATION
OF CONGREGATIONS,

UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS URGES OPPOSITION TO THE NOMINATION OF JUDGE SAMUEL ALITO JR. TO THE UNITED STATES 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 nomination 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 lightly—or frequently. Indeed, it was only in 2001 that we raised a red flag, urging the Senate to reject, or at the very least, confirm with a mere majority vote, Judge Alito's predecessor, Judge John Roberts. The decision to take a position on Judge Samuel Alito Jr. is significantly different, in that he has an extensive judicial record—more than 15 years on the Third 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, 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. Notable cases and patterns are mentioned below.

Police Power: In the case of Doe v. Groody, Judge Alito dissented from a Third Circuit ruling allowing the police to post clearly established constitutional rights. Police had strip-searched a mother and her ten-year-old daughter while executing a search warrant for the search of her husband and their home. Then-Third Circuit Judge Michael Chertoff, now Secretary of Homeland Security, held that the unauthorized consent of the "domestic partner" did not qualify as a "voluntary" consent of the "husband". Alito disagreed, arguing that even if the warrant did not authorize the search, an officer still could have read the warrant as allowing it.

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 creche and menorah) were not unconstitutional when "secular" decorations such as "snowy" trees were subsequently added to the display. While Justice O'Connor has voted to allow secular holiday displays, she has rejected efforts for religious symbols, "includingmounted commandments, to stand alone in public display.

In ACLU of New Jersey v. Blackhorse 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 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 battered women. In Bray v. Marriot Hotels, Alito disputed a ruling by Theodore McKeen—the Circuit's only African American judge—allowing a race discrimination case to go to trial. McKeen said that Alito's position would "immunize an employer from the reach of Title VII if the employer believes that it's 'best' candidate, was the result of conscious racial bias."

Judge Alito has narrowly construed statutes in gender discrimination cases. In Schenck v. R.I. Du Pont De Nemours Co., 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 to win cases. A 2004 that our highest policy-making body approved a resolution 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.

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—endorsed our position, expressing our "strong reservations about Judge Alito's confirmation, saying that it "would threaten protection of the most fundamental rights" that the Reform Movement supports. "This is especially true of 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 http://urj.org.

Liberty is at the core of our Unitarian Universalist faith. Civil liberties are at the heart of our values, and our 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 http://urj.org.
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 any professional or personal competition, we will oppose a nominee in those rare cases in which after consideration of what the nominee has said and written, and his/her historical case can be made that the appointment would threaten protection of the most fundamental rights which our Movement supports based on these criteria. November 9, 2005 we resolved to oppose the nomination of Judge Samuel Alito Jr. to the Supreme Court of the United States.

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 elevation has also taken anti-affirmative action positions beyond the individual nomination; that issue and will have significant implications beyond the individual nomination.

Many of his opinions are 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 on the bench in many areas of great import to the Jewish community reflect 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. 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. This sitting judge has 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, certain evidence of his lack of commitment to Establishment Clause values, in ACLU of New Jersey v. Black Horse Pike Regional Board of Education. Judge Alito’s opinion on this case argued that it was constitutional for a public school district to allow prayer at graduation ceremonies. Later, in a similar case involving application of the Establishment Clause, the judge did not agree. 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 protesting religious liberty for all Americans for two centuries.

A longtime advocate for women’s rights and reproductive choice, the Reform Movement opposes Judge Alito’s views on reproductive rights. During his time as an attorney in the Solicitor General’s office, Judge Alito helped author the Supreme Court’s reinstatement of the opinion in Thornburgh v. American College of Obstetricians and Gynecologists which argued for overruling Roe v. Wade decision. Judge Alito’s views on abortion were also a crucial one on the court in all cases.

In 1985, Senator Patrick Leahy, Ranking Member, Senate Committee on the Judiciary, recognized that 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, committed members of an estimated 1.5 million Reform Jews in 900 congregations across North America urges you to oppose his confirmation. Women of Reform Judaism rarely opposes 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, destroying church and state in schools and in community religious displays. Judge Alito has also taken anti-affirmative action positions regarding the Establishment Clause values, in ACLU of New Jersey 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, certain evidence of his lack of commitment to Establishment Clause values, in ACLU of New Jersey v. Black Horse Pike Regional Board of Education. Judge Alito’s opinion on this case argued that it was constitutional for a public school district to allow prayer at graduation ceremonies. Later, in a similar case involving application of the Establishment Clause, the judge did not agree. 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 protesting religious liberty for all Americans for two centuries.

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stand ready to discuss our concerns with you or your staff in greater detail. Respectfully,

Rabbi Day Vid Saperstein, Director, Religious Action Center of Reform Judaism.

Jane Winik, Chair, Commission on Social Action of Reform Judaism.

National Council of Jewish Women.

November 29, 2005.

Hon. Arlen Specter, Chairman, Senate Judiciary Committee, Hart Senate Office Building, Washington, DC.

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 U.S. 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 that 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 Senate. 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 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 documents and information that the Senate needs to review in order to make an informed decision. Judge Alito must now be forthcoming regarding his judicial philosophy and views on settled legal precedents.

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, NCJW President.

Mr. REED. Mr. President, nearly two centuries ago, Alexis de Tocqueville observed that “there is hardly a political question in the United States which does not sooner or later turn into a judicial one.”

As was the nomination of John Roberts to replace Chief Justice Rehnquist, the nomination of Samuel Alito to replace Associate Justice Sandra Day O’Connor, upon her retirement, is an extremely important moment for our Nation.

The Constitution makes the Senate an active partner, along with the President, in the confirmation of a Supreme Court nominee. Article II, section 2, clause 2 of the Constitution states that “nor shall any person … be appointed to the Supreme Court without the advice and consent of the Senate.” The Senate’s role in the confirmation process places an important democratic check on America’s judiciary.

As a result, this body’s consent is both a constitutional requirement and a democratic obligation. It is in upholding our constitutional duty as Senators to give the President advice and consent on his nominations to Federal courts that I believe we have our greatest opportunity and responsibility to support and defend the Constitution of the United States.

In our consideration of the nomination of Chief Justice Roberts last fall, I stated my test for a nominee to the Supreme Court. It is a simple test, one drawn from the text, the history, and the principles of the Constitution. As I said then, a nominee’s intellectual gifts, experience, judgment, maturity, and temperament are all important. But these alone are not enough.

In addition to a nominee who must not only commit to enforcing the laws, but to doing justice. A nominee must give life and meaning to the great principles of the Constitution: equality before the law, due process, freedom of conscience, individual responsibility, and the expansion of opportunity. It is these principles that ensure full and equal participation in the civic and social life of America for all Americans. A nominee to the Supreme Court must make these constitutional principles resonate in a rapidly changing world.

In my view, Judge Alito has not met this test. In his personal writings from his time in the Reagan Department of Justice, Alito outlined a vision of the Constitution that is narrow, restrictive, and backward-looking on issue after issue. He has pursued this vision through both the clients he has chosen to represent and the causes he has chosen to advocate.

In addition, his opinions on the Third Circuit Court of Appeals have shown the impact of his personal philosophy on his role as a judge. Too many times he has read constitutional clauses and statutes in a narrow and cramped way to protect the Government or big corporations instead of ordinary Americans. In case after case, and in his testimony before the Judiciary Committee, Judge Alito has failed to show a commitment to protecting the spirit of the Constitution.

Indeed, during his hearings, he had a chance to answer questions about his prior writings and rulings in a clear manner. Instead, Judge Alito opted to agree to his own request to answer questions in a manner that would qualify or put in adequate context his prior writings and rulings.

Part of the genius of the Constitution that our Founding Fathers crafted is that it fulfills two functions at once. It is a blueprint for our Nation to govern itself through a system of checks and balances. It is also a charter of the rights and liberties of the American people. I am deeply concerned about Judge Alito’s views in both of these areas. Judge Alito’s record on the Third Circuit shows he has joined or agreed with a movement to undermine the ability of Congress to protect the American people through restrictive interpretations of the Commerce Clause and the 14th amendment. The Supreme Court, in recent years, has shown a newfound interest in protecting Americans than ever before. By narrow 5-to-4 margins, in cases such as United States v. Lopez and United States v. Morrison, the Court has drifted from longstanding Supreme Court precedents to invalidate portions of the Gun-Free School Zones and the Violence Against Women Acts.

Judge Alito would go even further. In his dissent in the case of United States v. Rybar, he advocated striking down Congress’s ban on the transfer and possession of machineguns. Alito’s opinion did not just justify legality in his own Third Circuit but also from five other courts of appeals that had already found the law to be a constitutional expression of Congress’s authority.

Yet Judge Alito argued that he was not convinced by Congress’s findings on the impact of machineguns on interstate commerce. He substituted his own policy preferences in a way that the Third Circuit majority found was, in their words, “counter to the deference that the judiciary owes to its two coordinate branches of government.” Every other circuit has since disagreed with Judge Alito’s views on this case, and the Supreme Court has concurred in these circuit court decisions.

Judge Alito’s divergence from mainstream consensus views on this issue is particularly disturbing because it echoes personal views on congressional authority he has expressed in other contexts. For example, while...
working in the Reagan administration, he argued in a memo that the Truth in Mileage Act of 1986 “violates the principles of freedom” and should be vetoed by the President. This federal law requires a seller to disclose the vehicle’s mileage on the title when ownership is transferred. Congress enacted the law to prohibit odometer tampering and to protect consumers from mileage fraud. Samuel Alito argued that it was the States, and “not the federal government,” that should protect American citizens.

Not only does Judge Alito have an unusually narrow view of the Commerce Clause, it also appears that he would restrict Congress’s ability to pass laws under section 5 of the 14th amendment. This clause states that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” Those provisions include some of our most fundamental constitutional principles, including due process and the equal protection of the law.

Congress has acted under the authority of this clause to protect the rights of women and minorities, to ensure religious freedom, and to guarantee civil rights for the elderly and the disabled. But based upon his writings and rulings, Judge Alito would severely limit the meaning of this clause. In Chisister v. Department of Community and Economic Development, he found the sick leave provisions of the Family and Medical Leave Act to be unconstitutional because he believed that 12 weeks of leave was “out of proportion” to the gender discrimination that Congress wished to remedy. Here again, Judge Alito relied on his own policy preferences to strike down the measured judgment of Congress.

In the case of Nevada Department of Human Resources v. Hibbs, the Supreme Court explicitly upheld the family leave provisions of the act by a 6-to-3 vote. Had Judge Alito not questioned the judgments of Congress, the Hibbs majority, including Justices Rehnquist and O’Connor, found that, in their words:

The [Family Medical Leave Act] is narrowly targeted at the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest.

The possible consequences of this tendency by Judge Alito to second-guess the policy judgments of Congress and to replace them with his own policy preferences are profound. They go beyond any single act of Congress or any single area of policy. As just one example, the Supreme Court will consider a pair of cases on the constitutionality of the Clean Water Act. These cases challenge whether Congress can protect wetlands and tributaries through its commerce clause power. If the Supreme Court, with a recently issued concurrence by Justice Alito, adopts a more restrictive view of the commerce clause and the 14th amendment, it could limit our ability to protect our country’s wetlands, let alone our national interests in area after area.

At the same time that Judge Alito has advocated for a narrower vision of Congress’s constitutional authority, he has argued that the powers of the executive are unlim-

ited. In a 2001 speech to the Federalist Society, Judge Alito stated that since the 1980s, he had believed in the “theory of the unitary executive.” In the Judiciary Committee hearings, Judge Alito denied any connection between the unitary executive theory and the scope of Executive power. But scholars and judges have drawn from this theory to advance expansive views of the executive.

For example, in Hamdi v. Rumsfeld, the Supreme Court reviewed the President’s claim that he could indefinitely detain an American citizen without bringing charges or giving him a day in court to challenge the detention. Eight of the nine Supreme Court Justices rejected the claim, and Justice O’Connor wrote in her plurality opinion that “a state of war is not a blanket check for the President when it comes to the rights of the Nation’s citizens.” In a lone dissenting opinion, Justice Thomas deployed the unitary executive theory to support broad Presidential powers. He wrote that congressional or judicial interference in foreign affairs or national security “destroys the purpose of vesting the primary responsibility in a unitary Executive.” In view of the long scope of American constitutional history, the unitary executive theory is a relatively recent invention. It was a creation of the Reagan Justice Department in the 1980s. And according to his speeches, Judge Alito has subscribed to it since working there. While he worked in the Reagan administration, Judge Alito proposed a particular idea to, in his words, “increase the power of the Execu-

tive to shape the law.”

In a 1986 memorandum, Alito argued that the President should issue statements when signing a bill because the President’s “understanding of the bill should be just as important as that of Congress.” The administration has followed Judge Alito’s 1986 advice. For example, just recently, the President issued a signing statement regarding the McCain amendment which prohibits a statement. The President wrote that he would construe the McCain amendment “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch.”

The practice Judge Alito first advocated in the mid-1980s arguably helps the executive to thwart the will of Congress when it passes a law. While the current Supreme Court has not given weight to these signing statements in interpreting the meanings of acts of Con-
ger

gress, Judge Alito would view these Presidential statements should they come before him on the Supreme Court.

I think Judge Alito’s view of the unitary executive is wrong and violates the text and the spirit of the Constitution. In Federalist Paper No. 47, James Madison explained how the Constitution deliberately divided power among the branches of Government. Rather than create a unitary executive, the Framers created a careful and thought-
ful system of checks and balances be-
tween all three branches of Government. They were very weary of concen-
trating too much power in any one branch of Government. As the McCain amendment demonstrates, Congress plays a vital role in placing limitations on Executive power, but so do most of the courts.

In the near future, the Supreme Court will hear further cases in this area. Perhaps the President’s claimed authority to conduct warrantless surveil-

lance of Americans in violation of other laws is a matter that will come before the Court. In this time of crisis in particular, we need to have Supreme Court Justices committed to the balance and separation of powers between the three branches of Government. If Judge Alito’s statements that no one is above or beneath the law, Judge Alito’s record and views on the unitary executive give me pause. If Judge Alito believes that under the Constitution the President can determine which laws apply to him and how they apply, then he is essentially giving away the power of the Supreme Court as well as the power of Congress.

Ever since Marbury v. Madison, it has been “emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of ne-

cessity expound and interpret that rule. If two laws conflict with each other, the court must decide on the operation of each.” That settled doc-

trine, Marbury v. Madison, clashes with this notion of a unitary executive who can declare the law for himself and thus make himself exempt from the law.

Judge Alito’s support for a powerful and unitary executive is exacerbated by his 15-year circuit court record of repeatedly deferring to government officials when American’s civil rights and liberties lie in the balance. As I mentioned earlier, this is the other function the Founding Fathers created for the Constitution. The Framers included the fourth amendment in the Bill of Rights to protect Americans against unreasonable government searches and seizures. It was a response to the abuses of the British in the years leading up to the American Revo-

lution. Yet time and again, Judge Alito has deferred to police, prosecutors, and other governmental agents instead of ordinary Americans.

Judge Alito wrote in his now famous 1985 job application essay that he disagreed with the Warren Court’s crimi-

nal procedures decisions. These include famous cases in the development of American liberties—for example, Mi-

randa v. Arizona, which sets forth,
rights for the accused; or Katz v. the United States, which prohibited warrantless electronic surveillance; or Gideon v. Wainwright, which guaranteed every American the right to a lawyer. There is little doubt that Judge Alito personally cares in this area, as he has said publicly.

As Professor Goodwin Liu testified before the Judiciary Committee, in fourth amendment cases, Judge Alito has not one time taken a position more protective of individual rights than his colleagues on the Third Circuit. These include cases where there were defective warrants, where agents conducted warrantless electronic surveillance, or where police used excessive force against unarmed individuals. Indeed, the Washington Post found that Judge Alito had sided with the government in these cases over 90 percent of the time, whereas other appeals court justices nationwide only sided with the government 54 percent of the time. In the face of general principles favoring the jury's autonomy, and rights of individual Americans have carried less weight for Judge Alito.

As just one example, his dissent in the 2004 case of Doe v. Groody would have afforded a search of a mother and her 10-year-old daughter even though they were not named in the search warrant for the house. Judge Michael Chertoff, who wrote the majority opinion in the case and who is now the Homeland Security Advisor, said that Judge Alito’s opinion of the case, if adopted, could “transform the judicial officer into little more than the cliche ‘rubber stamp.’”

Judge Chertoff’s quote is an apt summation of my concern over the nomination of Judge Alito. American courts cannot become a rubberstamp blotting out the constitutional rights of our citizens. But from women’s rights to workers’ rights and reproductive freedom to disability rights, when the judiciary’s writings and rulings reveal insensitivity to the judiciary’s role in protecting the charter of freedoms enshrined in our Constitution.

The first amendment protects Americans’ religious liberties through two clauses that work in tandem: the free exercise clause and the establishment clause. I worry that if confirmed, Judge Alito would upset the careful balance the Founders sought in constructing the amendment. Judge Alito seems to interpret the establishment clause as a rarely applicable part of the first amendment. He applies the free exercise clause in a much broader basis, often interpreting establishment clause cases as free exercise cases. He seems to see a plaintiff’s complaint of establishment clause violations as attempts to block the free exercise of religion.

Judge Alito’s views appear to have been developed well over 20 years ago on these issues. In his 1985 job application essay, Judge Alito wrote that he disagreed with the Warren Court’s establishment clause decisions. These rulings prohibited government-sponsored prayer in public schools, protected students who are members of minority religious faiths, and prevented State interference with and entanglement in America’s religious liberties.

Judge Alito’s record on the bench supports a troubling view of the establishment clause. For example, he joined a dissenting opinion in the case of ACLU of New Jersey v. Black Horse Pike Regional Board of Education, supporting a student-led prayer at official, school-sponsored high school graduation ceremonies. The Supreme Court, in an opinion joined by Justice O’Connor, has since explicitly rejected this approach in Santa Fe Independent School District v. Doe and as recently as last year has sought a careful balance in establishment clause cases such as ACLU v. McCree County.

In summary, in ACLU of New Jersey v. Black Horse Pike Regional Board of Education, a majority of the Third Circuit majority determined that a student-led prayer at a graduation ceremony violated the establishment clause.

Judge Alito joined the dissent in arguing that the establishment clause was meant to protect students from a school-sponsored prayer. The school board involved had decided to allow graduating students to vote whether they wished to have a prayer, a moment of silence, or neither at their graduation ceremony. The Supreme Court, in O’Connor’s Wallace v. Jaffree and Board of Education v. Barnette, the Third Circuit majority said: An impermissible practice cannot be transformed into a constitutionally acceptable one by putting a democratic process to an improper use.

Judge Alito joined the dissenting opinion written by Judge Mansmann, stating that “the establishment clause should not be read to prohibit activity which the free exercise clause protects.” The dissent argued that the Supreme Court in Lee had not decided any broad constitutional precedents against prayer at graduation ceremonies, stating the facts in the case were wholly different, as the graduates, not the principal, maintained control over the ceremony, thereby avoiding the appearance of a state actor. The dissenters wrote: The establishment clause should not be used for imposing content-based restrictions on religious speech in a public forum under the appropriate scrutiny analysis.

The dissent further criticized the Lemon test established in Lemon v. Kurtzman, pointing to a “division” existing on the Supreme Court “as to whether the establishment clause precludes the government from conveying a message that endorses or encourages religion in a generic sense, or especially acknowledges or accommodates the broad Judeo-Christian heritage of our civil and social order.” It also concluded: [An] absolute prohibition on ceremonial prayer at graduation would violate the Free Exercise Clause by unduly inhibiting the practice of religion, and would also implicate the free speech guarantees of the First Amendment.

In another case, Child Evangelism Fellowship v. Stafford Township School District, Judge Alito wrote an opinion requiring a school to distribute a proselytizing religious group’s literature to elementary school students under the Equal Access Act. Justice Alito dismissed the school district’s concerns that students would perceive distribution of the religious fliers as endorsement of religion. Again, Judge Alito’s view in this area of the law differed from that of the Supreme Court. Justice O’Connor’s opinion in Board of Education v. Murzas, for example, carefully distinguished between requiring access to school facilities—which was acceptable under the Equal Access Act—and requiring the active involvement of school officials to distribute, which could claim an inappropriately coercive effect.

Although I could discuss more cases, the basic point I want to make here is that I believe Judge Alito would upset the careful balance between the Free Exercise and Establishment Clauses of the First Amendment, allowing majority religious views to prevail over minority views, and leading to an inappropriate Government coercive effect on religious practice.

As Justice O’Connor states in McCready: At a time when we see around the world the violent consequences of the assumption of religious authority by government, American courts should temper our regard for the constitutional boundaries that have protected us from similar trivilas, 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 us so poorly? I believe Judge Alito would make that trade. Consider another area. The Federal Courts play an important role in enforcing American workers’ access to fair and safe working conditions, while protecting their right to organize, and providing a forum for remedying wrongful discrimination. Yet, as a judge, Alito has consistently tried to limit the reach of Congress’ workplace statutes, and to make it more difficult for employees to bring their grievances. For example, in RNS Services v. Secretary of Labor, the Third Circuit majority found that the Mine Safety and Health Review Commission had jurisdiction over the workers’ safety conditions of employees at coal processing sites. But Judge Alito disagreed, siding with the employer by interpreting the statute and case law restrictively. One academic study has found that Judge Alito has sided with the employee or union in only 5 out of 35 labor opinions he has decided. These are cases where he has real world effects on working people, as the recent mining accidents in West Virginia demonstrate all too clearly.
As far as a woman’s right-to-choose is concerned, in his 1985 job application, Samuel Alito wrote that he was proud of his work in the Reagan administration advancing a “legal position” that he “personally believe[d] very strongly” was that “the Constitution does not protect the right to an abortion.” Let me make clear, he did not say that he thought abortion was wrong; he wrote that the Constitution did not protect a woman’s right to choose. This is a view that he advanced as a lawyer and then a circuit judge, and that he did nothing to dispel in his Judiciary Committee hearings.

In his work for the Reagan Justice Department, Alito wrote a memo with a strategy for “bringing about the eventual overruling of Roe v. Wade” by chipping away gradually at privacy and reproductive rights. In the case of Planned Parenthood of Southeastern Pennsylvania v. Casey, Judge Alito used his dissent to argue for a constitutional interpretation that would do what he had hoped for. In Pennsylvania v. Casey, Judge Alito sided with the BIA in 7 out of 9 opinions he has written on asylum, and in 7 out of 8 other immigration opinions he has authored. I believe that the spirit of our laws and the history of our country require that immigrants to our shores are assured fair and full hearings.

In an application to the Reagan Justice Department in 1985, Samuel Alito wrote that his interest in constitutional law had been “motivated in large part by disagreement with Warren Court decisions” about voting rights and employment, in cases like Baker v. Carr and Reynolds v. Sims, have enshrined the bedrock principle of “one person, one vote” into our Constitution. They have protected the right of all Americans to have an equal share in our democracy, regardless of the color of their skin or the location of their home.

While Judge Alito backed away from these strong statements in his confirmation hearings, his opinion in a voting rights case he heard on the Third Circuit calls that statement into question. In the case of Jenkins v. Manning, Judge Alito joined an opinion rejecting the African-American plaintiffs’ challenge to the voting system of the city of Milwaukee, on the ground that Judge Alito would have accepted. Judge Alito’s record in this area is long and clear, and I am disappointed that rather than openly answer the questions of Senators on the Judiciary Committee, he responded with obfuscating statements about the judicial process.

The Supreme Court has been a leader in safeguarding all kinds of civil rights, through momentous cases like Brown v. Board of Education, and through its application of historic laws of Congress like the Civil Rights Act of 1964. Victims of racial, gender, age, or disability discrimination can find remedies in the Federal Courts. But from my reading of the record, Judge Alito has repeatedly used procedural and evidentiary requirements to make it more difficult for plaintiffs to vindicate their civil rights claims. One study of discrimination cases heard by Judge Alito in which the panel was divided concluded that he sided against civil rights protections 85 percent of the time, more than any other judge on the Third Circuit.

For example, in the case of Bray v. Marriott Hotels, the Third Circuit said that an African-American woman denied a promotion in favor of a white woman, when the company had not followed its policy, should have a chance to present her case before a jury. Judge Alito disagreed, saying that this would “allow disgruntled employees to impose the costs of trials on employers.” As the majority in the case noted, under Judge Alito’s view Title VII “would be eviscerated.” I know Judge Alito spoke in the hearing about his own family’s history as immigrants to the United States. America’s courts have played a crucial role in reviewing the immigration, deportation, and asylum decisions of the Federal Government and the Board of Immigration Appeals (BIA). As the noted conservative Judge Posner recently wrote, his appellate court reversed the Board of Immigration Appeals “in 1 out of 6 cases” last year, mitigating the at-times harsh, unequal, and unfair application of our immigration laws. In the hearings, Judge Alito said he agreed that the way BIA cases are handled “leaves an enormous amount to be desired.” Yet immigrants who have appealed these decisions have found no place of refuge in Judge Alito’s courtroom. According to one academic study, Judge Alito sided with the BIA in 7 out of 9 opinions he has written on asylum, and in 7 out of 8 other immigration opinions he has authored. I believe that the spirit of our laws and the history of our country require that immigrants to our shores are assured fair and full hearings.

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At the hearings before the Judiciary Committee, Judge Alito attempted to distance himself from his record and the constitutional views he has advocated throughout his career. An attorney must vigorously serve the interests of his client, but in the case of Judge Alito, he has拿出 his political offices. Republican Justice Department—precisely because of the constitutional agenda it allowed him to advance. So, I do not accept Judge Alito’s plea that we should not evaluate him based on the constitutional values he advanced through political positions.

I also have not been convinced by Judge Alito’s vague rhetoric during the hearings about the judicial process, or his begrudging acknowledgment that important Supreme Court cases were indeed “precedents of the Court.” While judges on the Federal circuit courts are circumscribed by Supreme Court precedent, judges on the Supreme Court have no higher court to bind the Justices of the United States Supreme Court. Decisions of the Supreme Court are binding on all lower courts, so even if a circuit judge disagrees with well-established precedent about the rule of law, he or she must follow that law. But this is not true of the Supreme Court.

As Justice Frankfurter once wrote: “It is because the Supreme Court wields the power that it wields that appointment to the bench is a matter of public concern and not merely a question for the profession. In truth, the Supreme Court is the Constitution.

It goes without saying that the constitutional views of the Justices determine the rulings of the Supreme Court. In response to questioning during the hearings, Judge Alito pledged to put aside his personal views. But in his writings and speeches, including his 1985 job application, Judge Alito didn’t just record his personal political views; he wrote down his views about what the Constitution means—about what rights it contains, and what limits it places on Governments. This is exactly what it means to serve on the Supreme Court and interpret the Constitution.

America’s courtrooms are staffed with judges, not machines, because justice requires human judgments. This is particularly so on the Supreme Court. Of all the hundreds of thousands of cases filed in American Federal Courts each year, only about 80 reach the Supreme Court. The vast majority of cases, cases that have divided the country’s lower courts. These are cases where one constitutional clause may be in conflict with another; where one statute may influence the interpretation of another; and where one core national value may interfere with another. These cases often divide the Justices of the Court by close margins. Surely the Justices on both sides of a 5 to 4 case can claim to be following the judicial process and respecting the precedents of the Court. What divides their opinions is the set of constitutional values that they bring to the case. Judge Alito’s testimony before the Judiciary Committee suggests a failure either to understand or to acknowledge the impact of his own constitutional views on the outcome of cases that he hears.

Given his lengthy record and his ex post facto statements about the Constitution means, the burden was on Judge Alito to convince the Senate he would be a judicious and balanced member of the Supreme Court.
The questions he was asked by members of the Judiciary Committee gave him numerous opportunities to do so. Judge Alito did not meet this burden. He failed to inform this body of his views on important constitutional issues, he evaded fair and important questions, he failed to offer honest and insightful answers, and he in no way demonstrated that he would uphold the letter of the law, but also its spirit.

As a result, I cannot support his lifetime nomination to the highest court in America.

I yield the floor.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Mrs. MURRAY. Mr. President, I rise this evening to discuss my vote on the confirmation of Judge Samuel Alito, Jr., to the U.S. Supreme Court. After meeting with Judge Alito and studying his record and comparing his answers to my criteria for judicial nominees, I have decided to vote against confirming Judge Samuel Alito, Jr., as an Associate Justice of the U.S. Supreme Court.

The next Justice will have the power to change the Court, change the country, and define the rights of future generations. Judge Alito has a very troubling record. In his hearing and in our private meeting he did not show that he will be an independent judge who will uphold the rights and liberties of all Americans. With our rights and freedoms on the line, I will not take a chance on Judge Alito because I have serious questions about his independence and his commitment to protecting our rights and our liberties.

As with past nominees, I have evaluated this nominee based on my long-standing criteria, which ask: Is the nominee qualified, ethical, and honest? Will the nominee be fair, evenhanded, and independent? And will the nominee uphold the rights and liberties of all Americans?

Personally, I got involved in politics because of another Supreme Court nomination, that of Clarence Thomas. At the time, I was frustrated that average Americans didn't have a voice in the process that affects them so much. They were disenfranchised and the current administration is pushing the bounds of governmental power in remarkable ways. The Bush administration has arrested U.S. citizens and held them without access to the courts. It has run secret prisons around the world. It has expressed views on torture that put our own troops at risk. As we recently learned, the administration has been spying on American citizens without prior authorization. These are grave issues which will likely come before the Supreme Court. How that Court rules will affect the rights of our citizens, the balance of power between the branches of our Government, and the balance of power between our citizens and Government.

So as I make my decision on this nominee, I am very mindful of the historic times we are living in and the serious questions this Supreme Court will address in the years to come.

Secondly, I am very mindful of the seat that is open on the Supreme Court and its significance. Justice Sandra Day O'Connor was a pioneer in the field of law, and her decisions will shape the lives of the American people for generations to come.

As I said when she announced her resignation, we live in a better America due to her 24 years of service on the Court. Justice O'Connor was often a swing vote on critical decisions. Her successor could easily change the balance of power on the Court, which could dramatically shift the Court's ruling on so many issues. Because this is a swing seat that could tip the Court's balance of power, we need to make sure that the person we confirm is someone who will protect our rights and liberties.

Some have suggested that I should just go along and support the President's nominee. That is not the way I make decisions. I have criteria that I use to evaluate all judicial nominees, and Judge Alito is no different.

Third, I am also well aware of how Judge Alito came to be the President's nominee. The President, as we all remember, had nominated his counsel, Harriet Miers, to the High Court, but Ms. Miers was not acceptable to the rightwing of the President's party. I found it very interesting that before her nomination, Republicans were demanding a conservative here at home, and the current administration is pushing the bounds of governmental power in remarkable ways.

The Bush administration has arrested U.S. citizens and held them without access to the courts. It has run secret prisons around the world. It has expressed views on torture that put our own troops at risk. As we recently learned, the administration has been spying on American citizens without prior authorization. These are grave issues which will likely come before the Supreme Court. How that Court rules will affect the rights of our citizens, the balance of power between the branches of our Government, and the balance of power between our citizens and Government.

As I noted earlier, my standards are simple: Is the nominee qualified, ethical, and honest? Will the nominee be fair and evenhanded and independent? And will the nominee uphold the rights and liberties of all Americans?

I am very comfortable that Judge Alito is qualified, he is honest, and he is ethical. But whether he will be fair and evenhanded and independent? As I said when she announced her resignation, we live in a better America due to her 24 years of service on the Court. Justice O'Connor was often a swing vote on critical decisions. Her successor could easily change the balance of power on the Court, which could dramatically shift the Court's ruling on so many issues. Because this is a swing seat that could tip the Court's balance of power, we need to make sure that the person we confirm is someone who will protect our rights and liberties.

I have serious doubts that Judge Alito will uphold our rights and liberties. One example is his hostility to change the Court, change the country, and define the rights of future generations.
to the right of privacy. In the hearings, he refused to say that Roe v. Wade is settled law, and he did not adequately explain his 1985 statement that the Constitution does not protect a right to an abortion.

Later, when I voted to confirm, yes, Chief Justice John Roberts, I said I was choosing hope instead of fear and that Judge Roberts, through his answers, inspired such hope. Judge Alito, through his writings, his rulings, and his manner, does not inspire confidence in me that he will protect all our rights. Because so much is on the line, because I do not believe he will be sufficiently independent or will uphold our rights and liberties, I will respectfully vote against his confirmation to the U.S. Supreme Court.

Mr. President, I ask unanimous consent to print in the RECORD a letter from teachers around the country who have opposed this nomination.

The projection, the material was ordered to be printed in the RECORD, as follows:

SOCIETY OF AMERICAN LAW TEACHERS, January 9, 2006.

Re The Society of American Law Teachers’ Opposition to the Nomination of Judge Samuel Alito to the United States Supreme Court.

Hon. AARON SPECTER,
Chair, Committee on the Judiciary, U.S. Senate, Washington, DC.

Hon. PATRICK LEAHY,
Ranking Minority Member, Committee on the Judiciary, U.S. Senate.

DEAR SENATORS SPECTER AND LEAHY: The Society of American Law Teachers (SALT) opposes—and urges all members of the Senate Judiciary Committee to vote against—the nomination of Judge Samuel Alito to the United States Supreme Court. SALT is the largest organization of law professors in the United States, representing more than 900 professors at more than 160 law schools.

SALT has taken a position opposing only a very few judicial nominations. It did not oppose the nominations of Justices Roberts or Harriet Miers. However, it is deeply committed to civil rights, individual rights and liberties, and an interpretation of federalism that protects and preserves these rights. Judge Alito’s work in the United States Department of Justice and fifteen year record on the United States Court of Appeals for the Third Circuit evidence his disregard for all three. Replacing Justice Sandra Day O’Connor with Judge Alito will result in the Court shifting profoundly to the right.

A Knight-Ridder comprehensive review of published opinions written by Judge Alito concludes he has worked to devise a conservative legal agenda in the fabric of the nation’s laws . . . [His] record reveals decisions so consistent that the very results do matter to him . . . [He] rarely supports individual rights claims . . . [and] often goes out of his way to narrow the scope of individual rights.

While Judge Alito’s opinions are devoid of explosive language and appear to reflect a dispassionate application of law to facts, he has used legal craftsmanship and existing precedents to create an agenda that results in the protection of rights . . . A judge’s values, beliefs and experiences do matter. Judge Alito has undermined the protections of civil rights laws, devalued individual rights, overturned or weakened federal statutes, and narrowly reinterpreted precedent in the name of dispassionate application of the law.

UNDERMINING CIVIL RIGHTS PROTECTIONS

EMPLOYMENT DISCRIMINATION

Judge Alito has engaged in an effort to eviscerate the laws that seek to remedy violations of federal civil rights. This effort can be seen in his published opinions on employment discrimination cases and has sided with the plaintiff only four times, which includes one case in which he sided with white police officers challenging an affirmative action policy. He has evinced deep skepticism about the legitimacy of most discrimination claims and an unvarnished belief that discrimination is rare in our society.

In three cases in which Judge Alito would have dismissed claims of harassment, he displayed a lack of understanding of the dynamics of harassment and hostile environment discrimination and their impact on a victim’s workplace environment and psychological well-being. In one case, writing for the court, he reversed a report of a workplace harassment and sent the case back for trial. The majority held that a plaintiff would survive summary judgment if she made her prima facie case and presented evidence to rebut the employer’s evidence. Judge Alito would have disregarded the evidence in plaintiff’s prima facie case if the employer presented evidence of a non-discriminatory reason for its action and would have required additional evidence of discrimination. Judge Alito’s approach interpreted a Supreme Court case, St. Mary’s Honor Society v. Hicks, regarding litigants’ shifting evidentiary burdens in Title VII cases. The majority’s interpretation of Hicks was reaffirmed by the Supreme Court in Sanderson Plumbing Products, Inc. Although the dispute in Sheridan appears to be highly technical, it is central to whether victims of discrimination will have their day in court.

In another discrimination case in which Judge Alito dissented from the reversal of a grant of summary judgment, the majority said, “Title VII would be eviscerated if our analysis were to halt where the dissent suggests.” An African American woman was denied promotion and alleged racial discrimination. The issue was whether the employer’s evaluation of a female employee’s qualifications was objective. The majority accused Judge Alito of overstepping his judicial role and acting as a fact finder in resolving the conflicting evidence in favor of the employer. Judge Alito’s hostility toward some employment discrimination cases was reflected in his dissent:

“I have no doubt that in the future we are going to get many more cases where an employer is choosing between competing candidates of roughly equal qualifications and the candidate who is not hired or promoted claims discrimination. I also have little doubt that most plaintiffs will be able to use the discovery process to create incoherencies in terms of the employer’s having failed to follow its internal procedures to the letter. We are allowing disgruntled employees to impose the costs of trial on employers who, although they have not acted with the intent to discriminate, may have treated their employees unfairly. Together, these cases reflect a palpable hostility toward plaintiffs in employment discrimination cases.

DISCRIMINATION IN JURY SELECTION

Judge Alito has written troubling opinions in which he has penalized defendant challenges jury selection as reflecting discrimination. The cases are troubling for three reasons. First, they reflect a general hostility toward civil rights. Second, they suggest that Judge Alito is among the most conservative judges when it comes to the death penalty (whereas Justice O’Connor was frequently the swing vote in capital cases).

Third, one of the cases reflects Judge Alito’s hostility to the use of statistics to prove discrimination. This hostility is most troubling because the statistics are an important element of proof in creating an inference of discrimination or a discriminatory impact.
While picking a grand jury in Rameau v. Beyer, the judge announced that he was not randomly selecting jurors because he was trying to pick a cross section of the community. He has presided over numerous trials, including at least two African-Americans, to sit separately in the body of the courtroom. An en banc divided Third Circuit ruled against Judge Alito on a constitutional question regarding jury selection.

In Riley v. Taylor, the defendant was convicted of felony murder and sentenced to death. Eventually he filed a motion in federal court challenging his conviction on numerous grounds, arguing that peremptory challenges were used impermissibly to strike jurors based on race. The full Court reversed his conviction, in part based on a violation of his Sixth Amendment rights with respect to peremptory challenges. Judge Alito filed a dissenting opinion. Ramsey presented evidence that all three of the potential Black jurors on his trial and his prosecutors struck every potential Black juror in all four murder trials held the same year in Delaware County. Judge Alito completely discounted the statistical evidence, writing that inferring discrimination was no more reasonable than attempting to explain why a discrete pattern of recent events was left handed. As the majority noted, the analogy ignored the underlying constitutional right and “minimize[d] the history of discrimination, prospective discrimination, jurors and black defendants.” Because of this history of discrimination, courts have consistently held that, barring another explanation by the defendant, statistics can aid in proving discrimination. Judge Alito’s approach would completely discount reliance on statistics to help prove discrimination and would reverse years of judicial decisions in discrimination cases.

ENDANGERING CORE LEGAL RIGHTS FOR WOMEN

In cases raising issues of gender discrimination, Judge Alito has written troubling decisions in which he appears to accept traditional notions of the subservient role of women in society and to deny the separate rights of women to control their own destiny.

Judge Alito’s record, both prior to and subsequent to his appointment, reflects clearly that he does not support the constitutional right to choose and that his elevation to the Supreme Court would endanger this fundamental right and this most fundamental of rights.

In his Fourth Amendment opinion, Judge Alito was a member of a panel that held that evidence obtained by the police did not name or refer to his client. In Groody, where he voted to approve the strip search of a mother and her ten-year-old daughter, even though the search warrant obtained by the police did not name or refer to the children, Judge Alito held that the broad search was justifiable. In Chittister v. Department of Community and Economic Development involving a state employee who sued for damages for violation of victims of harassment. Even in cases involving sexual harassment and its detrimental impact on victims of harassment, Judge Alito has consistently deferred to state courts, police, and prosecutors. In particular, he has written that the majority’s theory would lead to the conclusion that Congress may ban purely intrastate possession of just about anything. He has suggested that the ban on interstate commerce is significant in federalism.

In Planned Parenthood v. Casey, Judge Alito’s opinion is a hallmark of judicial activism that he has sat on at least one panel of the Third Circuit. Judge Alito wrote a separate opinion rejecting by the majority and subsequently rejected by the Supreme Court in Planned Parenthood v. Casey, Judge Alito’s opinion that a woman notify her husband before having an abortion. He discounted the liberty and bodily integrity of the woman while showing no concern for the rights of the husband. Judge Alito’s view that the spousal notification provision in the law caused no undue burden to women suggests that he believes a woman loses her autonomy rights when she marries. Even in two cases concerning abortion rights protections which had previously been struck down by the Supreme Court and in which there had been no precedent, Judge Alito wrote narrow concurring opinions to insure that there was no language that might support the upholding of Roe or inhibit the ability to further narrow the right to choose.

Just as Judge Alito has denied the liberty rights of women to control their bodies, his decision striking down the Family and Medical Leave Act demonstrates that he has no understanding of the distinctive burdens women face in juggling work and family. In In re Application of the United States for an Order andoola's wills peremptory challenges. Judge Alito filed a dissenting opinion. Ramsey presented evidence that all three of the potential Black jurors on his trial and his prosecutors struck every potential Black juror in all four murder trials held the same year in Delaware County. Judge Alito completely discounted the statistical evidence, writing that inferring discrimination was no more reasonable than attempting to explain why a discrete pattern of recent events was left handed. As the majority noted, the analogy ignored the underlying constitutional right and “minimize[d] the history of discrimination, prospective discrimination, jurors and black defendants.” Because of this history of discrimination, courts have consistently held that, barring another explanation by the defendant, statistics can aid in proving discrimination. Judge Alito’s approach would completely discount reliance on statistics to help prove discrimination and would reverse years of judicial decisions in discrimination cases.

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to make any findings that state statutes had discriminated against women. The preamble to the statute explicitly states that the purpose of the Act is to remedy sex discrimination. As a result of a long history of litigation striking down state statutes disadvantageous women in the workplace. Nevertheless, Judge Alito would require Congress to engage in a precise factual inquiry directed at the FMLA. In a similar challenge, Nevada Department of Human Resources v. Hibbs the Supreme Court later held that state employees can enforce their right to damages pursuant to a violation of another provision of the FMLA.

ADVOCATING AN EXPANSIVE SCOPE OF EXECUTIVE POWER

Since the Nixon Administration, the country has witnessed a legal battle concerning the scope of presidential authority under our Constitution. The present administration advances an extreme, expansionist theory of the scope of presidential power, both foreign and domestic. The theoretical underpinnings for the concept of the "imperial presidency" have been developed by writings of the Federalist Society. Judge Alito's 1985 application to serve as Deputy Assistant Attorney General of Legal Counsel (OLC) boasts of his regular participation in the Federalist Society, an involvement which continues to this day. OLC, during his tenure, consistently advocated for an expansive presidential power. For example, OLC opined that the executive branch could ignore congressionally authorized procedures for federal procurement and determined that the President had constitutionally unfettered authority to determine when to tell Congress of his covert initiative with regard to Iranian arms sales—even though the power to regulate foreign trade is an express congressional authority.

In other memoranda which Judge Alito wrote while at the Justice Department, he argued in favor of expanded government authority to intercept computer messages and broaden authority for government agents to set up shell companies to help with undercover operations. He also told the FBI that it was not bound by two district court decisions restricting the Bureau's power to investigate employees whose jobs were not critical to national security.

During his years on the bench, Judge Alito has been an ardent advocate for the expansion of executive authority, particularly in the area of criminal law, and has gone out of his way to place limitations on Congress's legislative authority. The case that spawned (1) unprecedented claims of executive privilege, (2) claims of authority to engage in torture, (3) claims to hold U.S. citizens indefinitely as enemy combatants and foreign nationals as enemy combatants in Guantanamo Bay without any right of review of that designation, and now (4) an apparent pattern of flagrant violations of the Foreign Intelligence Surveillance Act by sanctioning domestic wiretapping without obtaining a warrant.

A LARGER CONCLUSION

With the retirement of Justice O'Connor, the direction of the Court stands in the balance. Judge Alito's record demonstrates that he would shift the court radically rightward. His view of the separation and independence of powers would dangerously expand the power of the executive and the states; shrink the power of Congress to protect the health, safety, and welfare of this nation's citizens; and diminish the role of the courts in guarding against discrimination and undue government intrusion into individual rights. Justice Alito's record shows an alarming detachment from real life and real people. His opinions are a historical and reflect a lack of empathy for or appreciation of the human condition and the role of courts in protecting the rights of minorities. We urge you to reject the nomination of Judge Alito to the Supreme Court.

Sincerely,
EILEEN KAUFRMAN,
Chairman

TAYYAB MAHMUD,
Chairman

Mrs. MURRAY, Mr. President, I yield the floor.
Mr. HATCH. Mr. President, today on this floor the distinguished Senator from Vermont accused me of misrepresenting him when I earlier characterized comments he has made about the nomination of Samuel Alito to the Supreme Court. He would not yield to me at that time, and I want to set the record straight.

This is how I characterized the Senator from Vermont's previous comments: "The Senator from Vermont, Senator LEAHY, has repeatedly said that, all by himself, Judge Alito is a threat to the rights and liberties of all Americans literally for generations to come."

The Senator from Vermont reacted by saying that I was not even "within the ballpark of accuracy."

This reaction is particularly perplexing because the latest example of the Senator from Vermont making such a statement had occurred just hours before.

This time, I will be careful to quote, rather than characterize, what he said. In his opening remarks today on the Alito nomination, the Senator from Vermont said: "This is a nomination that I fear threatens the fundamental rights and liberties of all Americans, now and for generations to come."

That language is simply cut and pasted from the statement as it appears on the Senator from Vermont's Web site. The Senator from Vermont made the exact statement yesterday, during the judicial business meeting at which we considered the Alito nomination. He said: "This is a nomination that I fear threatens the fundamental rights and liberties of all Americans now and in generations to come."

I was not only in the ball park, I was standing on home plate.

The PRESIDING OFFICER. The Senator from Colorado is recognized.
Mr. ALLARD. Mr. President, my time to speak is not until 6:15. Since there is nobody else in the Chamber, I will proceed to speak on the nomination of Judge Samuel Alito to the U.S. Supreme Court.

The PRESIDING OFFICER. Without objection, it is so ordered.
Mr. ALLARD. Mr. President, I rise today in support of Judge Samuel Alito, President Bush's nominee as Associate Justice to the U.S. Supreme Court.

Judge Alito has the experience, intellect, temperament, and integrity required of a Supreme Court Justice. He has more judicial experience than any Supreme Court nominee in 70 years. In his 15 years on the U.S. Court of Appeals for the Third Circuit, Judge Alito participated in over 1,500 cases and authored more than 350 opinions. Prior to becoming a Federal appellate judge, Judge Alito established a record as a tough Federal prosecutor while serving as the chief legal officer for the District of New Jersey.

As the State's top Federal law enforcement official, Judge Alito oversaw the prosecutions of drug traffickers, terrorists, and organized crime figures. He also cracked down on perpetrators of environmental crimes, creating a new position of Environmental Crimes Coordinator.

Prior to being unanimously confirmed twice by the U.S. Senate, Judge Alito proved himself to be an effective advocate on behalf of the United States while serving in the Office of the Solicitor General. There, Judge Alito participated in more than 250 cases, arguing 12 before the Supreme Court.

In sum, Judge Alito has served as a judge on one of the Nation's highest courts, as the top Federal prosecutor in one of the Nation's largest Federal districts and as an advocate for the United States in the Office of the Solicitor General. His 30 years of public service spans the full breadth of the law.

Judge Alito is unarguably a highly qualified nominee. However, I told the citizens of Colorado that I would also evaluate judicial nominees on their judicial philosophy and commitment to the rule of law.

Specifically, I pledged to support judicial nominees who rule on the law and facts before them—not judges who attempt to legislate from the bench. Judge Alito's judicial philosophy corresponds with that promise.

Judge Alito recognizes the limited role of the Federal judiciary, having observed that "although the judiciary has a very important role to play, it's a limited role. . . . It should always be asking itself whether it is straying over the bounds, whether it is invading the authority of the legislature, for example, whether it is making policy judgments rather than interpreting the law."

Like his view of the limited role of the judicial branch, Judge Alito also recognizes the limits on the powers of the executive branch. Speaking on his understanding of the "unitary Executive," Judge Alito explained, "the idea of the unitary Executive is that the President should be able to control the executive branch... [I]t goes just to the question of control. It doesn't go to the question of scope."

Further, Judge Alito recognizes that "[n]o person in this country, no matter how powerful or powerful he is, is above the law, and no person in this country is above the law." This statement reflects his commitment to a principle so fundamental to justice in this country that it is carved in stone over the entrance to the Supreme Court: "Equal justice under law."

Consistent with the principle of equal justice under law, Judge Alito does not
allow his personal opinion to decide the outcome of a case. He says “[a] judge can’t have any agenda. . . . 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.

I believe that each of my colleagues would agree that judges should be held to this standard. Yet, at the same time, some criticize Judge Alito’s record for living up to it.

In his dissent, Groovy Judge Alito argued in dissent that a search warrant authorized law enforcement officials to search everyone inside a drug dealer’s house, including the wife and daughter. Even though he personally ‘share[d] the majority’s visceral dislike of the intrusive search,’’ Judge Alito’s unwavering commitment to the rule of law led him to do what he believed the law required, despite his personal beliefs on the outcome. In every single case, Judge Alito will serve as an effective steward of the law and Constitution. His record evidences a deep respect for the separation of powers and other fundamental principles envisioned by our Founding Fathers. I have no reason to believe Judge Alito will be deferential to anyone or anything other than the law and the facts before him.

As a representative of Colorado, I also appreciate the uniqueness of the issues relevant to our State and the West. The departure of Justice O’Connor and Chief Justice Rehnquist marks the loss of a Western presence on the Supreme Court.

Earlier this year, I asked President Bush to nominate a judge who could capably decide issues important to Colorado and the West, such as water and resource law.

When I asked Judge Alito about his understanding of Western resource and water law, I was pleased to learn that he grew to appreciate the importance and complexity of these issues while working in the U.S. Solicitor General’s Office. He assured me that he understood the uniqueness to the West of water law, of Western water and complexity of these issues while he grew to appreciate the importance and complexity of these issues while working in the U.S. Solicitor General’s Office. He assured me that he understood the uniqueness to the West of water law, of Western water

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declined to answer 20 percent of questions. Justice Ginsburg received 96 votes in favor of her confirmation.

Throughout the course of the demanding process, Judge Alito demonstrated great patience, humility, and respect with all News points of that temperament desirable for a Supreme Court justice.

The hearings were also an opportunity for Judge Alito to set the record straight regarding his attempts to impugn his integrity. Laid to rest is the claim that he acted improperly by participating in a case involving Vanguard, his mutual fund company. Shares in Vanguard mutual funds are not an ownership interest in the Vanguard company, and Judge Alito had no legal or ethical obligation to recuse himself. His ultimate decision to do so—beyond what the law requires—should be praised, not attacked.

There are thinly veiled attempts to distract from the impeccable record of a highly qualified nominee.

Judge Alito’s jurisprudence and integrity have been praised by columnists, newspapers, legal scholars, former law clerks, and colleagues from both sides of the aisle.

The American Bar Association unanimously awarded Judge Alito its highest rating of “well qualified.” The ABA’s stated criteria for evaluating nominees are “integrity, professional competence and judicial temperament.”

Judges with whom he has served on the Third Circuit offer their praise. Judge Tim Lewis, a former Clinton appointee, commended Judge Alito for his role in discrimination cases. Judge Lewis, testifying in support of Judge Alito, said that “if I believed that Sam Alito might be hostile to civil rights as a member of the United States Supreme Court, I guarantee you that I would not be sitting here today.”

Major newspapers across the State of Colorado, including both the Rocky Mountain News and the Denver Post, offer their praise for Judge Alito.

The Rocky Mountain News says that Judge Alito “personifies judicial restraint” and “deserves confirmation.” He has refused to elevate his ideology above the rule of law while showing deference to the crucial but limited role the Founders envisioned for federal judges.

Commenting on the temptation for Democratic Senators to cave to the demands of “left-wing interest groups” —portray Alito as someone who should be under house arrest, rather than an accomplished nominee with a distinguished resume,” the Rocky Mountain News states that “Sen- ate Democrats have an opportunity to rise above the muck” concluding that “Samuel Alito should be confirmed.”

I ask unanimous consent to have the January 9, 2006 Rocky Mountain News editorial printed in the RECORD, as follows:

[From the Rocky Mountain News, Jan. 9, 2006]

ALITO PERSONIFIES JUDICIAL RESTRAINT

No one seriously questions the qualifications of federal appeals court Judge Samuel Alito to sit on the 3rd U.S. At- torney, assistant to the solicitor general and the attorney general, and a 15-year tenure on the 3rd U.S. Circuit Court of Appeals.

In former colleagues, who worked with Alito the prosecutor laud his insistence on defending the law rather than pursuing a political agenda. Keep that in mind as confirmation hearings open in Washington today. Liberal interest groups and some partisan Democrats are up in arms because Alito has served as a model of restraint.

And that’s why the Senate should confirm Judge Alito to succeed Sandra Day O’Con- nor. He has refused to elevate his ideology above the rule of law while showing deference to the crucial but limited role the Founders envisioned for federal judges.

On principle, the Senate should give the president substantial leeway to appoint fed- eral officials who share his views. And while we can’t help but feel for life-term on the Supreme Court deserve thorough scrutiny, we are confident that the hearings will let Alito earn the nation’s trust.

When I asked Judge Alito about his understanding of Western resource and water law, I was pleased to learn that he grew to appreciate the importance and complexity of these issues while working in the U.S. Solicitor General’s Office. He assured me that he understood the uniqueness to the West of water law, of Western resource and public lands.

In his dissent, Groovy Judge Alito argued in dissent that a search warrant authorized law enforcement officials to search everyone inside a drug dealer’s house, including the wife and daughter. Even though he personally “share[d] the majority’s visceral dislike of the intrusive search,” Judge Alito’s unwavering commitment to the rule of law led him to do what he believed the law required, despite his personal beliefs on the outcome.

In every single case, Judge Alito will serve as an effective steward of the law and Constitution. His record evidences a deep respect for the separation of powers and other fundamental principles envisioned by our Founding Fathers. I have no reason to believe Judge Alito will be deferential to anyone or anything other than the law and the facts before him.

As a representative of Colorado, I also appreciate the uniqueness of the issues relevant to our State and the West. The departure of Justice O’Connor and Chief Justice Rehnquist marks the loss of a Western presence on the Supreme Court.

Earlier this year, I asked President Bush to nominate a judge who could capably decide issues important to Colorado and the West, such as water and resource law.

When I asked Judge Alito about his understanding of Western resource and water law, I was pleased to learn that he grew to appreciate the importance and complexity of these issues while working in the U.S. Solicitor General’s Office. He assured me that he understood the uniqueness to the West of water law, of Western resource and public lands.

In conversing with Judge Alito, I could help but be reminded of my meeting with now Chief Justice Roberts. Judge Alito is a man of great re- straint, thoughtfulness, candor, and thorough responses to my many questions—a further reflection of his view of the limited role of a judge.

Although America was already aware of Judge Alito’s distinguished record, the Judiciary Committee hearings were helpful in shedding additional light on his character, temperament, and integri- ty, particularly in trying circumstances.

During the nearly 18 hours of ques- tioning, Judge Alito was both open and candid. He answered 97 percent of the nearly 700 questions that were asked of him, declining to answer only 3 per- cent. By comparison, Justice Ginsburg
The Senate debate should reflect that the job of a judge is to review cases impartially, not to advocate issues. Judges should be evaluated on their qualifications, judicial philosophy, and respect for the rule of law.

It would be unfortunate and irresponsible for Judge Alito and his colleagues to continue to politicize the judicial confirmation process. Judge Alito is eminently qualified, and he deserves a swift up-or-down vote.

I intend to vote in favor of Judge Alito's confirmation as the 110th Justice to the United States Supreme Court and I strongly urge my colleagues to do the same.

I believe that Judge Alito will not be an activist judge and supports limits on the judiciary.

I ask unanimous consent to have printed in the RECORD a letter from attorney William Banta in which he discusses judicial independence, judicial activism, and judicial usurpation, now referred to by many of us as just judicial activism.

There being no objection, the material was ordered to be printed in the RECORD as follows:

Englewood, CO, September 6, 2005,

Re: A Lawyer's Duty—Judicial Independence, Judicial Activism, and Judicial Usurpation.

Hon. WAYNE ALLARD,
U.S. Senate, Dirksen Senate Building, Washington, DC

DEAR SENATOR ALLARD: Recently there has been an outcry from the established bar in defense of judicial independence. However, much has been said against judicial activism, which used to be referred to as "judicial usurpation." Because of the present tension between them, it behooves us as lawyers to understand the relationship between judicial activism and judicial independence.

Judge Alito would only win confirmation unless opponents try to extend debate indefinitely; then 60 senators must agree to a vote. Republicans have 55 senators, willing to bar judicial filibusters if that's what it takes.

We hope Alito will moderate his views if voted to the court of last resort. His statements about Roe vs. Wade suggest he opposes abortion-rights, which we favor, while his support for the "unitary executive" theory, which the president is chasing, is chilling given the current debate on domestic surveillance and the balance of powers among the branches of government. Republicans have also cited his dissent as Circuit Court of Appeals for 15 years, and his confirmation should rise or fall on a majority vote.

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In the end, Republicans will probably support Alito en masse and most Democratic senators will vote no, reflecting both parties' expectation of his future role. Much attention is being paid to the "Gang of 14," the coalition (including Colorado Sen. Ken Salazar) to end filibusters that have occurred under extraordinary circumstances. This isn't one of them; Alito has served capably on the 3rd U.S. Circuit Court of Appeals for 15 years, and his confirmation should rise or fall on a majority vote.

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best judicial traditions.' Too often we justified baseless decisions on the unsteady promise of political results or indulged the sentiment that the Constitution is whatever a court declares it to be. Incidentally, in the course of presiding over the entire judicial branch, it is impossible to forget that the judges are not above the law. The Constitution is the supreme law of the land and is the source of the judicial power. The federal courts have no power to set aside or otherwise change the Constitution. The Constitution is the law of the land.

By not remarking the wronging of judicial activism all along, the established bar must now be careful not to excuse judicial activism in the mistaken belief or to preserve judicial independence. The risk of confusing judicial activism with judicial independence could confound our problem so that the public do not recognize the whole truth of our own making. If that happened, the American people could demand direct political control over those who had Wayne Allard lost the self-control upon which Chief Justice Marshall insisted, those who became unaccountable to the law they had taken an oath to support.

To avoid such a misfortune, it might be a good idea to revise the instruction manual. Perhaps we could think about whether the Constitution is a vessel who is our era, more like a nomad's tent pitched on shifting sands. We might ask ourselves whether we ought to dismiss the Constitution as an outdated framework or to acknowledge that it was designed in light of human experience and human nature to endure for all time. And we can mull over whether our Constitution, who is his colleague, who is our more in judicial dead reckoning or whether, instead, the written Constitution provides a reliable compass, trustworthy and, in spirit for the American people.

My impression is that commentators and many in the public are way ahead of us lawyers and judges on these concerns. Nonetheless, I believe the public is entitled to know that as Judge Miner would probably say, “the judiciary is strengthened, the rule of law is reinforced, and the public duty of the bar is performed.”

Very truly yours,

WILLIAM M. BANTA
Attorney at Law.

Mr. ALLARD. Thank you, Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. KYL. Mr. President, I ask unanimous consent to have an item printed in the Record.

There being no objection, the material was ordered to be printed in the Record, as follows:

SENATE REPUBLICAN POLICY COMMITTEE: FOLLOW JUDGES TESTIFY IN SUPPORT OF ALITO NOMINATION

On January 12, 2006, five sitting and two former judges from the U.S. Court of Appeals for the 3rd Circuit testified on behalf of Judge Samuel Alito. Their nomination to the Supreme Court joins Chief Justice Rehnquist and Justice O'Connor in the record of Senate confirmation.

The judges included nominees of Presidents Lyndon Johnson, Richard Nixon, Ronald Reagan, George H.W. Bush, and Bill Clinton. Collectively they have served with Judge Alito for more than 75 years, watching him work and evaluating his intellect, character, independence, and judgment.

The Senate is considering the nomination of Judge Samuel Alito to the Supreme Court. The judges included the following individuals.

Judge Rudo in 1973, is a Senior Judge on the 3rd Circuit and formerly its Chief Judge. (Note: a Senior Judge continues to sit on the court with a limited basis; he is not retired.) Judge Anthony Scirica, appointed by President Ronald Reagan in 1981, is a Senior Judge on the 3rd Circuit and formerly its Chief Judge. (Note: a Senior Judge continues to sit on the court with a limited basis; he is not retired.) Judge Anthony Scirica, appointed by President Ronald Reagan in 1984, is the Chief Judge of the 3rd Circuit. Judge Maryanne Trump Barry has served on the 3rd Circuit since President Bill Clinton appointed her in 1999. Judge Rudo in 1973, is a Senior Judge on the 3rd Circuit and formerly its Chief Judge. (Note: a Senior Judge continues to sit on the court with a limited basis; he is not retired.) Judge Anthony Scirica, appointed by President Ronald Reagan in 1981, is a Senior Judge on the 3rd Circuit and formerly its Chief Judge. (Note: a Senior Judge continues to sit on the court with a limited basis; he is not retired.) Judge Anthony Scirica, appointed by President Ronald Reagan in 1984, is the Chief Judge of the 3rd Circuit. Judge Maryanne Trump Barry has served on the 3rd Circuit since President Bill Clinton appointed her in 1999. Judge Rudo in 1973, is a Senior Judge on the 3rd Circuit and formerly its Chief Judge. (Note: a Senior Judge continues to sit on the court with a limited basis; he is not retired.) Judge Anthony Scirica, appointed by President Ronald Reagan in 1981, is a Senior Judge on the 3rd Circuit and formerly its Chief Judge. (Note: a Senior Judge continues to sit on the court with a limited basis; he is not retired.) Judge Anthony Scirica, appointed by President Ronald Reagan in 1984, is the Chief Judge of the 3rd Circuit. Judge Maryanne Trump Barry has served on the 3rd Circuit since President Bill Clinton appointed her in 1999. Judge Rudo in 1973, is a Senior Judge on the 3rd Circuit and formerly its Chief Judge. (Note: a Senior Judge continues to sit on the court with a limited basis; he is not retired.) Judge Anthony Scirica, appointed by President Ronald Reagan in 1981, is a Senior Judge on the 3rd Circuit and formerly its Chief Judge. (Note: a Senior Judge continues to sit on the court with a limited basis; he is not retired.) Judge Anthony Scirica, appointed by President Ronald Reagan in 1984, is the Chief Judge of the 3rd Circuit. Judge Maryanne Trump Barry has served on the 3rd Circuit since President Bill Clinton appointed her in 1999.
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 sit on, but in particular, the United States Supreme Court."

Judge Lewis on Judge Alito’s honesty and integrity. “As Judge Becker and others have vehemently contended, he has 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, when he exhibited anything remotely resembling an ideological bent.”

Judge Lewis on Judge Alito and civil rights. “If I believed that Sam Alito might be hostile to civil rights as a member of the United States Supreme Court, I guarantee you that I would not be sitting here today... My sense of civil rights matters and how courts should approach them jurisprudentially might be a little different. I believe in being a little more aggressive in these matters, not perhaps as much as a 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-orientedness.”

Judge Lewis on why he endorses Judge Alito. “I am here as a matter of principle and as a matter of my own commitment to justice, to 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.”

Mr. KYL. Mr. President, I ask unanimous consent that the attached editorial by the Arizona Republic, dated January 24, be printed in the Record of this debate on the confirmation of Judge Samuel Alito to the U.S. Supreme Court. The editors’ support for Judge Alito is welcome, and their statement that “Judge Alito is a superior candidate for the high court regardless of his political leanings” is absolutely true.

There being no objection, the material was ordered to be printed in the Record, as follows:

[From the Arizona Republic, Jan. 24, 2006]

ALITO: WISE IN THE WAYS OF “WHY”

If America is not on pins and needles over today’s Senate Judiciary Committee vote on Samuel Alito for the U.S. Supreme Court, perhaps this headline on Monday helps provide an explanation: “Feingold unsure of Alito” — WSAW-TV, Wausau, Wis. The headline is misleading. If one of the Senate’s most solidly liberal members, Sen. Russ Feingold, D-Wis., remains uncertain about President Bush’s nominee one day prior to his scheduled Judiciary Committee vote, prospects for derailing the nomination in the full Senate would seem dim.

We’ll see how the votes pan out. Still, it is worth wondering: Was it all the drama go?

The most obvious answer among many is that Alito is a superior candidate for the high court regardless of his political leanings. After 15 years on the bench, Alito has established a lengthy track record as a fair jurist who has struck a proper balance between his own constitutional interpretations and those of his colleagues.

Even his obvious discomfort at the beginning of his Judiciary hearings worked to Alito’s favor. The candidate is bookish and uncomfortable in the limelight! All the better for a position on the nation’s most deliberative, most cerebral panel.

Many commentators have noted that the even-keeled Alito presents himself far differently from Robert Bork, the famously rejected conservative. Well, yes. Alito was not combative in the face of relentless grilling, as Bork was. And he wears no wicked-looking beard.

But it would be easy to dismiss success as a matter of television facials, facial adornment or even judicial philosophy than it is a reflection of the public’s expectations of a new Supreme Court.

Unquestionably, the public wants jurists to be fair, and it seems to believe that Alito will live up to that standard. The public wants a jurist who respects the judgment of other courts, but it also wants one who understands that Job 1 is to interpret the Constitution.

Sometimes, Supreme Court judges have found those two directives in conflict. The public, and most of the senators who represent them, seems to believe Alito will find his way through those conflicts fairly and intelligently.

But most of all, Alito appears to have won over converts because he has demonstrated the trait that increasingly seems to distinguish great jurists from mediocrity-good ones: He can explain.

We all wish to know why. With all due respect to President Bush’s previous nominee, Harriet Miers, it was not enough that—wink, wink—her vote on the “right” issues was ensured. Indeed, that constituted the most damning argument against her.

Alito, by contrast, has won support because senators believe his decisions will be grounded and argued in the facts of the law, not in some predisposed political prejudice that is unsupported by the case before him.

And that is a powerful argument for Alito all by itself.

Mr. KYL. Mr. President, I rise in support of Judge Alito’s nomination to the Supreme Court and urge my colleagues to quickly confirm him.

I begin by observing that the party-line vote in the Judiciary Committee yesterday raises a troubling question for all of us. It is basic to our deliberations. What is the proper test for determining whether to confirm a nominee to the Supreme Court? Until very recently, the Senate has evaluated whether the nominee was qualified—that is, whether he or she possessed the requisite experience, integrity, and temperament to serve. But a new test has been proposed by Judiciary Committee Democrats: will the nominee provide assurances that he or she will rule a particular way on cases that are before the court?

Before I discuss the ramifications of that troubling question, though, I would like to apply the traditional test—the proper test—to the nominee before us.

A Supreme Court Justice should be an experienced judge. Samuel Alito has more Federal judicial experience than all but one nominee in U.S. history, Horace Lurton, who was nominated by President Taft. In 15 years of service, Judge Alito has authored more than 300 opinions and participated in more than 4,800 decisions. It is an extensive record. A Supreme Court Justice should have integrity. If Alito’s favor. The candidate is bookish and uncomfortable in the limelight! All the better for a position on the nation’s most deliberative, most cerebral panel.

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other words, a judge must accept that the Constitution will sometimes require him to make rulings that he might disagree with. Politicians are free to vote their convictions; judges must put their personal views aside. I will have more to say about this issue in a moment.

Fourth, the judge must have the right understanding of the “living Constitution.” Our Constitution must always remain alive to new situations that the Founders did not contemplate. But the judge must apply the constitutional provisions in the way that most closely approximates the meaning of the text and the underlying principles as understood when drafted. The Constitution is not infinitely malleable. It is not a blank slate for the judicial branch to draw upon. It has no “trajectory” or “evolutionary theme.” It is a text—words with meanings. If the Constitution can be twisted to mean anything, then it ultimately means nothing, and we lose under the rule of judges, not the rule of law.

Judge Alito respects the proper divisions within American constitutional government. As he explained in his testimony, the judiciary “should always be aware of and respect the fact that it is straying over the bounds, whether it’s invading the authority of the legislature [or] making policy judgments other than interpreting the law.” He emphasized that judges have a duty to police themselves, and he called the “const- ant process of re-examination on the part of the judges.” If all judges engaged in this process of re-examination, the quality of justice in this Nation would improve dramatically.

Judge Samuel Alito is not going to legislate from the bench or bend the Constitution to suit any political preferences that he might have. He is not going to rely on foreign law, but will look to our American traditions. He is not going to use policymaking to decide cases. To him, the Constitution means the Constitution as understood when drafted. The Constitution is not infinitely malleable. It is not a blank slate for the judicial branch to draw upon. It has no “trajectory” or “evolutionary theme.” It is a text—words with meanings. If the Constitution can be twisted to mean anything, then it ultimately means nothing, and we lose under the rule of judges, not the rule of law.

This is the analysis we have applied in the past, and its application has resulted in confirmation for most nominees. It was certainly the analysis used to evaluate President Clinton’s nominees to the Supreme Court. So in this context that I want to discuss what is evolving as a new test—a “results-oriented” test.

The minority members of the Judiciary Committee did not question Judge Alito’s qualifications. Rather, they tried to get him to commit to certain results in cases that are sure to come before the courts. They want to see certain policy goals enacted into law. They want to see certain policy goals become law, but our aim should be enacting constitutional legislation, not relying on the courts to enact our policy preferences.

In my September statement supporting Judge Roberts, I explained that this same dynamic had played itself out during his hearings. It is apparent that there is now a fundamental difference between the majority and the minority parties on this matter. We believe the courts should not try to impose policy results in their decisions; they should just decide the questions of statutory interpretation and constitutional meaning.

For the Supreme Court, the results are—or should be—a function of the proper application of the Constitution and law to the facts of each case. To the minority, however, that’s not enough. As many minority Senators have expressed, they are not going to vote for anyone who will not assure them that he will vote the way they want in future cases. I submit that that is wrong. As Judge Alito testified, “Results-oriented jurisprudence is never justified because it is not our job to produce particular results.” Yesterday’s meeting of the Judiciary Committee illustrates that many Senators have adopted this results-oriented approach to the confirmation process. The wrong questions are being asked, and the wrong answers are being demanded. The right question is how the nominee will do his job, not what the nominee will decide. This fundamental point is getting more and more lost with each passing confirmation battle.

Let me give a few examples. Yesterday a Senator said that it was necessary to vote against Judge Alito because that Senator believes in a right to abortion and there is no guarantee that Judge Alito will agree with that position in a future case dealing with abortion regulations.

That Senator took the same approach when discussing the just-decided case of Gonzales v. Oregon, which dealt with the Attorney General’s pro- mulgation of regulations in response to a state physician-assisted suicide statute. The Attorney General had said that, despite the Oregon statute, physicians could not use Federally regulated drugs to kill patients.

The case, therefore, did not turn on the Court’s reliance on physician-assisted suicide, but, rather, on the interpreta- tion of the underlying statute. The ma- jority made this clear in the first para- graph. Justice Kennedy explained:

The dispute before us is in part a product of this litigation, but its resolution requires an inquiry familiar to the courts: interpreting a federal statute to determine whether Executive action is author- ized by, or otherwise consistent with, the enactment.

The Supreme Court had not ruled on the wisdom or appropriateness or con- stitutionality of physician-assisted sui- cate, but the Senator was critical of Chief Justice Roberts because he had not voted to uphold assisted suicide, and the Senator didn’t think Sam Alito would either. One could fervently agree with the Senator on the policy issue, yet interpret the statute in a way that requires a different result. But, it ap- pears, results are all that matters.

As another example from yesterday’s committee meeting, a Senator said that protecting wetlands was very important, and wanted to make sure that Judge Alito would allow the Federal Government to protect them under the Clean Water Act. The Senator acknowledged that the underlying constitutional question was the extent of Congress’s power to regulate non-naviga- ble waterways which, arguably, are not in interstate commerce. That is a thorny constitutional question. But, rather than acknowledge that Congress might have gone too far in exer- cising its power to regulate interstate commerce, the Senator was troubled that Judge Alito’s future votes on protecting wetlands could not be pre- dicted.

Now, I don’t mean to single out any one Senator, because the same thing happened throughout the committee meeting. Senator after Senator would bring up the results of decisions by Judge Alito without any regard as to why he reached a certain result, such as their procedural disposition, the proper standard of review, the governing case law of the Supreme Court or the Third Circuit, or the legal rea- soning that Judge Alito used. It was all about results.

As a final example, another Senator wanted Judge Alito to tell him that it was unconstitutional for the President to order a major military action against Iran or Syria absent prior congres- sional authorization. He was exasper- ated that Judge Alito wouldn’t just pre-judge the question, which the Sen- ator called “basic,” and say that the President could not do so. But Judge Alito gave the judge’s answer. It was anything but “basic.” Judge Alito ex- plained that he needed to consider the political question doctrine first, then to analyze the scope of the President’s Article II War Powers, the history of the use of force absent congressional authorization—it’s a very complicated history—and then apply it to the facts before him. The Senator wanted a poli- tician’s answer, a policymaker’s an- swer. In other words, he wanted to know how that case would turn out, be- fore it was briefed and argued. But all we should be asking, is how he would approach the question. What principles would Sam Alito apply, not what kind of vote would Sam Alito make on it.

Abortion, executive power in a time of war, congressional power, State sov- ereign immunity, the 4th amendment,
I had the opportunity to meet Judge Alito and I find he is extremely qualified to join the highest Court in this land. His experience, his temperament, his understanding of the role of the Court and his respect for the law make him an admirable candidate who I believe will serve this Nation well.

The single most important factor that went into my decision of whether to support Judge Alito has to do with the Justices' role on the Court. The job of the judiciary is to apply and interpret the Constitution and the laws of the land. Unfortunately, not everyone in the Senate realizes that what is happening in the judiciary activism has become so rampant in this country. In no way is it the judiciary's purview to make laws. That is clearly the job of legislators. Legislators are to make the laws and judges to apply them. The Senate should reject this principle and demonstrate it throughout his esteemed career.

In his testimony before the Senate Judiciary Committee he spoke about the limited role of the judiciary. Judge Alito stated it should always be asking itself whether it has strayed over the bounds, whether it is invading the authority of the legislature, for example, whether it is making policy judgments rather than interpreting the law. That is a constant process of reexamination of the judges.

During Judge Alito's confirmation hearing, Democrats tried to make the case that judicial precedent is more important than the Constitution itself. They criticized that the liberal judges that decided that segregation cases with an open mind, and gave deference to the President's choice. After all, he had won the election.

We have fallen a long way since Justice Breyer was confirmed in 1994. The Republicans who put aside their policy goals and supported liberal Democratic nominees have been rewarded with unprecedented filibusters of qualified nominees to the lower courts and the adoption of a results-oriented confirmation standard for the Supreme Court.

I say to my Democrat colleagues—is this really the path you want to put us on? You have already dramatically increased the chance of future filibusters. Do we really want Senators to vote against any nominee who will not judge cases and guarantee results? I know that the most ideological activists on both sides of the spectrum would prefer that path, but do you? Does the Senate? Does the Nation?

As I said, for now this is a Democrat problem. But it is naive to think that, someday, Republicans won't decide that what is good for the goose is good for the gander. And while your "no" votes on Judge Alito will not keep him from the Supreme Court, I say to my Democratic friends—what if President Bush had lost the 2004 election but had won the 2000 election?

I support Judge Alito's nomination because his testimony demonstrates his understanding of the principle that the Constitution, and not precedent, is more important than the Constitution itself. Most Americans believe the words of the Constitution should have real meaning. A strict constructionist approach to interpreting the Constitution is necessary for the consistent application of our laws. How can we as the legislative branch do our jobs effectively if the Supreme Court, in fact, has overturned its own precedent at least 225 times. That is nearly once per year.

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on day four of the hearings, January 12, 2006, four sitting and two former judges of the U.S. Court of Appeals for the Third Circuit testified on behalf of Judge Sam Alito’s nomination to the Supreme Court. They spoke about his independence, judgment, intellect, and character.

I remember listening to Judge Timothy Lewis tell us that Judge Alito will be the type of Justice who will listen with an open mind and will not have any agenda-driven or result-orientated approach. I think that is what we want in a judge.

What is interesting is that Judge Lewis is a Clinton appointee. He stated:

‘I am openly and unapologetically pro-choice and always have been.’

Judge Lewis went on to state:

‘I am openly—and it’s very well known—a committed human rights and civil rights activist and am actively engaged in that process in my time permitted. I am very, 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 anyone who puts on a robe, no matter what court they will serve on, but in particular, the United States Supreme Court.

It has been said that the most important decision in Government is “who decides?” With magnificent simplicity, article II, section 2 of the Constitution lays out the process for placing members on our Highest Court. It says:

“. . . he [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint [justices] of the Supreme Court. . . .”

For us, elected officials, the process of determining who will lead is long, drawn out, expensive, and sometimes very messy. The Founders, in their selection of Justices, the Founders wanted the process to reflect the dignity of the office.

Unfortunately, we have witnessed a deterioration of the dignity and solemnity of that process in the last few years. Despite Chairman Specter’s best efforts, the hearing before the Judiciary Committee seemed, at times, to me, at least in some ways, an exercise in futility. I would like to know the breakdown between the amount of time Senators on the committee spent making speeches for the witness to hear and how much time they spent listening to him. The “advice and consent” process became “lobby and confront.”

The Senate should examine the nominee, not dissect him or her. I have read he was asked more than 700 questions. The President Officer should know; he was there. He sat through part of that process. I believe he brought, and others try to bring, a sense of asking the nominee about the process that he would employ in making decisions. It was clear that what Judge Alito brought to the table was not one that says here is what I believe and as a result this is what I will do but, rather, what you would want a judge to do: What do the facts say, what does the law say, what does the Constitution say.

In being asked 700 questions, I think that is something like 500 more than Justice Ginsburg was asked. Senators on the committee who had previously counseled nominees not to answer specific questions on issues that would come before them on the Court on this occasion abused the nominee for not doing so. The American people know what this process is supposed to be about. The President nominates and the Senate confirms. The President, who was elected by all the people, did his job. Now it is time for us to do ours.

When we approach issues of greatest magnitude, the Senate should be at its very best. I like Stephen Covey’s advice to leaders when he wrote the Main Thing is to keep the Main Thing the Main Thing.

Despite all the distractions and attempted detours, there is a main thing to be focused on. This main thing is not a particular issue or political agenda. This main thing is very, very basic. It is based on whether your party is in the White House. I hope that in my time in the Senate, if there is a President of a different party, I will bring the same approach that I have tried to bring to the Senate that the President has nominated. My consistent standard throughout my time in the Senate will be this: Is the nominee qualified by relevant experience, proper judicial temperament, and ethical standards which are beyond reproach? Does he bring a perspective that says a judge is to be a judge or referee, not to bring his or her personal opinions to the table to create law as he or she sees it but, rather, does what Judge Alito does, looks at the facts, looks at the law, the Constitution.

I would submit that a quick search for the votes and record of judicial nominations over the last 200 years would indicate this is the historical standard almost all Senators have taken. The current circumstance of microscopic examination, politicizing, and threats of filibusters is a major historical aberration. For the sake of the judiciary and the whole constitutional system, I hope we find our way back to the way things have been for over the last 200 years plus, rather than the last 5 years.

In my view, Judge Samuel Alito is extremely well qualified to serve on the Supreme Court. He has an extraordinary legal mind. There is no doubt about it. He has demonstrated in his years on the bench and in hundreds of cases that he views the judicial role as follows the Constitution and interpreting the law, not making the law.

Judge Alito told words that “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.” He also told us that “our Constitution applies in times of peace and in times of war, and it protects the rights of Americans under all circumstances.”

On results-oriented jurisprudence, Judge Alito said:

Results-oriented jurisprudence is never justified because it is not our job to try to produce particular results. We are not policymakers. We shouldn’t be implementing any sort of policy agenda or policy preferences we have.

In effect, this was the same standard that Judge Roberts applied. I recall he was asked a question whether he was ruling on behalf of the little guy. And the comment was, if the Constitution says the little guy deserves to win, he will. And if it says that he doesn’t deserve to win, then he won’t. That is what judges should do. That is the way they should operate.

Advice and consent was never intended as a means for the Senate to impound its policy agenda on a future court. I worry that we are walking down a dangerous path when Senators start crafting and in effect requiring them to say, yes, I will rule a certain way or otherwise you will not get my vote.

Advice and consent was never intended as a means to grandstand or place political pressure on the President. The President has done his job admirably. He has nominated an individual to serve on the Supreme Court. The President has done his job well. He has nominated a Supreme Court nominee of President Clinton, who took the oath of office on November 10, 1993. He, like a Supreme Court nominee of President Clinton, was confirmed overwhelmingly by the Senate. That appears to be a confirmation of point No. 1 that the White House generated not only in conversation today on the floor, but also at the hearing held last week in the Senate Judiciary Committee. There are some fundamental flaws in their reasoning and I will point out three:

First, as I mentioned this morning, Justice Sandra O’Connor, whose vacancy is being filled, has been the fifth and decisive vote on many issues central to our democracy. The Justice who takes her place is truly in the position to tip the scales of justice in America. In the last 10 years, 193 cases have been decided by the Supreme Court by the closest of votes, 5 to 4; and of the 193 cases, Justice Sandra Day O’Connor has been the deciding vote in 148; 77 percent of those closely divided decisions were decided with Justice Sandra Day O’Connor. Now, the Justice whom Ruth Bader Ginsburg replaced in 1993, Byron White, didn’t play that pivotal role. Justice O’Connor has played as the decisive vote on so many important issues.

Second, President Clinton selected Justice Ginsburg after a real, authentic consultation with Republicans in the Senate. This morning, I saw Senator HATCH early in the day and I said his book sales must be up because everyone quoted him. His book he wrote entitled “Square Peg: Confessions of a Citizen Senator.” In that book, Senator Orrin Hatch of Utah described how in 1993, as the top Republican on the Judiciary Committee, he received a telephone call from President Clinton to discuss possible Supreme Court nominees. Senator HATCH recounted in his book—and still stands by it—that he warned President Clinton away from a nominee whose conservative credentials he believed “would not be easy.” In his words, he wrote in his book that he suggested the names of Ruth Bader Ginsburg, whom President Clinton had never heard of, according to Senator HATCH, and Stephen Breyer. Senator HATCH wrote that he assured President Clinton that Ginsburg and Breyer “would be confirmed easily.”

What a contrast to the situation we face today. President Bush sends the names of nominees to the Senate without fact. I may be mistaken on this particular nominee, Judge Alito, but I do recall Senator SPECTER saying he learned of Harriet Miers’ nomination when the news media announced it—or only shortly before. I think he said he was called within an hour or so before the news announcement. That is much different than the consultation that took place with Senator Bork and President Clinton, where President Clinton went to the ranking Republican—not even the Chair at that moment—and asked him for advice and consultation on the next Supreme Court nomination.

Judge Alito was nominated not as a product of bipartisan consultation with the Senate but, rather, as a payoff—or at least a satisfaction to the radical right who had turned their back on Harriet Miers’ nomination.

There is another crucial difference between Judge Alito and Judge Ginsburg. Despite some Republican Senators’ efforts to rewrite history, Judge Ginsburg was viewed at the time of her nomination as a moderate and centrist judge based on her dozen years of service on the Federal bench. In a National Public Radio news story dated June 18, 1993, a reporter named Nina Totenberg said as follows:

Why did the Republicans feel so comfortable with Judge Ginsburg? The answer is that her judicial record shows her to be the most conservative Carter-appointed judge on the U.S. Court of Appeals here in the District of Columbia.

She’s considered a centrist, a swing vote. And in fact, a statistical analysis done in 1987 of that Court’s voting pattern shows Judge Ginsburg voting substantially more often with the court’s conservative Republican bloc of judges, led by then-Judge Robert Bork, than with the liberal Democrat judges.

Judge Alito, by contrast, has never been called a centrist judge. At least those who looked at his record have not called him that. He is not a judge who votes more often with his Democratic colleagues than his Republican colleagues. Far from it. Judge Alito is a staunch conservative and the most frequent dissenter on his court. When he dissents, it is almost always in a rightward and more conservative direction.

I spoke earlier about Judge Alito’s track record on civil rights. I talked about some of the cases in which he showed a particular insensitivity to those who came before his court without the trappings of power. In fact, Judge Alito, in many of those cases, was the sole dissenting judge. Because Justice O’Connor was the fifth and deciding vote on so many cases involving civil rights and racial justice, Judge Alito will tip the scales of Justice on those issues if he is confirmed.

At this point, I ask unanimous consent to have printed in the RECORD a letter of January 6, 2006, from the Leadership Conference on Civil Rights that has been submitted in opposition to the confirmation of Judge Alito, signed by Dr. Dorothy Height, chairperson, and Wade Henderson, executive director.
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 vigorous protector of our nation’s civil rights and labor laws. His decisions thus far in such cases show a pattern of narrow interpretations of the law that give greater power to 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. E.I DuPont de Nemours and Co., a gender discrimination plaintiff who had been denied a promotion had shown discrimination as 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.” In Sheridan v. E.I DuPont de Nemours and Co., a gender discrimination plaintiff who had been denied a promotion was de- nied 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” that the jury’s conclusion that discrimination was a factor, but Judge Alito was the lone dissenter in the en banc decision. Judge Alito acknowledged that ad- ded 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 such a juror’s judg- ment might still be appropriate in some cases. The result Judge Alito would have reached was the Sheridan case—re- versing 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, a prospec- tive medical student filed suit under the Rehabilitation Act of 1973, claiming that the school had failed to provide accommodations for a back injury. The trial court granted sum- mary judgment in favor of the school, but a Third Circuit panel reversed on the Rehabili- tation Act claim, finding that the dif- ferent factual assertions that necessitated a jury trial. Judge Alito dissented, prompting his colleagues to write that under his stand- ards, “few if any Rehabilitation Act cases would survive summary judgment.”

Judge Alito’s record on anti-discrimina- tion cases becomes more troubling when con- sidered in light of his record prior to serving on the Third Circuit. As Assistant to the Sol- licitor General during the Reagan adminis- tration, Judge Alito co-authored several amici curiae briefs that sought to eliminate af- firmative action policies that were put in place to remedy past discrimination, dis- crimination which, in one case, persisted in contravention of at least three court orders over an eight-year period. In his 1985 application for a promotion within the Justice De- partment, the Judicial Council had later mischaracterized these cases as involving nothing more than challenges to “racial and ethnic quotas.” Judge Alito’s involvement in that campaign to undermine affirmative action remedies suggests that he adheres to an ide- ology that goes beyond mere conservatism on the subject.

In cases involving other worker protec- tions 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 related community newspapers were protected by the overtime rules of the Fair Labor Standards Act. The majority reasoned that 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 “enter-
prise” in which nothing in the statute in question “even remotely can be read to ex-
cuse the agents and officers” from liability once a company files for bankruptcy.

JUDGE ALITO’S TROUBLING RECORD ON IMMIGRATION LAW

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 ex-
 pense 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.

In Doe v. Groody, Judge Alito argued in dissent that police officers who conducted strip searches during a warrantless arrest warrant immunity. The ma-
 jority concluded, in a decision authored by Judge Chertoff, that strip searches of the suspect’s wife and ten-year-old daughter were the subject of a search warrant. The search warrant specified a location but there was no mention of a warrant for the suspect’s wife and ten-year-old daughter. Judge Alito concluded that the warrant was deficient under the require-
ments of the Fourth Amendment. Judge Alito’s record also reveals a dis-
 tention toward law enforcement 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.

In Burd v. Gateway Press, for example, Judge Alito —then an attor-
yey with the Justice Department—opined that the Attorney General and other govern-
martment officials would have qualified immunity from civil liability for wiretapping the phones of Americans without a warrant. 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, went on to rule that absolute immunity did apply in 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 enforce-
ment that can open the door to abuses. In 1984, in a memorandum, Judge Alito argued in defense of a state law that had au-
 thorized Tennessee police to use deadly force against any fleeing felon suspect whom po-
lice have probable cause to believe had com-
mitted a violent crime or was armed or dan-
gerous. In the case of Tennessee v. Garner, that law was invoked after police shot and killed a suspect fleeing another’s burglary 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 possibly violent sus-
pect to escape, Judge Alito argued that “[r]easonable people might choose dif-
fently in this situation.”

The Supreme Court disagreed with Alito’s farfetched analy-
sis, finding the statute unconstitutional by a 6-3 margin.

Judge Alito’s record also reveals a dis-
tension between a long history of habeas corpus claims of those in the criminal justice sys-
tem. In Rombilla v. Horn, Judge Alito held that in the sentencing phase of a capital murder case, the failure of a defense attor-
ey to investigate and present mitigating evidence, including the defendant’s trau-
matic childhood, alcoholism, mental retar-
dation, 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 and was over-
turned by the Supreme Court, which noted that some of the mitigating evidence was publicly available in the very courthouse in which the defendant was tried. Justice O’Connor concurred in reversing Judge Alito’s ruling, describing the defense attor-
yee’s performance as “unreasonable.”

In another case, in United States v. H. Khra, Judge Alito’s dis-
sent would have denied the defendants’ claims of a death row inmate. Judge Alito concluded that a jury instruction regarding the defen-
sants’ constitutional claim that Congress only intended for tax evasion to trigger mandatory deportation, but Judge Alito disagreed and pushed for a more expa-
nsive 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 “spec-
ulative” and unfounded reasoning. 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 cases from aliens in custody challenging deportation or-
ners. The Supreme Court ultimately rejected

JUDGE ALITO’S TROUBLING RECORD ON IMMIGRATION LAW

Judge Alito’s record in appeals of asylum and deportation claims is widely seen as a typically narrow tendency to defer to adverse Board of Immigration Appeals (BIA) and lower court rulings. For example, in 1996, in a decision authored by Judge Alito, the court ruled that Judge Alito has sided with immigrants in only one out of every eight cases he has han-
dled, which, according to the Post, sets him apart even from most Republican-appointed judges. Judge Alito’s record is more problem-
atic in light of the recently growing criti-
cism, by many other federal judges from both the BIA and administrative immigration judges.

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 countries of origin. In Chang v. Ashcroft, 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, Judge Alito dissented from a majority opinion granting asylum to an engineer from the Republic of Guinea whose house had been burnt down and whose wife had been raped in retaliation for his opposition to the govern-
mment’s unfair labor practices. Judge Alito concluded that the immigration judge seemed to be searching for ways to deny asylum and find fault with the credi-
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cized Judge Alito’s dissent, noting that his proposed standard would “null the statutory standard” and “ignore our precedent.”
Judge Alito’s reading of the law, in INS v. St. Cyr, because such an interpretation would raise serious constitutional questions. Also troubling is a 1986 letter Judge Alito wrote as Deputy Assistant Attorney General, to former FBI Director William Webster in which he suggested, inter alia, that “illegal aliens have no claim to non-discrimination respecting ‘states’ rights’” and that the Constitution “grants only fundamental rights to illegal aliens within the United States. Judge Alito’s reading of the 1976 Supreme Court ruling in Mathews v. Diaz to support this assertion, but oddly, he makes no mention of Judge Wayne Phillips’ dissenting opinion, which squarely ruled that a state could not discriminate against undocumented children in public education, even though education is a firmly entrenched constitutional right. As such, Judge Alito’s letter raises questions about whether he would be willing to adequately protect undocumentation rights from unconstitutional forms of discrimination.

JUDGE ALITO’S RESTRICTIVE VIEW OF THE ESTABLISHMENT CLAUSE

Judge Alito’s record shows that he takes an overly literal view of the Establishment Clause, a view that sets him apart from Justice O’Connor and the majority of her colleagues to serve on the Supreme Court—upholding with his acknowledged disagreement with the Supreme Court’s most noteworthy rulings in this area—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, Judge Alito voted—against an 11-0 majority of his colleagues on the Third Circuit—to uphold a public school policy that allowed high school seniors to vote on whether to hold a prayer service 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 been so frequently rejected by the Supreme Court in a later case—would have essentially defeated the purpose of the Establishment Clause.

Judge Alito’s ruling in ACLU of New Jersey v. Schundler (Schundler II) is equally troubling. In Schundler, the municipality of Jersey City had placed a nativity scene and menorah outside of City Hall. After a district court ruled that the display violated the Establishment Clause, the city added additional religious symbols following the 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 was 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 considered such history to be highly relevant when determining whether a practice or policy violates the Establishment Clause.

JUDGE ALITO’S EFFORTS TO LIMIT CONGRESS’S AUTHORITY IN FAVOR OF ‘STATES’ RIGHTS’

Judge Alito’s record demonstrates a troubling tendency to favor “states’ rights” over the rights of minority 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 the immunity provisions of 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, the Third Circuit upheld the conviction of a firearms dealer for selling machine guns that were part of an interlocking six circuits in finding the federal law banning the transfer or possession of machine guns to be a valid exercise of Congress’ power to regulate interstate commerce. But Judge Alito disagreed, arguing that the Supreme Court’s recent decision in United States v. Lopez—invalidating gun-free school zone laws—made clear that Congress did not have such power. The majority distinguished Lopez because it dealt with a small geographic area—whereas, as 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 arms of civil rights infrastructure such as the ban on discrimination in employment, housing, 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, Judge Alito’s majority opinion would have denied a state employee the benefits of the Family and Medical Leave Act (FMLA). 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 the employee’s favor. On appeal, the 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 Nebraska Department of Human Resources v. Hibbs. The Court held that state employees could in fact sue their employers under the FMLA, a decision that Judge Alito disavowed.

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” (“CAP”). Though out its existence, CAP was notorious for its outspoken, inflammatory rhetoric opposing Princeton’s decision to enroll female students. Indeed, CAP reportedly advocated the percentage of women admitted to the school. CAP also derided Princeton’s efforts to increase the number of minority students; the group argued that they were not 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 homogeneous in interests and backgrounds,” but that he now worried about the future of the University “with an undergraduate student body that is diverse in race and minorities, such as the Administration has proposed.” In 1975, an alumni panel reviewed admission issues and condemned CAP’s character of minority students. The panel, which included current Senate Majority leader Bill Frist, determined that CAP “pre-
Mr. DURBIN. Mr. President, there is another aspect of Judge Alito’s record that is equally troubling, and that is his failure to show that he will protect the average American from the overreaching hand of government.

I am concerned that he is dedicated to protecting the privacy rights of individuals from government officials in many critical areas of our lives. For example, I share the concern of many of my colleagues about Judge Alito’s decision in a police case in which he conducted a strip search of an innocent 10-year-old girl. The police officer, who did not have a valid search warrant in the opinion of a majority of the judges on Judge Alito’s court, took the 10-year-old girl and her mother into a bathroom, ordered them to empty their pockets, and then ordered the young girl and the mother to lift their shirts and drop their pants—a 10-year-old girl. A majority of the judges on Judge Alito’s court said that went too far; the search was not authorized by law; Judge Alito saw it differently. He was the only judge on the court to say that the Constitution permitted this search.

The majority opinion in this case, incidentally, was written by Michael Chertoff, a conservative Republican, today is in the President’s Cabinet as the head of our Department of Homeland Security. Judge Chertoff, writing the majority opinion, said that what was done was wrong, and Judge Alito’s decision was wrong.

In the context of reproductive freedom, I am troubled about whether Judge Alito accepts some of the basic rights of personal privacy. One of the cases which we should not forget was decided some 41 years ago by the Supreme Court. The case was Griswold v. Connecticut.

As hard as it may be to believe, there was a battle within the State of Connecticut and in many other States, including my home State of Illinois, at that time which made it a crime for a married couple to buy birth control devices or for a doctor to prescribe them or for a pharmacist to fill the prescription. It was a crime for married couples to engage in family planning by buying any type of birth control device. It is hard to believe. That was America in the 1960s.

The Supreme Court took a look at this case and said that is wrong. There is built into our rights as a citizen the right of privacy, and that privacy goes to those intimate, personal decisions made by individuals—in this case, husbands and wives—in the State of Connecticut. They struck down the Connecticut statute.

I asked Judge Alito what he thought about this Griswold decision and this right of privacy. He was willing to say that Griswold was settled law. But, of course, Griswold v. Connecticut and the right of privacy was the basis of a decision made a few years later in Roe v. Wade. In that particular case, the Supreme Court built on this concept of a right of privacy and said that for a woman making the most important and personal decision of her life, in terms of the continuing of a pregnancy, she had a protected status in certain stages of the pregnancy. That was a decision which was handed down over 30 years ago—33, as a matter of fact.

So we asked Judge Alito if he accepted that Griswold v. Connecticut, which established the right to privacy, was settled law in America, and did he also accept that Roe v. Wade, which followed, was settled law? He repeatedly refused to provide us with that assurance about this landmark decision.

What a contrast to John Roberts, who, just a few months before when he was nominated for the Chief Justice position on the Supreme Court and was asked the same question, said that he believed Roe v. Wade was settled precedent in America. That is a defining difference between these two nominees and an important one.

If Judge Alito is confirmed, there are very serious questions about what will happen with the right of privacy in America, not just for the women who could be affected by these decisions but for everyone.

It wasn’t that long ago, a little over a year ago, that the Congress was embroiled in a controversy over something that many families face every day in America. You will remember the Schiavo case and the controversy where some chemical imbalance led to Terri Schiavo going into a coma. Her life was sustained by extraordinary means for 15 years while her husband argued that she never wanted it that way. She had made it clear not to take extraordinary measures to keep her alive.

There was a battle within the family. Her parents saw it differently, and they went to court regularly to fight this out. The Florida courts reached the decision that what Terri Schiavo’s husband said would be controlling and that her wishes would be honored and that extraordinary measures to keep her alive would be discontinued, and then the case would be appealed.

Finally, the day came when all appeals had been resolved, and it was apparent a decision would finally be made to remove the life support system. That moment when a group—a political group—inspired some Members of Congress to get involved. They started arguing it was the time, at that moment, for the Federal courts to step into the hospital room and for the Federal judges to make decisions overriding the State courts, overriding the stated wishes of Terri Schiavo, overriding the wishes of her husband.

There is hardly a person in the Senate who hasn’t faced a similar family decision when someone you love is near the end of their life and the doctor comes in and says there are several things we can do. I know in my family, my mother made it very clear to me she didn’t want any of that life support, extraordinary effort made. I was determined to honor her wishes. She passed away very quickly with a heart attack, and we never had to face that decision, but we knew what she wanted. Her sons said they would stand by her wishes. Most people feel the same way. Do you know why, Mr. President? Because it is an extremely private, personal, and family issue. But in the case of Terri Schiavo, the President of the U.S. Congress, particularly in the House of Representatives, who wanted the Federal Government to step in at that moment.

So when we talk about diminishing the right of privacy in America, it goes far beyond the contentious issue of abortion. It goes to issues involving the last wishes of a person who is dying. It goes to issues involving protecting personal lives. In speeches to the ultraconservative Federalist Society which Judge Alito bragged about belonging to in the 1980s, Judge Alito has said he is a “strong proponent” of the so-called “unitary Executive theory.” Another phrase you won’t find in the Constitution. He even criticized the Supreme Court, specifically Chief Justice Rehnquist, for failing to defer to this theory. During his hearings, Judge Alito said he still supports key elements of the theory today and indicated he will follow it, to some degree, in making his decisions.

The same unitary executive theory has been the basis for many claims by the Executive administration that they had the Executive power to make some of the most controversial decisions of their Presidency, including the war on terrorism, the use of torture, and the power to eavesdrop on our phone conversations without court approval, as required by law.

Based on the unitary executive theory, the Bush administration has claimed the right to seize American citizens and imprison them indefinitely without charge. In his hearings, the Supreme Court, in an opinion written by Justice Sandra Day O’Connor, rejected this policy. Only one Justice
voted to uphold the administration’s decision. That Justice, Clarence Thom- as, based his dissent on the unitary ex- ecutive theory, the same general the- ory to which Judge Alito says he sub- scribes.

It appears that if Judge Alito is ap- proved for the Court, he will join Jus- tice Thomas and Justice Scalia as only the third Supreme Court Justice who has announced public support for this fringe theory called the unitary executive theory which gives more and more power to the President and less re- straint of law on his activities.

The Supreme Court is supposed to be a check on the power of the President. The Court’s role is to interpret the Constitution, not to advance some marginal theory of the Federalist Soci- ety or any other special interest group. During his hearings, Judge Alito did attempt to distinguish his position on the unitary executive theory from the Bush administration’s, but he refused to say whether he agreed with Justice Thomas’ dissent in Hamdi, and he repeatedly refused to say whether this President or any President has the right to disregard a law passed by Con- gress.

Several Senators asked Judge Alito about this directly, and several times he gave the same carefully worded re- sponse—and I quote it:

The President must take care that the statutes of the United States that are con- sistent with the Constitution are complied with.

Here is what we don’t know about that statement: If the President claims that a law is not consistent with the Constitution, can he ignore the law with impunity? And if Judge Alito is on the Supreme Court, is that how he would rule? That certainly is the way he answered the question.

Presidents often issue formal state- ments when they sign a law. When Judge Alito was attorney in Presi- dent Reagan’s Justice Department, he advocated the use of Presidential signing state- ments to, in his own words, “increase the power of the Executive to shape the law.” In this way, Sam Alito argued “the President will get in the last word on questions of interpreta- tion.”

The Framers of our Constitution didn’t see it the same as Judge Alito. They said Congress was to have the last word. The Bush administration has adopted Judge Alito’s proposal. In more than 100 Presidential signing statements, the Bush administration has cited unit- tary executive theory and pledged to uphold the law if it doesn’t conflict with this theory.

Just 3 weeks ago, we saw a good il- lustration. The White House issued a Presidential signing statement claim- ing that the President could set aside the McCain torture amendment which Congress passed overwhelmingly in De- cember. Under what rationale could a President ignore a law that passed in this Chamber 90 to 9? The White House claimed the President has the power under the “unitary Executive theory.” So hold on to your seats, America. If Judge Alito goes onto the Court push- ing this theory that was inspired by the Federalist Society saying this President has never had, it will consoli- date more power in the executive branch than our Founding Fathers ever imagined.

Does any President have the power to ignore the McCain torture amend- ment or FISA, the law that requires court approval to wiretap American citizens? Based on his record, I am fearful that Judge Alito, facing these questions, is more likely to defer to the President’s power than defend our fundamental constitutional rights.

I will speak more to this issue about wiretaps in a moment.

I also fear that Judge Alito, if con- firmed, would blur the traditional line between judges and politicians. In his 1985 job application essay, he indicated his disapproval of the Warren Court deci- sions on the establishment clause of the Constitution.

What is the establishment clause? In the first amendment, the Constitution makes clear that we have the freedom of religious belief. Of course, that means each of us has the right under the law, under our Constitution, to be- lieve any religious belief or to hold to no religious belief. That is our basic freedom. It says:

Congress shall make no law respecting an establishment of religion. . . .

What was an understandable part of our Constitution because many of our Founding Fathers hailed from England, which had an official national church. They wanted to make it clear that there would be a separation, a clear wall of separation between church and state, as Thomas Jefferson said in the early 1800s.

The Warren Court, led by Earl War- ren, as Chief Justice, struck down gov- ernment-sponsored prayer and govern- ment-sponsored devotional Bible read- ing in public schools, arguing that it violated the establishment clause. The decisions by the Warren Court were nearly unanimous. They stood for the proposition, as the Constitution said, that our government must be neutral toward religion in order to maintain this healthy separation of church and state.

The rulings of Judge Sam Alito on the Third Circuit raise questions as to whether he will continue to protect the separation of church and state that has served America so well.

Let me speak for a moment about a timely issue which is not only in the headlines but really relates directly to this confirmation consideration of Judge Alito. Like many Americans, I am deeply concerned about recent rev- elations that sometime in 2001, Presi- dent Bush authorized the National Se- curity Agency to begin spying on Americans in the United States without- out court approval. This is an apparent violation of law.

Let me say at the outset, this is not about whether we should wiretap ter- rorists. Of course, we should. We should use every legal tool available to put an end to Osama bin Laden’s deadly franch- ise.

Under a law called the Foreign Intel- ligence Surveillance Act, or FISA, the President has broad authority to wire- tap suspected terrorists. The FISA Court has been virtually a rubberstamp for Presidents asking for wiretap or- ders. In fact, over 19,000 requests have been made of this court to wiretap sus- pected terrorists, and the administra- tion has been denied only 4 times. 19,000 requests, 4 denials.

Within the FISA law there is an emergency exception so if there is a suspicion that a conversation about to take place needs to be wiretapped to protect America, the Government can move quickly, without court approval, so long as they go through the regular process within 72 hours. So the Govern- ment can act if it feels that a conversation would lead to terrorism and endanger Americans.

So the President has authority, under this Foreign Intelligence Sur- veillance Act, to engage in the activi- ties that has described to the American people: time-sensitive electronic sur- veillance on suspected terrorists.

What this debate really is about is the President’s constitutional obliga- tion to follow the law of the land. Legal scholars, former Government of- ficials from both political parties, and the nonpartisan Congressional Re- search Service have all concluded that the NSA program appears to violate the law.

President Bush has recognized it is improper to wiretap Americans in the United States without court ap- proval. Listen to what President Bush said in a speech to the American people on April 20, 2004. I quote it verbatim:

I think we ought to reflect on this long and hard. We live in a country of diverse religious belief. We try to show respect for each person’s religious be- lief, and we make it clear that our gov- ernment won’t pick favorites among religions. We can only look overseas to other countries that are torn with strife over religious divisions to under- stand the wisdom of our Founding Fa- thers, a wisdom that should be honored by our Supreme Court.

President Bush reiterated this concern that Judge Sam Alito on the Third Circuit raise questions as to whether he will continue to protect the separation of church and state that has served America so well.

What is the establishment clause? I think we ought to reflect on this long and hard. We live in a country of diverse religious belief. We try to show respect for each person’s religious be- lief, and we make it clear that our gov- ernment won’t pick favorites among religions. We can only look overseas to other countries that are torn with strife over religious divisions to under- stand the wisdom of our Founding Fa- thers, a wisdom that should be honored by our Supreme Court.

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What is the establishment clause?
That is the end of the quote. April 20, 2004, after the President had initiated this NSA wiretapping that is not approved by law and does not use a court order.

When President Bush concluded over 4 years ago that he wanted to eavesdrop on Americans without the court approval required by law, he had an obligation to come to Congress and ask us to change the law.

Congress has always been a willing partner when the President has requested additional authority to fight terrorism. I can recall the President, within days of 9/11, asking for an authorization for the use of force by this Congress to go after Osama bin Laden and al-Qaeda, which I readily voted for. There was unanimous support for a bipartisan resolution which passed the Senate.

Shortly thereafter, the President came to Congress and asked us to pass the PATRIOT Act. It was an act that gave the Government more authority, more tools, more legal ways to go after terrorism in the United States. It was overwhelmingly approved with only one dissenting vote in the Senate. Within the PATRIOT Act, the President asked for some changes in this FISA law to make it easier to wiretap terrorists.

So the administration at this point seems to concede the point that they were bound by this law and were looking for changes so they could use it, in their words, more effectively. We tried to accommodate them as much as we possibly could. After the White House asked Congress to pass this bill, we cooperated with them. Members of Congress from both sides of the aisle were happy to work with the President to keep America safe.

This is not what the President has done here. Instead, we have learned that the President has not followed even the law that he asked us to change. He claims the power to eavesdrop on the phone conversations of Americans and e-mails without any court approval, without any legal authority.

That raises fundamental questions. Is this President or any President above the law? Does the President have the authority to disregard laws passed by Congress, whether it is the question of torture or eavesdropping? Can Congress place any limits on the President’s power over our lives?

Today, I joined the distinguished minority leader, Senator Harry Reid, and my colleagues, Senators Kennedy and Feingold, and sent a letter to President Bush. We have urgently requested that the President notify us immediately of the changes in the law that he believes are necessary to permit effective surveillance of suspected terrorists and why the changes are needed.

I ask unanimous consent that this letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:


President George W. Bush,
The White House,
Washington, DC.

Dear President Bush: We strongly support efforts to do everything possible, within the limits of the law, to combat terrorism. We are therefore concerned that sometime in 2001, in apparent violation of federal law, you authorized the National Security Agency (NSA) to eavesdrop on Americans in the United States without court approval.

When you concluded over four years ago that existing law did not provide you sufficient authority to conduct this program, you had an obligation to propose changes in the law to Congress. Rather than doing so, you have apparently chosen to ignore the law. We urgently request that you notify us immediately what changes in the law you believe are necessary to permit effective surveillance of suspected terrorists, and why these changes are needed.

The Foreign Intelligence Surveillance Act (FISA) gives the government broad authority to wiretap suspected terrorists. Federal law provides that FISA and the criminal wiretap statute “shall be the exclusive means by which electronic surveillance . . . means by which electronic surveillance . . . the electronic wire, cable, and electronic communications may be conducted.” 18 U.S.C. § 2511(2)(f). FISA makes it a crime, punishable by up to five years in prison, to conduct electronic surveillance except as permitted by statute. 50 U.S.C. § 1809.

In fact, you have recognized that it is improper to subject Americans in the United States to warrantless wiretapping. In a speech on April 20, 2004, you said: “Now, by the way, any time you hear the United States government talking about wiretap, it requires—a wiretap requires a court order. Nothing has changed, by the way. When we’re talking about chasing down terrorists, we’re talking about getting a court order before we do so.”

You and officials in your administration have repeatedly asserted that FISA does not provide adequate authority to monitor suspected terrorists. However, FISA authorizes monitoring suspected terrorists, who are the purported targets of NSA’s warrantless wiretaps. Moreover, FISA includes an emergency exception for situations where there is insufficient time to obtain judicial approval before beginning a wiretap. This exception allows for the use of electronic surveillance immediately, as long as it seeks a court order within 72 hours. 50 U.S.C. § 1805(f). During the course of its existence, the FISA court has approved over 19,000 wiretap applications from the government while disapproving only four.

It therefore appears that your administration has sufficient authority under FISA to engage in the activities you have described—time-sensitive electronic surveillance of suspected terrorists.

Officials in your administration have asserted that the government’s internal process for preparing and authorizing a FISA application is too burdensome and slow to monitor suspected terrorists effectively. To be clear, your administration’s bureaucratic and paperwork delays are not an excuse for violating the law. As the nonpartisan Congressional Research Service (CRS) concluded: “To the extent that a lack of speed and agility is a function of internal Department of Justice and practice under FISA, it may be argued that the President and the Attorney General could review these procedures and practices in order to introduce more efficiency to address such needs.” CRS Memorandum, Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information, by Elizabeth A. Bazan & Jennifer K. Elsea.

If you or officials in your administration believe that FISA, or any law, does not give you enough authority to combat terrorism, you should propose changes in the law to Congress. You may not simply disregard the law.

In your December 19, 2005 press conference, you called FISA “a very important tool.” FISA is more than a tool; it is a law, and we are a nation of laws. Under Article 1 of the Constitution, Congress has the power to make laws. Under Article 2 of the Constitution, you must take care that the laws are faithfully executed.

In order to win the war on terrorism, we must maintain the high ground by respecting the rule of law as embodied in our Constitution. To do otherwise makes us weaker as a nation and harms our national security. The Supreme Court long ago rejected the notion that there is a wartime exception to the Constitution’s separation of powers. As the Court concluded in the historic Youngstown Steel case: “The Constitution is neither silent nor equivocal about who shall make the laws when the President initiates a national war effort. The Founders of this Nation entrusted the lawmakership of the power to Congress alone in both good and bad times.” 443 U.S. 579, 587-89 (1979).

In light of the very serious nature of this matter, we request that you respond to this letter as soon as possible, and, in any case, no later than February 1, 2006.

Sincerely,

Harry Reid,
U.S. Senator.

Edward M. Kennedy,
U.S. Senator.

Richard J. Durbin,
U.S. Senator.

Russell D. Feingold,
U.S. Senator.

Mr. Durbin. The President cannot continue to simply disregard the law.

At a press conference on December 19, 2005, President Bush called FISA “a very important tool.” I would say to the President, FISA is more than a tool. It is a law, and we are a nation of laws.

Our Constitution separates powers between different branches of Government. Under article 1 of the Constitution, Congress has the power to make laws. Under article 2 of the Constitution, the President must take care that the laws are faithfully executed.

The Supreme Court has faced questions like this in the past, questions regarding the powers of the President in the midst of a war. During the Korean war, President Harry Truman violated the law by seizing America’s steel mills to aid the war effort. In the historic Youngstown Steel case, the Court rejected President Truman’s actions and concluded:

The Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The Founders of this Nation entrusted the lawmakership of the power to the Congress alone in both good and bad times.

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In order to win the war on terrorism, we must maintain the high ground by respecting the Constitution and resecting the laws of the land. To do otherwise makes us weaker as a nation and harms our national security.
Mrs. BOXER. Mr. President, yesterday in Burbank, CA, I gave a major address before my constituents announcing my opposition to the nomination of Samuel Alito to the Supreme Court of the United States.

To me, it is not because of the Executive’s assertions of power. At this moment in history, like none other in recent times, that is a critical and timely issue. We have to ask the question, would this judge on the Court protect our basic personal freedom or would he give to this President power to ignore the law?

Last week Attorney General Gonzales issued a long memo supporting the administration’s position on the NSA spying program. That memo went so far as to suggest that this administration is not even bound by the PATRIOT Act. It suggests that the President can use the powers authorized by the PATRIOT Act without even the limited checks and balances contained in the PATRIOT Act, regardless of what Congress says.

So what has happened is the administration from the question of torture to this whole question of eavesdropping, and now has suggested that this President has the authority to do whatever he cares to do in the name of his power as Commander in Chief.

The Supreme Court in the past has not agreed with Presidents who have tried to seize that much power. President Truman learned that the hard way. I am hopeful this Supreme Court will respect the Constitution and re-assert the land and restrain this President or any President who tries to move that far and that fast.

So it comes down to this with the Alito nomination. I am afraid as we look carefully at his record it is clear that he would allow the Government to go too far, to intrude on our personal privacy and our freedoms. I am afraid that he would take the country in the wrong direction when it comes to women’s rights. I am afraid that his record, as I mentioned earlier on the floor today, is evidence that when he is given a choice between ruling in court for an established institution—whether it is a business or a government—or standing with a consumer or an individual, he consistently rules for the established institution. I am afraid that the 1985 memo, which became a large part of his recent hearing, still guides Judge Alito in many respects.

I think the fact that Harriet Miers was rejected by so many conservative groups and the President had to withdraw her nomination has to be taken into consideration here. Judge Sam Alito is his successor in the nomination.

The same groups that had rejected her accepted Sam Alito. They know or believe they know what I have spoken of this evening, that his is a philosophy that is outside the mainstream that is not consistent with the fine record written by Justice Sandra Day O’Connor.

In Doe v. Groody in 2004, he said a police search of a 10-year-old girl and a 16-year-old boy is constitutional. But after reviewing the hearing record and the record of his statements, writings and rulings over the past 24 years, I am convinced that Judge Alito is the wrong person for this job.

I am deeply concerned about how Justice Alito will impact the ability of other families to live the American dream to be assured of privacy in their homes and their personal lives, to be secure in the grounded of the law, to have fair treatment in the workplace, and to have confidence that the power of the executive branch will be checked.

As I reviewed Judge Alito’s record, I asked whether he will vote to preserve the fundamental American liberties and values.

Will Justice Alito vote to uphold Congress’s constitutional power to pass laws to protect Americans’ health, safety, and welfare? Judge Alito’s record says no.

In the 1996 Rybar case, Judge Alito voted to strike down the Federal ban on the transfer or possession of machine guns because he believed it exceeded Congress’s power under the Commerce Clause. His Third Circuit colleagues sharply criticized his dissent and said that it ran counter to “a basic tenet of the constitutional separation of powers.” And Judge Alito’s colleagues on every one of the six other court circuits and the Supreme Court. Judge Alito stood alone and failed to protect our families.

In a case concerning worker protection, Judge Alito was again in the minority when he said that Federal mine health and safety standards did not apply to a coal processing site. He tried to explain it as just a “technical issue of interpretation.” I fear for the safety of our workers if Judge Alito’s narrow, technical reading of the law should ever prevail.

Will Justice Alito vote to protect the right to privacy, especially a woman’s reproductive freedom? Judge Alito’s record says no.

We have all heard about Judge Alito’s 1985 job application, in which he wrote that the Constitution does not protect the right of a woman to choose. He was given the chance to disavow that position during the hearings and he refused. He said he was “a uniter, not a divider.” Sadly, this nomination shows that he has forgotten that promise because it is not from the center and it is not unifying the Nation.

The right thing to do would have been to give us a justice in the mold of Justice O’Connor, and that is what the President should have done.

Let me be clear: I do not deny Judge Alito’s judicial qualifications. He has been a judge of the Third Circuit for more than 20 years and the American Bar Association rated him well qualified. He is an intelligent and capable person. His family should be proud of him and all Americans should be proud that the American dream was there for the Alito family.

But after reviewing the hearing record and the record of his statements, writings and rulings over the past 24 years, I am convinced that Judge Alito is the wrong person for this job.

I am deeply concerned about how Justice Alito will impact the ability of other families to live the American dream to be assured of privacy in their homes and their personal lives, to be secure in the grounded of the law, to have fair treatment in the workplace, and to have confidence that the power of the executive branch will be checked.

As I reviewed Judge Alito’s record, I asked whether he will vote to preserve the fundamental American liberties and values.

Will Justice Alito vote to uphold Congress’s constitutional power to pass laws to protect Americans’ health, safety, and welfare? Judge Alito’s record says no.
girl. "a reasonable police officer could certainly have read the warrant as doing so..." This casual attitude toward one of our most basic constitutional guarantees—the fourth amendment right against unreasonable searches and seizures—alarmed Congress. As the Alito's own Third Circuit Court said regarding warrants, "a particular description is the touchstone of the Fourth Amendment." We certainly do not need Supreme Court Justices who do not understand this fundamental constitutional protection.

Will Justice Alito vote to let citizens stop companies from polluting their communities? Judge Alito's record says no.

In the Magnesium Elektron case, Judge Alito voted to make it harder for citizens to sue for toxic emissions that violate the Clean Water Act. Fortunately, in another case several years later, the Supreme Court rejected the Third Circuit and Alito's narrow reading of the law. Judge Alito doesn't seem to care about a landmark environmental law.

Will Justice Alito vote to let working women and men have their day in court against employers who discriminate against them? Judge Alito's record says no.

In 1997, in the Bray case, Judge Alito was the only judge on the Third Circuit to say that a hotel employee claiming racial discrimination could not take her case to a jury.

In the Sheridan case, a female employee sued for discrimination, alleging that after she complained about incidents of sexual harassment, she was demoted and marginalized to the point that she was forced to quit. By a vote of 10 to 1, the Third Circuit found for the plaintiff.

Guess who was the one? Only Judge Alito thought the employee should have to show that discrimination was the "determinative cause" of the employer's action. Using his standard would make it almost impossible for a woman claiming discrimination in the workplace to get to trial.

Finally, will Justice Alito be independent from the executive branch that appointed him, and be a vote against power grabs by the president? Judge Alito's record says no.

As a lawyer in the Reagan Justice Department, he authored a memo suggesting for the President to encroach on Congress's lawmaking powers. He said that when the President signs a law, he should make a statement about the law, giving it his own interpretation, whether it was consistent with what Congress had written or not. He wrote that this would "get in the last word on questions of interpretation" of the law. In the hearings, Judge Alito refused to back away from this memo.

When asked whether he believed the President could invade another country, in the absence of an imminent threat, without first getting the approval of the American people, of Congress, Judge Alito refused to rule it out.

When asked if the President had the power to authorize someone to engage in torture, Alito refused to answer.

The administration's law asserting vast powers, including spying on American citizens without seeking warrants—in clear violation of the Foreign Intelligence Surveillance Act—violation international treaties, and ignoring laws altogether. We need Justices who will put a check on such overreaching by the executive, not rubberstamp it. Judge Alito's record and his answers at the hearings raise very serious doubts about his commitment to being a "watchdog check on an 'imperial President.'"

In addition to these substantive matters, I remain concerned about Judge Alito's answers regarding his membership in the Concerned Alumni of Princeton and his failure to recuse himself from the Vanguard case, which he had promised to do.

During the hearings, we all felt great compassion for Mrs. Alito when she became emotional in reaction to the prospect of her husband's trial. Everyone in politics knows how hard it is for families when a loved one is asked tough questions. It is part of a difficult process, and whoever ran politics is not for the faint of heart was right.

Emotions have run high during this process. That is understandable. But I wish the press had focused more on the tears of those who will be affected if Judge Alito becomes Justice Alito and his out-of-the-mainstream views prevail.

I worry about the tears of a worker who, having failed to get a promotion because of discrimination, is denied the opportunity to pursue her claim in court.

I worry about the tears of a mentally ill woman who is forced by law to tell her husband that she wants to terminate her pregnancy and is afraid that he will leave her or stop supporting her.

I worry about the tears of a young girl who is strip searched in her own home by police who have no valid warrant.

I worry about the tears of a mentally retarded man, who has been brutally assaulted in his workplace, when his claim of workplace harassment is dismissed by the court simply because his lawyer failed to file a well-written brief on his behalf.

These are real cases in which Judge Alito has spoken. Fortunately, he did not prevail in these cases. But if he goes to the Supreme Court, he will have a much more powerful voice—a radical voice that will replace a voice of moderation and balance.

Perhaps the most important statement Judge Alito made during the entire hearing process was when he told the Judiciary Committee that he expects to be the same kind of Justice on the Supreme Court as he has been a judge on the Circuit Court.

That is precisely the problem. As a judge, Samuel Alito seemed to approach his cases with an analytical coldness that reflected no concern for the human consequences of his reasoning.

When I listen to what he said about a case involving an African-American man convicted of murder by an all-White jury in a courtroom where the prosecutors had eliminated all African-American jurors in many previous murder trials as well.

Judge Alito dismissed this evidence of racial bias and said that the jury makeup was no more relevant than the fact that left-handers have won five of the last six Presidential elections. When asked about this analogy during the hearings, he said it "went to the issue of statistics... (which) is a branch of mathematics, and there are ways to analyze statistics so that you draw sound conclusions from them..." That response would have been appropriate for a college math professor, but it is deeply troubling from a potential Supreme Court Justice.

The great and Supreme Court Justice Oliver Wendell Holmes, Jr. wrote in 1881, "The life of the law has not been logic; it has been experience... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

What Holmes meant is that the law is a living thing, that those who interpret it must do so with wisdom and humanity, and with an understanding of the consequences of their judgments for the lives of the people they affect.

It is with deep regret that I conclude that Judge Alito's judicial philosophy lacks this wisdom, humanity and moderation. He is simply too far out of the mainstream in his thinking. His opinions demonstrate neither the independence of mind nor the depth of heart that I believe we need in our Supreme Court Justices, particularly at this crucial time in our country's history.

That is why I will oppose this nomination.

MORNING BUSINESS
Mr. THUNE. Mr. President, I ask unanimous consent that there now be a period of morning business with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

GSRI HEALTHY LIVING STUDY— THE NEW NORMAL? WHAT GIRLS SAY ABOUT HEALTHY LIVING
Mr. FRIST. Mr. President, America is confronting a childhood obesity crisis, and over the past 25 years, the percentage of overweight girls has more than doubled—16 percent of girls ages 6 to 19, up from 6 percent in 1974. To support the search for a solution, the Girl Scout Research Institute...