In the recent past, Republican Presidents have made 15 of the last 17 nominations to the Supreme Court.

The Republican stamp on the current Court is undeniable, and clearly the prospects of the Court becoming more moderate in the near future are unlikely.

Upon this backdrop, I have evaluated the decisions and writings of Judge Alito, closely watched the nomination hearing in the Senate Judiciary Committee, and listened to the statements of many colleagues on his nomination. I have come away from this review with a number of concerns.

First, Judge Alito did not provide complete answers on many important topics the way now Chief Justice Roberts did during his nomination hearing. These included many critical issues such as: Is Roe settled law? What are the limits of the executive branch’s power?

Second, Judge Alito failed to distance himself from the radical views he expressed in his earlier writings on the supremacy of executive power.

Third, Judge Alito’s record includes troubling decisions on vital issues such as search and seizure, reproductive rights, the power of Congress, civil rights, and affirmative action.

Because of these facts, I have concluded that the addition of Judge Alito to the Supreme Court would unacceptably shift the balance of the Court on many critical questions facing our country, such as:

Are there limits on the power of the presidency?

Can the Congress regulate the activities of the states?

How expansive is the right to privacy?

What deference should be given to legislative acts of the Congress?

How the Court addresses these questions goes to the heart of what we stand for as a country, which is why this nomination is so important.

While many of my colleagues will disagree with my assessment of Judge Alito, this will be a lifetime appointment and a lifetime is too long to be wrong.

I yield the floor.
are going to have a justice who believes in that march of progress, or whether we are going to have somebody who is going to be a roadblock in that march toward progress. I express my opposition to Judge Alito because I think he is the wrong judge at the wrong time in making this a fairer country and where Congress has led the way and, certainly, we have seen that with Executive power in terms of the adoption of the Medicare Programs and Medicaid. We had Presidential leadership for a while in the early sixties, and finally we passed those. As a result, we are a fairer country. Ask our elderly people if we didn’t have the Medicare programs we would be as a nation.

That is the issue.

I accepted the challenge of Judge Alito, who said, let’s read my cases. I am reviewing the fact that to understand a nominee, one has to read their dissenting opinions. Ruth Bader Ginsburg and Robert Bork agreed 91 percent of the time. Isn’t that extraordinary about two individuals with dramatically different judicial philosophies? They agreed 91 percent of the time. Where you found their differences were in their dissents.

That is where I looked with regard to this nominee. That is why I came to the conclusion. The dissents are not going to be friendly to the average worker, friendly on women’s rights, friendly on the issues of race, friendly on the issues of the environment, and would no doubt be willing to accede to a President who may have the Executive power programs where we would be as a nation.

I remember the time when the President announced the nomination of Judge Alito. It was in the early morning. I happened to be in Massachusetts on an appointment that was going to be friendly to the average worker, friendly on women’s rights, friendly on the issues of race, friendly on the issues of the environment, and would no doubt be willing to accede to a President who may have the Executive power programs.

We have had a great many of those nominees who were virtually unanimous in this body—Democrats and Republicans voting together. That is what I think all of us were hoping for. We had seen the fiasco that had taken place with Harriet Miers. We saw groups in this country that were prepared to exercise a veto. We have seen groups in or out of Washington that were prepared to exercise a litmus test. We have seen groups that have said absolutely, no, we are not going to have Harriet Miers. These are the same groups that indicated for so long that nominees are entitled to a vote up or down.

We ought to be able to look at a nominee’s judicial philosophy and all the rest. All of those issues went right out the window when Harriet Miers was nominated. The reason was because Harriet Miers didn’t pass a litmus test. Now we have Judge Alito. Before the announcement ended, we see this extraordinary wave of support that has come over in terms of support for this nominee. I wonder how people could be so opposed to Harriet Miers and, as soon as Judge Alito was announced, how they could be so overwhelmingly supportive of him. What did they know? Who knew?

One of the things I think of is what our Founding Fathers wanted. What did the Constitution say on this issue? The Founding Fathers, in debating the Constitution, considered the issue of appointment of judges four different times. On three occasions they gave all the authority to this body here, the Senate, to recommend and appoint. The last important decision at the Constitutional Convention—10 days before the end of the power—was the Executive having the power to appoint and the Senate having the power to give advice and consent. You cannot read the debates, which I have read, and not understand that it was a real shared idea. Because of that, it is my belief that the Senate is supposed to be a rubber stamp. I know it suits their interests, but our Founding Fathers wanted the shared responsibility. Remember the checks and balances, the essential dualization of the United States? When they give authority and power in one place, they give authority and power to the other—the Commander in Chief, Executive, making of war; with the Congress, the power of the purse, and the rest of the issues we all are familiar with.

This is a shared responsibility, and we in this Senate have a very important constitutional obligation to review the recommendation. The real question for us, we have no nominee is to find out—not for ourselves, but as instruments for the American people—what are the beliefs of this nominee are; what are the real beliefs of the nominee for the Supreme Court of the United States; do we have the assurances that this individual is the best of the best. We have seen that. President Reagan gave us Sandra Day O’Connor, who was the best of the best. The list went on. We have had extraordinary jurists in the past.

We approached this to try to find out these things on the Judiciary Committee. We have a pretty good sense that the executive branch knows the philosophy of this nominee. They have made the recommendation and obviously they have inquired of this nominee, so they know where he is.

I was absolutely startled this morning when I picked up the New York Times and saw in Mr. Kirkpatrick’s article how this nominee was selected, who selected him, and what the process was. All during this period of time, that was some-thing those of us on Judiciary Committee had no mind of. Maybe our friends on the other side knew about it. But this is on the front page of the New York Times: Paving The Way For Alito Began In Reagan Era.

It goes on extensively, continuing on page A18. I asked unanimous consent that the article be printed in the RECORD. There being no objection, the material was ordered to be printed in the RECORD, as follows:

IN ALITO, G.O.P. REAPS HARVEST PLANTED IN 1982

(By David D. Kirkpatrick)

Last February, as rumors swirled about the failing health of Chief Justice William H. Rehnquist, a team of conservative grassroots organizers, political strategists and legal specialists met to prepare a battle plan to ensure any vacancies were filled by like-minded jurists.

The team recruited conservative lawyers to study the records of 18 potential nominees including Judges John G. Roberts Jr. and Samuel A. Alito Jr. Fewer than three dozen lawyers across the country to respond to news reports on the president’s eventual pick.

Now, on the eve of what is expected to be the Senate confirmation of Judge Alito to the Supreme Court, coming four months after Chief Justice Roberts was installed, the lawyers stand on the brink of a watershed for the conservative movement.

In 1982, the year after Mr. Alito first joined the Reagan administration, that movement was little more than the handful of legal scholars who gathered at Yale for the first meeting of the Federalist Society, a newly formed conservative legal group.

Judge Alito’s ascent to join Chief Justice Roberts on the court “would have been beyond our best expectations,” said Spencer A. Weil, one of the organizers, a former Secretary of Energy under President Bush and now the chairman of the Committee for Justice, one of many conservative organizations set up to support judicial nominees.

He added, “I don’t think we would have put a lot of money on it in a friendly wager.”

Judge Alito’s confirmation is also the culmination of a disciplined campaign begun by the Reagan administration to seed the lower federal judiciary with like-minded jurists who could reorient the federal courts toward a view of the Constitution much closer to its 18th-century authors’ intent, including a much less expansive view of its application of constitutional rights and liberties.

It was a philosophy promulgated by Edwin Meese III, attorney general in the Reagan administration, that became the goal of the Federalist Society and the nascent conservative legal movement.

Both Mr. Roberts and Mr. Alito were among the cadre of young conservative lawyers attracted to the Reagan administration’s Justice Department. And both advanced to the pool of promising young judges whom strategists like C. Boyden Gray, White House counsel in the first Bush administration and an adviser to the current White House, sought to place throughout the federal judiciary to groom for the court.

“It is a Reagan personnel officer’s dream come true,” said Douglas W. Kmiec, a law
professor at Pepperdine University who worked with Mr. Alito and Mr. Roberts in the Reagan administration. "It is a graduation. These individuals have been in study and practice for these roles all their professional lives."

As each progressed in legal stature, others were laying the infrastructure of the movement. When Mr. Alito was defeated in the Supreme Court nomination of Judge Robert H. Bork conservatives vowed to build a counterweight to the liberal forces that had mobilized against him.

With grants from major conservative donors like the John M. Olin Foundation, the Federalist Society functioned as a clearinghouse of shadow conservative bar association, planting chapters in law schools around the country that served as a pipeline to prestigious judicial clerkships.

During their narrow and politically costly victory in the 1991 confirmation of Justice Clarence Thomas, the Federalist Society lawyers forged new ties with the increasingly sophisticated network of grass-roots conservative Christian groups like Focus on the Family in Colorado Springs and the American Family Association in Tupelo, Miss. Many conservative Christian pastors and broadcasters had railed for decades against "Scalito," which would have linked him to the conservative Justice Antonin Scalia.

In November, some Democrats believed they had a firmer hold on the position after the disclosure of a 1985 memorandum Judge Alito wrote in the Reagan administration about his conservative legal views on abortion, affirmative action and other subjects.

"It was a done deal," one of the Democratic staff members of the Senate Judiciary Committee said, focusing on the condition of anonymity because the staff is forbidden to talk publicly about internal meetings.

"This was the most evidence we have ever had about a Supreme Court nominee's true beliefs." Mr. Leo and other lawyers supporting Judge Alito were inclined to shrug off the memorandum, which described views that were typical in their circles, people involved in the effort said. But executives at Creative Response Management, the Republican public relations firm, quickly convinced them it was "a big deal" that could become the centerpiece of the Democrats' attacks, one of the people said.

"The call came in right away," said Jay Sekulow, chief counsel of the American Center for Law and Justice and another lawyer on the Alito team. Responding to Mr. Alito's 1985 statement that he disagreed strongly with the abortion-rights precedents, for example, "The answer was no, it was not consistent with his position," Mr. Sekulow said. "He worked for the Reagan administration. He was a lawyer representing a client, and it may well have reflected his personal beliefs. But look what he has done as judge."

His supporters deluged news organizations with phone calls, press releases and lawyers to interview, all noting that on the United States Court of Appeals for the Third Circuit, Judge Alito had voted to uphold and to strike down abortion restrictions.

Democrats contended that those arguments were irrelevant because on the lower court Judge Alito was bound by Supreme Court precedent, whereas as a justice he could vote to overturn any precedents with which he disagreed.

By last week it was clear that the judge had enough for confirmation. And the last gasp of resistance came in a Democratic caucus meeting on Wednesday when Senator Edward M. Kennedy, joined by Senator John Kerry, both of Massachusetts, unsuccessfully tried to persuade the party to organize a filibuster.

No one defended Judge Alito or argued that he did not warrant opposition, Mr. Kennedy said in an interview. Instead, opponents of the filibuster argued about the political cost of being accused of obstructionism by conservatives.

Still, on the brink of this victory, some in the conservative movement say the battle over the court has just begun. Justice O'Connor was the swing vote on many issues, but replacing her with a more dependable conservative would bring that fact of the court at most to four justices, not five, and no one wants to substantially change the court or overturn precedents like those upholding abortion rights.

"It has been a long time coming," Judge Bork said, "but no one wants to do it.'"

Mr. KENNEDY, Mr. President, America is listening to the President. He said: We are going to get the very best nominee we possibly can. That is one side of the story. Most of us certainly believed it. Well, this is the story. This may be accurate and it may not be. I think it is very difficult to read this story and not certainly find a very powerful ring of truth in it.

Last February, as rumors swirled about the health of Chief Justice William H. Rehnquist, a team of conservative grassroots organizers, public relations specialists, and legal strategists met to prepare a battle plan to ensure any vacancies were filled by like-minded jurists.

So the right wing had a plan. They knew what the thinking of the nominee was. The article continues:

The team recruited conservative lawyers to study the records of 18 potential nominees—including Judges John G. Roberts and Samuel A. Alito—and trained more than three dozen lawyers across the country to respond to news reports on the President's eventual pick.

So members of the right wing are going to make the pick and we see around the country where dozens of lawyers are going to respond to the news reports. It continues: "We boxed them in."

Boxed whom in? They boxed in the American people. That is what they are saying proudly—"we boxed them in," one lawyer present during the strategy meetings said with pride in an interview over the weekend.

Boxed whom in? This is a nomination for the Supreme Court of the United States. This is supposed to represent all of the people, all Americans. No, no, they boxed them in, a lawyer present at the strategy meeting said with pride.

This lawyer and others present who described the meeting were granted anonymity because the meetings were confidential and because the team had told its allies not to exult publicly until the confirmation vote was cast. It is, they said, "a big deal." Although I was surprised that—and this would be my 23rd Supreme Court nominee—the nominee was up in the Capitol last week thanking Senators for their support and receiving congratulations prior to the time we even vote on him. It has been debated for less than a week on the floor of the Senate. Twenty-five Senators from our side have spoken. Only half of our caucus had a chance to speak. They will not speak now if we cut it off. They have not had a chance to talk. Again, the article says:"

... The team had told its allies not to exult publicly until the confirmation vote was cast.

Then they will pop the champagne and say we pulled one over on you. And it continues:

They laid out a two-part strategy to roll out behind whomever the President picked, people present said. The plan: first, extol the nonpartisan legal credentials of the nominee, steering the debate away from the nominee's possible influence over hot-button issues. Second, attack the liberal groups they expected to oppose any Bush nominee.

They found a new way to organize, the Judicial Confirmation Network, to coordinate grass-roots pressure on Democratic senators from conservative states. And they found a consistent campaign scorecard for conservative groups around the country to brief them about potential nominees and to make sure they all stuck to the same message. They fine-tuned their strategy for Judge Alito when he was nominated in October by recruiting Italian-American broadcasters to use the nickname of the nickname "Scalito," which would have linked him to the conservative Justice Antonin Scalia.

"It has been a long time coming," Judge Bork said, "but no one wants to do it.'"

Mr. KENNEDY. Mr. President, America is listening to the President. He said: We are going to get the very best nominee we possibly can. That is one
January 30, 2006

CONE...
They affect whether families can obtain needed medical care under health insurance policies. Decisions on health care, we understand ERISA, often go to the Supreme Court.

Decisions affect whether people will actually receive retirement benefits they were promised. There was $8 billion lost in the last 5 years; 700 retirement programs lost $8 billion, where workers actually paid in. Who is going to protect their rights? Is it going to be the powerful companies, powerful interests, special interests, or are we going to have a judge who is going to be looking out for the worker and the worker’s interest? It is a legitimate issue.

If you care about your health care, if you care about your retirement, if you care about your conditions of employment, this Supreme Court nominee is where you ought to be focusing on where you ought to give your attention.

Supreme Court decisions affect whether people will be free from discrimination, prejudice, and outright bigotry in their daily lives. You are going to be told you are not going to get the job because of the color of your skin or because of your gender. There are cases we went through during the Judiciary Committee about Judge Alito being insensitive in those areas. I will come back to them.

Do you hear me? Discrimination, prejudice, outright bigotry in their daily lives. You are going to have to make sure you are going to have a Supreme Court that is going to be fighting for you.

The decisions affect whether Americans’ most private medical decisions will be a family matter or subject to government interference. Terri Schiavo is a classic example. We have governmental solutions to these issues, or should these matters be left to the individuals who are closest to any patient—their families, their loved ones, their priests, their ministers, their rabbis? We had a debate on this issue. People can think that is a long way away from them, but there is nobody in this body, nobody in this audience, nobody who is watching who doesn’t have a real personal interest that is going to happen to their parents, to their loved ones, and whether we are going to be able to deal with that issue or whether the Supreme Court is going to say: Well, we think there are appropriate governmental kinds of roles in this kind of a situation. We certainly saw where a majority of this body legislatively felt the courts ought to become much more involved in that situation. They basically retreated on that position, although some still defended it even in recent days.

The decisions affect whether a person with disabilities will have access to public facilities and programs. I gave the example of Tennessee v. Lane. That is a case that was decided in the last few years about disability rights. Who among us doesn’t have a member of their family who has some kind of challenges, either mental health challenges or physical challenges? We have people in our families, and when we get the chance to talk about disabilities and disability rights in this body, it is always amazing—not amazing, it is always interesting to me that we give such little attention to those people who have challenges and disability needs and we give such little attention and assistance to them.

“Parity” is the code word, whether we are going to treat people who have mental health issues and those with disabilities the same as those who have physical issues. We still haven’t had it. I certainly hope, with the leadership of Senator DOMENICI, certainly myself, Senator HARKIN, and many other Members, that we will have a chance to vote on that issue this year. It is long overdue.

Supreme Court decisions affect whether we will have reasonable environmental laws that keep our air and water clean. Care about the water? Is the air we breathe back and forth that is going to really make much of a difference to us, Senator? Does it really make much difference to us? Interesting, we have doubled the number of deaths from asthma this year than we had 5 years ago—doubled. That led to the question: why is that. Do you know where they are? They are all in the States and cities and communities that, by and large, have inhaled the toxins and the dioxins which have come, as a result of changes in the environmental laws, from major plants, carbon-producing plants in this country.

We had laws. I don’t know what to tell a mother when she sees her child having that intense reaction. I know, as a father of a chronic asthmatic, they are going to live with it. I wonder if we grow it—not in our family. We see the constant challenge that it is for any young person as they grow to adulthood. Asthma is increasing, and there is no question about it. It is because of the pollution in the air.

Are we going to have a judge who will recognize what the Congress wanted to do, or someone who is going to say, Oh, no, we have a very powerful community that is going to have a reasonable argument—as we saw with Judge Alito; I will come back to that case as well—so, therefore, we are going to find for the company, and we are going to let them continue to discharge pollutants into the lakes. Do we care about the lakes? Do we care about the streams?

Mercury advisories apply to nearly a third of the area of America’s lakes and 22 percent of the length of our rivers, and mercury pollution has led 45 states to issue water consumption advisories. Where kids used to go out and fish and enjoy it, that is absolutely denied them for health reasons. With respect to expectant mothers, that is very real.

We in Congress pass laws, the President signs them, they go to the courts for interpretation, and where will this nominee come out? Will he come out for that mother who has a child who has asthma or that parent seeking the pollution taking place in a lake nearby and whose child has been affected by those kinds of poisons? Where is he going to come out on the issues of discrimination in jobs, issues we have been fighting to eliminate under title VII of our civil rights laws and that still are a problem.

We can go through those cases where this nominee falls to shape up. Let me just say this vote this afternoon will last for 15 or 20 minutes. But the implications of that vote, the implications for your life, your children’s lives and your grandchildren’s lives, will continue for years to come. We have only one chance to get it right. This is not another bill of legislation we can go ahead and pass it and then say, oh, well, we got it wrong.

I think with respect to the prescription drug bill we will have to come back and redo it. I think we should. We can’t let the Senate pass a prescription drug bill. Americans are entitled to that. Seniors are entitled to it. We got it wrong when, effectively, the conference was hijacked by the drug companies and the HMOs. There were extraordinary payoffs. It was written up in the Washington Post last week about the payoff—it was $46 billion to the HMOs back in 2003, now it is $67 billion.

People who go to the HMOs are 8 percent healthier, and they got a 7-percent inflator, a 15-percent advantage. I thought Republicans used to say the private sector was more efficient; that we can do it more effectively than the Government so we don’t need extra help. No, they want all the extras, 15 percent more, so it comes to $46 billion more. You are asking why people in my State are paying higher copays and premiums and all the rest? It is because we have these kinds of payouts.

We can come back and deal with those. People can deal with those in the elections next fall. I understand that. You win or lose and we come back to it, but not on the Supreme Court of the United States. You get only one ticket. It was written up in the Washington Post last week about the payoff—it was $46 billion to the HMOs back in 2003, now it is $67 billion.
January 30, 2006

CONGRESSIONAL RECORD — SENATE

issues and women’s privacy issues, which are so at risk at this particular time with this nominee. All of those issues are out there. All we are saying is, don’t we think we ought to try to get it right? Don’t we think we ought to have a chance to lay this out just a little more.

In every one of those examples I gave, in those nine different titles, there are cases on which Judge Alito has ruled. He has taken a position. In many instances he has taken the position in strong opposition to other judges appointed by Republicans. Judge Rendell talked about Gestapo-like tactics that were used when marshals came in on a civil action. There was no crime committed. It was a civil action in order to repossess a farm in bankruptcy to be sold at public auction. People had worked their whole lives for this small farm in Pennsylvania, and the marshals came in, they seized it, and grabbed these individuals who had committed no crime. There was no attempt to run. There was no attempt to evade. And we have Judge Rendell talking about Gestapo-like tactics by those marshals. Whether they were Gestapo-like or they were not Gestapo-like certainly ought to be decided by the jury. I think most of us would agree with that, would we not?

Judge Alito said: No, no, we are not going to let that go to the jury. They were just performing their own responsibilities. I am not going to let that go to the jury.

Other judges, on issues about whether there is discrimination in employment—including some Republican judges who sat with Judge Alito and said if we follow Judge Alito’s reasoning and rationale we would effectively—‘eviscerate’ is the word that was used—title VII, title VII being the provisions we passed in the 1964 act to make sure we are not going to discriminate in employment.

The list goes on. It is not just myself or others who have expressed opposition. We have the very distinguished Cass Sunstein of the University of Chicago who has done a review of Judge Alito’s cases and said that 84 percent of the time Judge Alito decided for the powerful or the entrenched interests or the government. Cass Sunstein said that.

Knight Ridder, that is not a Democratic organ. That is not Democratic members of the committee. They have a whole group who analyzed his opinions independently. The Knight Ridder newspaper chain reached the same decision.

The Yale study group—gifted, talented students and professors up there at Yale University—did a study about Judge Alito’s dissents and opinions and came to the same conclusion. If you are looking for someone who is going to protect men and women of color, if you are looking for somebody who is going to protect children, if you are looking for someone who is going to protect the privacy issues of women, this is not your candidate.

Those are the conclusions of a broad range of different groups who have studied this broad range. They not just Democrats, not partisan. Knight Ridder is not partisan. Cass Sunstein is basically in the middle. Some will say this afternoon, oh, well, you can always find a few cases. It is not just a few. These are the overwhelming number of studies. Even the Washington Post study, in terms of the number of victories that people of color had or the workers had over the existing power system, reaches the same conclusion.

It seems to me we ought at least to have the opportunity to make sure the American people understand this. It takes time. It took some time for the American people to understand what was really happening in Iraq. It took some time for the American people to understand what is right and play by the rules. It takes some time for them to understand what is right and play by the rules to affect their lives and their well-being in the future. But there is nothing more important. There is nothing more important here in the Senate. There is nothing more important in the unfinished business of the Senate. Nothing comes close to it. If you said right behind this is the Defense appropriations bill, this is going to delay a decision on armor and support for our troops, I would say, fine, let’s do that and go through. Maybe we will find time after that for Judge Alito. But that is not here. What are we doing after this? We are doing asbestos issues. That is entirely different. We have real questions about asbestos. That is going to be adequate funding for those people who have been sickest and all the rest. We have to have a full debate on that issue. But there is no reason in the world we cannot take the time and can’t have the debate on this issue, which is incalculably more important to the lives and well-being of Americans.

There are sufficient questions across the front pages of America’s newspapers today that raise very serious issues and questions about this whole process that ought to cause our colleagues, friends, associates, the Members of this body, some pause. Let’s try to think. Let’s try to get it right. I say let’s try to get it right. We will have an opportunity to do that this afternoon at 4:30.

Mr. President, I believe my time is just about up.

The ACTING PRESIDENT pro tempore. The minority has an additional minutes.

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

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

The assistant legislative clerk proceeded to call the roll.

Mr. KENNEDY. Mr. President, I ask unanimous consent the order for the question on this issue be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. KENNEDY. Mr. President, in one reference to Judge Rendell and also Judge Chertoff on the two cases I referred, it was Judge Rendell who described the tactics of the marshals brandishing shotguns as “Gestapo-like” and Judge Chertoff who criticized Judge Alito’s position, which was an absolutely bad case, Doe v. Groody, which involved the strip-search of the 10-year-old girl. I ask the RECORD reflect that change.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Under the previous order, the time from 11 to 12 will be under the control of the majority side, and then debate will continue to alternate on an hourly basis until 4 p.m.

The Senator from Wyoming.

Mr. THOMAS. Mr. President, I appreciate the opportunity to talk a little bit about Judge Alito’s position. I was here before us. I have not done so until now. I have watched this debate with interest because I think it is one of the most important things we do. Of course, is for the President to nominate and for the Senate to confirm or reject. So that is really one of the important issues before us.

I must confess I have been a little surprised at the system we have gone through. It has been strung out for a very long time and seems to me perhaps it has gone on longer than necessary, but nevertheless that is where we are. I was very pleased to learn it is not partisan, not political. I was a little surprised to hear that. But nevertheless I do think it is important.

I have not practiced law, but I certainly understand in our system the Supreme Court is one of the three elements of our Government and is a very important one. And so it is important that we deal with it. I just would like to say that it seems to me, as I have listened and as I have paid as much attention as I could to Judge Alito’s hearings, I am certainly impressed. I am impressed with his qualifications and his experience. I would think surely one of the most important elements of the question of confirmation is experience, someone who has the qualifications of experience, someone who has had the background. Certainly Judge Alito has that—Princeton University, Harvard Law School, Army Reserve, DOJ legal counsel, U.S. attorney, unanimously confirmed in New Jersey, circuit court judge Third Circuit, unanimously confirmed by his colleagues before the Supreme Court. Many attorneys, of course, have not had this kind of distinguished opportunity. I would guess
for the most part many of the candidates for the Supreme Court have not had that kind of experience. He has had some 15 years with the Third Circuit, some 35,000 votes. So the background is there.

I think one of the things, certainly, that is a part of the confirmation and the confirmation hearing and what we need to understand is the positions that these various candidates take, and I would like to just share a few quotations, responses that the judge gave that were asked.

In terms of believing in the Constitution and that it protects rights for all, under all circumstances, in times of peace or war, the judge said:

Our Constitution applies in times of peace and in times of war, and it protects the rights of Americans under all circumstances. It is particularly important that we adhere to the Bill of Rights in times of war and in times of national crisis, because that’s when there’s the greatest temptation to depart from them.

It seems to me that is very clear and one that has been talked about a good deal currently.

Another question was: Do you believe anyone, the President, the Congress, the courts, rise above the law? The candidate said:

No person in this country is above the law. And that includes the President and it includes the Supreme Court. Everyone has to follow the law, and that means the Constitution of the United States and it means the laws that are enacted under the Constitution of the United States.

Again, I think that is a very basic premise. We are all treated equally under the law. “Under the law,” that is the key.

As we do, go to schools quite often, and having spent some time on the Foreign Relations Committee, I often tell students that one of the significant differences about our country and most of the rest of the world is we have laws under which everyone is treated equally. I think that is one of the keys, and that response, it seems to me, is a great one.

He was asked would he base decisions on the Constitution and the rule of law, not shifting public opinion. He said:

The Court should make its decisions based on the Constitution and the law. It should not sway in the wind of public opinion at any time.

Certainly, that is a very important element as well. He was asked about his personal views and how that would affect his decisions. He said:

I would approach the question with an open mind, and I would listen to the arguments that were made.

When you become a judge, you really have to put aside the things that you did as a lawyer at prior points in your legal career and think about legal issues the way a judge thinks about legal issues.

When asked about upholding the high standards of integrity and ethics, he said:

I did what I’ve tried to do throughout my career as a judge, and that is to go beyond the letter of the ethics rules and to avoid any situation where there might be an ethical question raised.

It seems to me those are the kinds of responses that make you feel comfortable with. I am very pleased that apparently we are going toward the end. Certainly, it is time to get down toward the end. There is no reason to continue to drag this out. We know what we need to know, it is there, and to do it.

So I think throughout the process the candidate has answered the questions to the best of his ability. Unfortunately, many of the questioners spent more time giving speeches and circumventing the process than asking relevant questions, but that is part of the process.

I must confess I am getting a little concerned about the Senate confirmation process. We ought to take another look at our role and not deviate from that role for other unrelated reasons. So I hope Members have not taken us down the path of setting a bad precedent, and I am sure that is not the case. I am looking forward to completing this this afternoon and completing it tomorrow. I think we have before us a great opportunity to confirm one of the most capable persons that we could have on our Supreme Court.

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

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

The legislative clerk proceeded to call the roll.

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

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

Mr. BENNETT. Mr. President, I was here in the Chamber in the role of Presiding Officer during the presentation of the senior Senator from Massachusetts in which he referred to a story in this morning’s New York Times with respect to public relations activity aimed at supporting Judge Alito. He was quite outraged at what he had read in the New York Times and talked about how improper it was for a public relations firm or any group of lawyers to gather together and mount a campaign on behalf of this nominee; that that should be left to the Senate and that there should be no outside interference in that process.

The New York Times had focused on the activities that had been in favor of the nominee, and the Senator from Massachusetts found that objectionable.

As I listened to him, I could not help but think of the actions that went forward in opposition to this nominee by groups of lawyers who gathered together to get their ammunition ready in the public arena, by public relations firms that were hired to oppose the nominee.

I remember the story in the Washington Post when John Roberts was proposed where they described those groups that were opposed to the President gathering with their press releases to attack the nominee, who were forced to strip out the name of the person they thought the nominee would be, and I was embarrassed by the fact that they could issue the press releases as soon as the name was made public.

They had prepared their ammunition to attack the President’s nominee before they knew who he was, and they were embarrassed by the fact that they had guessed wrong. But they did not change a single word of their attack once they knew that the actual nominee was someone different than they had anticipated.

My only comments to the Senator from Massachusetts would be that if he decries the work that was done in favor of a nominee by outside lawyer groups and public relations firms, he should join with some of the rest of us and say that the same criticism applies to those who were prepared to savage the nominee, whomever he might have been.

If the Senator from Massachusetts will have a conversation with Ralph Nader and the People from the American Way and say to them, Back off, let the nominee be made known, let his views or her views be made known, have a clear evaluation of where they stand before you start your public relations attack, then I will turn to the groups on the right and say the same thing: You back off. Let the nominee be known. Let the views be examined before you mount your public relations campaign.

But we saw what happened when people in support of a Republican President’s nominee back off and allow the field to be dominated by those who are on the attack. Out of that first experience of seeing attack after attack after attack into an empty field, we have created a new word in the English language. It is a verb, to “Bork.” The nominee was Robert Bork. I had my problems with Robert Bork. I am not sure how I would have voted, having heard his record. But I do know that the record was distorted and the opportunity to hear his record was changed by virtue of the groups that were all prepared to savage him, to attack his personality, to destroy any careful analysis of his record. He was “Borked.” And we heard other people would be “Borked” by this same savage attack from the left.

So I have sympathy with the Senator from Massachusetts when he complains about the groups on the right that were marshaled in advance of the nomination to defend the nominee. But I say to him they were marshaled to defend the nominee because they saw what happened when such previous activity was not carried forward. With the way in which the Chief Justice, John Roberts, name was put in both sides having their say but ultimately the public demonstrating a sense of revulsion about this whole “Borking”
process, and now with Judge Alito moving forward in a manner far more dignified than we have seen in the past, I hope “Borking” would become a historic artifact and would disappear and that groups on the far left and the far right—finally realizing that the Senate is no longer controlled by these kinds of tactics—that the ads that are run, television ads attacking the nominee boomerang.

We have seen some of these groups that have attacked Judge Alito have had their ads taken down because they were false, they were attacked by the media generally for the severity and the falsity of their position. “Borking” does not work any more. And I hope that both sides would recognize that the Senate has demonstrated a level of civility and intelligence in this situation that says we will not be moved by those who raise large sums of money, who run television ads in our home States savaging the nominee. That will be focused on what happens in the hearings. We will be focused on the actual record. We will not allow this to turn into an electoral circus.

That was done in the case of Judge Bork. That was done successfully, although it was attempted with Chief Justice Roberts.

It is not working now with Judge Alito. I hope people on both sides will then abandon those tactics, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. GRASSLEY. Mr. President, I assume that the business is to speak on the Alito nomination.

The PRESIDING OFFICER. The Senator is correct.

Mr. GRASSLEY. Mr. President, I choose to do that.

I support the nomination of Samuel Alito, Judge Alito, as we heard in our hearings, and so far in most of the debate on the floor, is a person who is a dedicated public servant, who practices what he preaches: integrity, modesty, judicial restraint and a devotion to the law and to the Constitution. He understands a judge should not have a personal agenda or be an activist on the bench but should make decisions as they should be decided—do it in an impartial manner, do it with an open mind, and do it with appropriate restraint and, of course, in accordance with the laws and the Constitution.

Listening to a lot of my colleagues on the committee, and last week, I am extremely disappointed that they are looking now at an attempt by Senators—and they are all on the other side of the aisle—to delay and filibuster this nominee. It is too bad Majority Leader Frist had to take the extreme position of filing cloture on this very important nomination. No Supreme Court nomination has ever been defeated by filibuster if a majority of the Senators stood ready to confirm the nominee. And that is not the case here because we already know a bipartisan majority of Senators will vote to confirm Judge Alito if we get to that point tomorrow at 11 o’clock. We also know we have had plenty of time to provide this nomination. It is unfortunate that certain Senators will vote against this nominee because they think doing so is a good political issue for them. These Senators are applying a very different standard to what has been the history and the tradition in the Senate of considering Supreme Court nominees.

The position being taken by these Senators is that Judge Alito ought to somehow share Justice O’Connor’s judicial philosophy in order for him to fill that seat where she has been for the last 225 years. That sort of thinking is totally at odds with what the Constitution requires, but more importantly than what the Constitution requires, what this Senate’s tradition in the last 225 years and that is that Judge Alito does not have to be Justice O’Connor’s judicial philosophy soulmate to deserve confirmation by this Senate. Because the Supreme Court does not have seats reserved for one philosophy or another. That kind of reasoning is completely antithetical to the proper role of the judiciary in our system of Government.

My colleagues on the other side, then, have it all wrong. There has never been an issue of ideological balance on the Court. If that were the case, do you think President Ford would have nominated Justice Stevens or President Bush I would have nominated Justice Ginsburg. Those appointees who have turned out to be the most liberal members on the Court appointed by Republicans? Those Senators did not think in terms of ideological balance.

The Senate’s tradition, then, has not been to confirm individuals to the Supreme Court who promote special interests or represent certain causes. The Senate has never understood its role to maintain any perceived ideological balance in the composition of the Court. The Senate’s tradition has been to confirm individuals who are well qualified to interpret and to apply the law and who understand the proper role of the judiciary to dispense justice.

Recent history, of course, is proof of that because in my years in the Senate, but as recently as 10, 12 years ago, when Ruth Bader Ginsburg was before the Senate, we gave overwhelming confirmation to her—a former general counsel of the very liberal group, the ACLU. So, Judge Alito, a conservative Justice, Byron White, on the Court at that time. The Senate confirmed Justice Ginsburg. Why? Because President Clinton won an election, campaigning on the basis of the kind of people he was going to nominate, and President Clinton did that. That is what the Constitution says the role of the President, the role of the Senate is. Now, my colleagues have said elections have results and the Constitution says the President gets to nominate Supreme Court candidates. Of course, Justice Ginsburg, whether you agree with her or not, had the requisite qualifications to serve on the Court.

Right after her, Justice Breyer came to the Supreme Court, a liberal as well, appointed by President Clinton. But the Senate confirmed that Justice by a big vote. The President made his choice, sent it to the Senate, the Senate found him qualified, and he was confirmed on an up-or-down vote. No filibuster was ever talked about, and no one talked about maintaining any ideological balance on the Court. Under the Senate’s tradition historically, is not the place to play politics. The Court is supposed to be, and as far as I know, is free of politics. But the Democrats and liberal outside interest groups want to change the rules because they think they could not win the box. They want to implement their agenda from the Court. Of course, that is a dangerous path, making the Supreme Court a superlegislature. The Constitution does not presume that.

Under our system of Government, a system based upon the judiciary being the arbiter of the war that often—I should say continually goes on between the executive branch of Government and the legislative branch of Government. Under the Constitution want the Supreme Court to assume an expansive role well beyond what was originally intended by the Constitution and its writers. They want the Court to take on a role that is closer to the role of the legislative branch, which is to make policy and bring about changes in our society.

Now, this has consequences when you go down this road. It has brought about the politicization of the judicial confirmation process that have seen. Under our checks and balances system, that nomination, but also on the Roberts nomination, or go back 3 years previous to the holding up of several circuit court nominees before this body through the threat of filibuster or not just the threat but the use of the filibuster.

Politicizing the judicial confirmation process is wrong. That is because when judges improperly assume the role of deciding essentially political questions rather than legal questions, the judicial confirmation process devolves into one focused less on whether a nominee can impartially and appropriately implement law. Instead, it becomes one
more focused on whether a nominee will implement a desired political outcome, and do it from the bench, regardless of the law and regardless of what the Constitution says.

Americans want what the Constitution means, Alito’s colleagues said. They want judges who will confine their job to interpreting the law as passed by legislative bodies and the Constitution as written rather than having the same group of men and women make policy and societal changes from the bench. We need to reject firmly the notion that the Supreme Court should be in the business of political decision-making or in the business of politicians—you and I who were elected to the Senate.

The Constitution provides that the President nominates a Supreme Court Justice and the Senate provides its advice and consent. Alexander Hamilton wrote an awful lot about the role the judiciary was to play and what judges were to do. That is because he was to explain that in relation to the ratification by the original 13 States. So he wrote several papers. But in Federalist 66, he wrote:

"It will be the office of the President to nominate and, with the advice and consent of the Senate, to appoint. That will, of course, be no exertion of choice on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they [meaning the Senate] cannot themselves choose—they can only ratify or reject the choice he may have made.

The way the Senate provides its advice and consent has been by a thorough Judiciary Committee evaluation, and then by an up-or-down vote in the full Senate. The Judiciary Committee has an important job because its members can ask in-depth questions of the nominee. The committee evaluates whether the nominee has the requisite judicial temperament, intellect, and integrity. The committee also looks to see whether a nominee understands the proper role of a Justice and respects the rule of law and the words of the Constitution. It reviews personal conduct because no Justice should be sitting on the Court who has a personal agenda that he wants or she wants to carry out.

I have been a member of the Judiciary Committee for more than 25 years and take this responsibility seriously, as do my colleagues. I thought Judge Alito did a very good job answering our questions and that he was candid. No doubt he was thorough. As far as I am concerned, he was very responsive.

Judge Alito understands the proper role of the judiciary is not to make the law. He will strictly interpret the law as written and do his best to remain faithful to the actual meaning of the Constitution. As Judge Alito said, Judges don’t have the authority to change the Constitution. The whole theory of judicial review that we have, I think, is contrary to that notion. The Constitution is an enduring document. Constitution doesn’t change. It does contain some important general principles that have to be applied to new factual situations that come up. But in doing that, the judiciary has to be very careful not to inject its own views into the matter. It has to apply the principles that are in the Constitution to the situations that come before the judiciary.

To quote Judge Alito again: A judge can’t have any agenda. A judge can’t have any preferred outcome in any particular case. And a judge certainly doesn’t have a client or an agenda such that 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.

Judge Alito also understands that the Constitution provides justice for all, for everybody. He told the committee this:

"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 said:

"Our Constitution applies in times of peace and in times of war, and it protects the rights of Americans under all circumstances.

"Alito understands the importance of the role of the judiciary in our system of checks and balances. We ought to be careful to make sure that we only approve judges who understand that. His colleagues believe Judge Alito will be an independent judge who will apply the law and the Constitution to every branch of Government and every person because Judge Alito knows that no one, including the President, is above the law. When I said "his colleagues," I meant those colleagues who testified before our committee and have worked with him for a long time on that circuit.

One of his colleagues, Judge Aldisert, testified:

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

"Former Judge Gibbons, who now represents clients against the Bush administration over its treatment of detainees in Guantanamo, doesn’t believe that Judge Alito will “rubber-stamp” any administration’s policy if it violates the law and Constitution. He said: I’m confident, however, that as an able legal scholar and a fairminded judge, he will be mindful that what may be presented on behalf of our clients careful and thoughtful consideration, without any predisposition in favor of the position of the government.

Yet Judge Alito’s critics claim he is out of the mainstream. That is what the debate last week was all about from the other side, that he is a judge with an agenda hostile to individual rights, civil rights, women, and the disabled. The truth is Judge Alito’s record has been distorted and mischaracterized. First, a statistical analysis that some try to use of how many times a certain kind of plaintiff wins or loses is not the way we dispense justice in America. It is a bad way to look at the law. Second, it is easy to manipulate and cherry pick cases to reach certain desired conclusions of why somebody should not be on the bench. But the bottom line is, who should win in a case depends on the facts presented in that specific case and what the applicable law says. What is important to Judge Alito is that he rules on specific facts in the case and in the issue before the Court, in accordance with the law and the Constitution.

As his colleagues attested, Judge Alito doesn’t have a predisposed outcome in cases. He doesn’t bow to special interests but sticks to the law regardless of whether the results are popular. That is precisely what good judges should do and what good judging is all about.

Moreover, when you consider all these accusations, look at what the ABA said. They unanimously voted to award Judge Alito their highest possible rating, and that is, in their words, “well qualified.” A panel of Third Circuit Court judges, I had already referred to two of them—who know Judge Alito more than 15 years, in their testimony had unqualified support for Judge Alito as they appeared before the committee. These colleagues didn’t see Judge Alito as an ideologist, hostile to specific groups, or with having a personal agenda. They testified about Judge Alito’s fairness, his impartiality with respect to all plaintiffs.

Judge Lewis, one I have not quoted yet, described himself as the committee to be “openly and unapologetically pro-choice” and “a committed human rights and civil rights activist.” But yet a person coming from this end of the legal continuum fully endorsed Judge Alito to the Supreme Court, testifying: I cannot recall one instance during conference or during any other experience that I had with Judge Alito, but in particular during the Senate Judiciary Committee, he would listen to all cases. He would listen to all arguments, he would listen to all sides. He would listen to all sides, and he would then listen to all sides and then come to a conclusion, and he would then have a client. The judge

The testimony of Judge Lewis continues:

"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 . . . I believe that Sam Alito will be the type of justice who will listen with an open mind and will not have any agenda-driven or result-oriented approach.

Justice Aldisert summarized these judges’ testimony best on the day they appeared before the committee when he said: We have heard his probing questions during oral argument, we who have been privy to his wise and insightful comments in our private decisional conferences, we who have observed at firsthand his impartial approach to decision-making and his thoughtful judicial temperament and know his carefully crafted opinions, we who are his colleagues are convinced that he will also be a great justice.

What other conclusion can you come to when you listen to people who have been close to him for a long time? We have a lot of people who worked with him on the court, who were not judges, who also appeared from both political parties. How can you come to any conclusion other than Judge Alito is going
to do what Justices on the Supreme Court ought to do based upon his 15 years on the circuit court, that he is fair and openminded and will approach cases without bias and without a personal agenda?

The senators who know Judge Alito best believe, without reservation, he is a judge who follows the law and the Constitution without a preset outcome in mind. They believe he is a man of great integrity, modesty, intellect, and insight. They believe he is a fair and openminded judge committed to doing what is right rather than committed to implementing a personal agenda.

After hearing all that, some of my colleagues ought to be ashamed of the blue smoke they are making out of this nomination or the ghosts they are putting up to scare us. Judge Alito will carry out the responsibilities that a Justice on the Supreme Court should, and he will do it in a principled, fair, and effective manner.

If Members have any doubt where I stand, I will cast my vote in support of Samuel Alito. This highly qualified nominee deserves to be confirmed to the Supreme Court. I hope my colleagues will see that as well and vote accordingly. Particularly on a very tough vote because of the extraordinary majority it takes to also vote to end a filibuster, the first filibuster of the 110 nominees to the Supreme Court. Hopefully, we will never see another extraordinary majority uncommitted by other colleagues on the floor of the Senate with such a filibuster once again. Vote to end the filibuster late this afternoon and then vote to confirm Judge Alito tomorrow.

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.

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

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

Ms. STABENOW. Mr. President, this is an incredibly important time in our Nation’s history. This is the second Supreme Court nominee to come before the Senate in the past 6 months. We are truly at a time where we are making decisions that will affect our children, our grandchildren, and an entire generation of people. Sandra Day O’Connor, the first woman Justice, and often the critical deciding vote, is retiring, as we know. The nominee who will replace her will have the power to change the direction of the Court and, as I indicated, touch people’s lives, affect people’s lives and opportunities for a generation.

I take this constitutional responsibility very seriously, as I know my colleagues have closely examined Judge Alito’s written opinions, his testimony, as well as the hearing transcript. I commend Senators SPECTER and LEAHY for conducting the hearings in a respectful and bipartisan manner. The Constitution grants all Americans, as we know, the same rights and liberties and freedoms under the law, which is why it is so important that we get it right. And the values upon which the United States was founded—not just words, but they are values, they are beliefs, they are the motivation for us as we, together, fight for the things we want for our families and work hard every day as Americans to make this process work for everybody. We count on the Supreme Court to protect these constitutional rights at all times, whether the majority agrees or whether it is popular. Every American has the same rights under our Constitution.

Judge Alito’s nomination comes at a time when we face new controversies over governmental intrusion into people’s private lives, from secret wiretaps conducted without a warrant or the knowledge of the court to attempt to subpoena millions of Internet searches from random companies such as Google. One of the most important responsibilities of the Supreme Court is to serve as a check on excessive Government intrusion into people’s lives.

In light of where we are today and the issues that this Court will face, it is even more important to have a Justice who will stand up for Americans.

Unfortunately, Judge Alito’s record is clear and deeply troubling. When one looks at his writings, his court opinions from over 15 years on the Third Circuit Court of Appeals, and when one looks at the hearing transcripts, there is a clear and consistent record of siding with the government, siding with other powerful interests at the expense of American citizens.

In case after case, whether it is about job discrimination, pensions, illegal search, or freedom of speech, he has been an activist judge who has tilted the scales against the little guy. Often, he has been criticized by his colleagues as trying to legislate from the bench in order to reach the result he desires.

His views are way outside the mainstream, especially in his dissent opinions. There are numerous cases where Judge Alito was the only dissenter, which means he felt strongly enough about his personal views that he objected to what the other 10 judges supported. He has even written separate opinions on an issue. These dissents give insight into what I believe is an extreme ideology on the most basic of American freedoms, liberties, and rights.

Because of his extreme record and after much deliberation, I concluded that Judge Alito is the wrong choice to replace Sandra Day O’Connor on the U.S. Supreme Court. He may well, as we know, be the deciding vote on issues that affect our children and grandchildren and an entire generation.

His record on workers’ protections is outside the mainstream. Our manufacturors are struggling in Michigan, as well as across the country, and every day we see announcements of plant closings and filings of bankruptcy. Michigan families are worried. They are worried that they will not have a job tomorrow. They’re worried that they are going to lose their pensions and their health care benefits for themselves and their families. We in Michigan need a Supreme Court nominee who will stand with us, stand with Michigan’s workers, families, and Judge Alito is not that nominee.

In Belcufine v. Aloe, a company in bankruptcy did not give its employees the retirement benefits and vacation time they earned under the bankruptcy. Under Pennsylvania law, corporate officers are personally liable for nonpayment of wages and benefits. The employees sued, and Judge Alito sided with the company, saying that the law did not apply once a company filed for bankruptcy. Not only did he side with the CEOs at the expense of the workers’ hard-earned wages and pensions, but he legislated from the bench to get the result he wanted.

Judge Greenberg, a Reagan appointee, wrote a strong dissent accusing Judge Alito of trying to rewrite the Pennsylvania law, stating:

[We] are judges; not legislators, and it is beyond our power to rewrite the [law] so as to create a bankruptcy exception in favor of statutory employers merely because we believe it would be good for business to do so.

Again, a colleague indicating that, in fact, Judge Alito was writing law instead of just interpreting the law.

In another case addressing pension benefits, the plaintiff had worked in jobs covered by the Teamsters pension fund from 1960 to 1971, had a 7-year break in service, and then worked under the fund again from 1978 until his retirement. The majority on the court held that both periods of employment would be counted when the man was calculating his pension benefits, regardless of the break in service. If you are working and then you need to take a break, whether it is illness, caring for a loved one—regardless of the circumstances—if you work under the pension system, you work until retirement, all of the years you worked hard should be counted toward your pension.

Judge Alito dissented, arguing that the first period of employment, a total of 11 years of hard work, should not count, essentially cutting the workers’ pension benefits. If his dissent had prevailed, I imagine that the thousands of workers across this country would have their pensions cut, even if they worked 30 years in one job, if there was a gap in their employment. That is not right. If you work hard for 30 years, you should get the pension you paid in and you have earned.

The majority once again admonished Judge Alito for ignoring the plain language of the law and trying to legislate from the bench, reminding him that:

Changes in legislation in Congress and if our interpretation of what Congress has said so plainly is now disfavored, it...
He recommended that when the President signs a bill passed by Congress, he should issue a signing statement announcing his interpretation of the law in order to influence the court’s interpretation, essentially creating a backdoor line-item veto.

Why is this important? I had one particular case recently which I will share with you, Mr. President. Last fall, Senator VITTER from Louisiana and I included an amendment in the 2006 Commerce-Justice-State appropriations bill to prevent the industry from taking advantage of the President’s trade promotion authority to import drugs for citizens.

A majority of us in the Senate and in the House believes that we should be able to safely bring retail prescription drugs back into our country for our citizens at a much reduced price. There was also a nearly identical provision put in the House bill, and in the final bill, was after you can’t use trade agreements to stop a policy that is supported by Congress and use it as a backdoor way to stop the importation of less expensive prescription drugs for citizens.

Even Judge Alito was on the case. In the final bill that came to the President’s desk, in his signing statement, the President stated that this section was “advisory.” We passed a law—bipartisan, House, Senate—and it goes to the President’s desk, he signs it and it goes to the

The trial court dismissed the case, and by a vote of 10 to 1, the Third Circuit reversed, saying she had produced sufficient evidence to warrant a jury trial of her peers. Judge Alito was the lone dissenter, arguing that she had not presented enough proof and that her case should be dismissed. When you are outnumbered 10 to 1, you really are outside the mainstream.

In another dissent, Judge Alito voted to deny a mentally retarded young man the chance to challenge severe abuse and sexual harassment. In his very first job out of high school, he had suffered vicious sexual harassment. He was held down in front of a group of workers, subjected to sexual touching, and he feared he would be raped. Judge Alito would have denied him a trial, not because the facts were disputed but because he felt that the brief was not well written.

Judge Alito even joined an opinion preventing veterans from suing the Federal government for failing to enforce a law which requires agencies to have plans in place to help veterans gain employment.

The Supreme Court is the ultimate check on Presidential overreaching. However, the Justice Department, Judge Alito advised to expand Presidential power and argued that “the President’s understanding of a bill should be just as important as that of Congress.” So, in other words, passing a bill for us is not enough; equal standing is what the President believes it says or wants it to say or his opinion on what it says.

is for Congress to cure. We do not sit here as a policy-making or a legislative body.

Judge Alito has had a clear and consistent record when it comes to siding with corporate interests over working Americans and, in many of these cases, he has voted with the majority of the court. He dissented on a case to pay reporters overtime pay under the Fair Labor Standards Act. He dissented from a majority opinion that found a company in violation of Federal standards on the site where they were removing materials from a refuse heap and sending them to powerplants to be processed into electricity. These are laws that exist to protect working Americans, to protect their health and their safety. The recent tragedies in West Virginia have reminded us of how important this is, but Judge Alito argued that the safety standards did not apply to this site.

The same is true for workplace discrimination cases. Time and again, he has voted to make it more difficult for victims of discrimination to get their day in court as Americans.

In Sheridan v. E.I. DuPont de Nemours and Company, a woman sued, claiming sex discrimination. Over the years, she was promoted from a part-time waitress to a supervisory position. She received commendations and bonuses for her work. But after she complained about being treated differently, she was transferred to a more isolated branch, and her work environment got worse and worse.

The trial court dismissed the case, and by a vote of 10 to 1, the Third Circuit reversed, saying she had produced sufficient evidence to warrant a jury trial of her peers. Judge Alito was the lone dissenter, arguing that she had not presented enough proof and that her case should be dismissed. When you are outnumbered 10 to 1, you really are outside the mainstream.

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In another case deeply concerning to me, a family of dairy farmers was being forced off their farm by a bankruptcy court. This was in Pennsylvania. It could easily have been in Michigan or anyplace else in the Midwest. When they refused to give up their farm, seven U.S. marshals and a State trooper arrived at their home to evict them by pointing shotguns and semiautomatic rifles at the family. The marshals grabbed a family friend who was also at the house and used him as a human shield. They then handcuffed and dragged him back, led him into another house on the property, and told him: If anything goes wrong in here, you are going to be the first to go down.

The family sued, arguing that the marshals used excessive force. Judge Alito wrote an opinion saying it was reasonable for marshals, carrying out an unresolved civil eviction notice, to point shotguns and semiautomatic rifles at a family sitting in their living room whose property was not contested. They were not dangerous. They were dairy farmers who had lost their home and their livelihood because of a bankruptcy.

Judge Alito also argued that putting a gun to the man’s back and using him as a human shield was not an unreasonable search under the fourth amendment because the marshals never told him that he wasn’t free to leave. A fellow judge on the court dissented and called the marshals’ conduct “Get-stapo-like” since seven marshals had detained and terrorized the family and friends and ransacked a home while carrying out an unresolved civil eviction. But Judge Alito’s decision made sure the family never got a trial.

In another dissent, Judge Alito again would have allowed the invasive search of a mother and her teenage son based on a broad reading of a warrant. Mrs. Baker and her three children arrived at the home of their renter’s son for dinner in the middle of a drug raid by police. The warrant was limited to the search of her son’s home, but when Mrs. Baker and her three children started walking up to the house, the police threatened them with guns, handcuffed them, and dumped Mrs. Baker’s purse out onto the ground. They then took her teenage son into the house and searched him. Judge Alito once again dissented to keep a jury from hearing whether the warrant was unlawful by handcuffing, holding at gunpoint, and searching a mother and her teenage children who by happenstance walked up to visit the home of a family member.

This disregard for the personal privacy and freedom of Americans extends to the decision on a woman’s right to choose, which affects every woman in this country. In Planned Parenthood v. Casey, Judge Alito voted in dissent to uphold a law requiring a woman to notify her husband before exercising her constitutional right to obtain an abortion. He argued that the spousal notification provision would only restrict a small number of women and didn’t substantially limit access to an abortion, even though the women affected may face physical abuse as a result of this requirement. The Supreme Court, including Judge O’Connor, affirmed that the spousal notification provision was unconstitutional, rejecting Alito’s argument, comparing it to antiquated 18th century laws that said that women had no legal existence separate from their husbands.

Justice O’Connor eloquently summarized the problem with Judge Alito’s position, writing, “women do not lose their constitutionally protected liberty when they marry.” These cases are not isolated instances. They are part of a long and consistent record of siding with powerful interests over Americans—people who have had their rights violated, people who have been injured, people who have been persuaded, people who have been victimized and are asking the court to make things right, make things whole, women in this country who want to know they are respected in their privacy and their most personal decisions.

For 15 years, Judge Alito has said no. A group of schoolchildren, ages 6 to 8, were being sexually abused by their bus driver. Despite the young age of the children and the fact that the driver had total custody of them when they were on the bus, Judge Alito joined an opinion dismissing the case, arguing that the school superintendent did not have a duty to make sure the children were protected because riding the bus wasn’t mandatory.

A disabled student had to drop out of medical school because of her severe back pain that made it difficult for her to sit in classes for hours at a time. She had requested a special chair during class so she could continue her studies and become a doctor. The school failed to accommodate her request, and the Third Circuit ruled that her case should go forward, she should not go to trial; she should not get her day in court. The majority wrote that “few if any Rehabilitation Act cases would survive” if Judge Alito’s view prevailed.

A college student died at a varsity lacrosse practice. None of the team’s coaches were trained in CPR. The nearest phone was 200 yards away on the other side of a 8-foot fence, and there was no ambulance on the field. The Third Circuit ruled that the negligence of the driver did not go to trial; she should not get her day in court. The majority wrote that “few if any Rehabilitation Act cases would survive” if Judge Alito’s view prevailed.

When we take a step back and look at the entirety of Judge Alito’s record, we see a systematic tilt toward powerful institutions and against the little guy; a long history of writing ideologically driven dissent that are not only out of step with the majority of his peers or the Thirteenth Amendment but way outside the mainstream of America.

Let me say in conclusion, whether it is a family losing their dairy farm, workers losing their pensions, a mentally disabled young man who was the victim of sexual harassment in the workplace, an unarmed 15-year-old boy being shot dead in the back of the head, a strip search of a 10-year-old girl, or the ability of a woman to make her own reproductive health decisions, Judge Alito has consistently said no to the daily concerns of average Americans.

Now we are being asked not just to confirm a nominee who has spent 15 years tipping the scales of justice against Americans but to confirm a judge who will replace Sandra Day O’Connor, a woman who was a consensus builder, a uniter on the U.S. Supreme Court.

Based on this record, I cannot in good conscience cast my vote for Samuel Alito to be Associate Justice of the U.S. Supreme Court. The Supreme Court is the ultimate check on Presidential overreaching. And over and over again, we see this judge siding against Americans.

We can do better than this nominee at this critical time in American history, and I urge my colleagues to join me in voting no on this nominee.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KERRY. Mr. President, on countless nominations Democrats have joined Republicans and Republicans have joined Democrats to send a judicial nomination to the floor with a bipartisan majority. Justice Roberts came to the floor 13 to 5. Justice Breyer came to the floor unanimously. Justice Ginsburg came to the floor unanimously. Justice Breyer won on the floor 87 to 9; Justice Ginsburg, 97 to 3; and Chief Justice Roberts, 78 to 22.

But, in this case, Judge Alito comes to the floor in a straight party line, particularly divided vote. In a divided court, at a time of heightened partisan tensions, at a time of ideology often trumping common sense or broad public interest, the President has chosen to send a Supreme Court nominee who comes directly out of a revolt by the ideological wing of his party in order to satisfy their demand for ideological orthodoxy.

Some people obviously delight in that. We have read about that today in the New York Times. And that is their right. But most don’t. Most don’t think that is the way to pick a Supreme Court Justice. It doesn’t mean it is good for the country, it doesn’t mean it fills our current needs, and it doesn’t mean it is even the right thing to do.
As we approach this nominee, we can’t forget that he was not the President’s first choice. His first choice was Harriet Miers, and opposition to her nomination came not from Democrats but from the far right of the Republican Party. They challenged her ideological purity with such conviction that the President capitulated to their demands and gave them Judge Alito instead—a nominee who they received with gleeful excitement.

Jerry Falwell “applaud[ed]” his appointment. Rush Limbaugh called it “a truly outstanding nomination.” Ann Coulter and Pat Buchanan raved about how it would upset liberals. This rightwing reaction can only mean one thing: they know what kinds of opinions Judge Alito will issue—opinions in line with their extreme ideology.

All of this is to be contrasted with the standard set out by Justice Potter Stewart. He knew how to be impartial. He knew the mark of a good judge is a judge whose opinions you can read and... have no idea if the judge was a man or a woman, Republican or Democrat, a Christian or Jew... You just know that he or she was a good judge.

What he is saying is not really limited to the status of religion, gender, or politics, or any other trait by which we categorize people. He is saying that a good judge through all their decisions shows no discernible pattern of identity that pigeonholes that judge except for the purity of their legal reasoning, their genuinely open-minded approach to judging.

But Judge Alito we do see patterns—patterns which demonstrate a bias towards the powerful, patterns which demonstrate a lack of skepticism towards government overreaching, and patterns which demonstrate a hostility to the disadvantaged. This does not mean that Judge Alito never rules in favor of an individual suing the government for an unlawful search or a minority suing a corporation for unlawful discrimination. But it does mean that in the overwhelming majority of cases he has not. And this raises the question of whether he approaches each case with an open mind or whether he comes with a bias that can only be overcome in the rarest of circumstances.

So why should the debate on Judge Samuel Alito continue now? Well, to begin with, there hasn’t been that much debate on this nomination in the first place—a nomination of extraordinary consequence. It came to the floor on Thursday the 25th, and that was the very next day on Thursday. To this moment, not more than 25 Democratic Senators have had a chance to speak. At this time, the Senate has spent a total of 25 hours on a nomination that will last a lifetime.

The Supreme Court has granted the executive the right to use torture, or to eavesdrop without warrants. Not after a woman’s right to privacy has been taken away. Is history going to care what we say after the courthouse door is slammed in the faces of women, minorities, the poor, and the poor? No. Except to wonder why we didn’t do more when we knew what was coming.

Obviously, I have heard some people try to demonstrate that his judicial philosophy is “obstructionist.” But did people suggest it was obstructionism when the extreme rightwing of the Republican Party scuttled the nomination of Harriet Miers? How many times have we heard our colleagues come to the floor and demand that judicial nominees get an up-or-down vote? She never got an up or down vote. She never even got a hearing. Yet a minority in the Republican Party was able to stop a nominee that they considered unfit for the Supreme Court.

It is hardly obstructionism to use, as the former chair of the Judiciary Committee Senator HATCH described it, “one of the few tools that the minority has to protect itself and those the minority represents is exactly what we are doing here. That is why we have the Senate and the rules we live by. We are protecting basic rights and freedoms that are important to every American: privacy, equality, and justice.”

It is important to remember that the rights we are expressing concern about didn’t come easily. Access to the court house, civil rights, privacy rights, voting rights, antidiscrimination laws—all of these were hard fought for. They came with bloodshed and loss of life. Their achievement required courage and determination. None of these basic rights were written into law without a fight, and still today it requires commitment to enforce them.

That commitment for vigilance is one of the characteristics that should leap out in a Supreme Court nominee. We should remember that even though the 13th, 14th, and 15th amendments outlawed slavery, provided for equal protection under the law, guaranteed citizenship, and protected the right to vote for African American Americans, the fact is the Federal Government did not enforce them until the 1960s. Few politicians were willing to take a stand—to fight for the rights of African Americans. Something besides grassroots pressure was ultimately needed to prompt the Congress into action. That something was the unanimous Supreme Court decision in Brown v. Board of Education.

Imagine if the Court had not enforced the equality guaranteed by the 14th amendment. Imagine if it still had the same ideological outlook it had when Plessy was decided. Or when Dredd Scott was decided. Two of the most ideally driven—and regrettable—decisions ever. Segregation would still be a fact of life. African American children would be forced to attend their own schools, would be receiving an inferior and inadequate education. And, there would have been no catalyst to start the civil rights movement.

This is exactly what this vote is.

There is no question in anyone’s mind that Samuel Alito will have a profound impact on the Supreme Court. This is a pivotal moment in history for the Court. You only need to look at his past opinions to know that much.

Let me share with you the story of David D. Chittister. On February 14, 1997, David requested sick leave from the Pennsylvania Department of Community and Economic Development, where he worked. He was granted leave, but approximately ten weeks later, his leave was revoked, and he was fired. David knew the Family Medical Leave Act guaranteed him 12 weeks of sick leave. So he sued the Pennsylvania Department of Community and Economic Development for firing him during that time. He lost.

Imagine that you become sick. You become so sick that you are hospitalized, completely unable to work. The only reason that you can afford your treatment is because you are still employed. And also you believe you are protected by the Family Medical Leave Act.

Now imagine that Judge Alito is on the Supreme Court. He is one of the nine voices that gets to decide whether the Family Medical Leave Act is constitutional. And he votes the way he did on the Third Circuit, invalidating that part of the Family Medical Leave Act which guarantees an individual 12 weeks of sick leave and applies to you. You are out of luck as you mount medical bills without any source of income.

This is not hypothetical. That is the decision he made. Health care is a very real problem for many more Americans than ever. Many of us have been pushing for a national approach to health care for years. Our citizens can’t get the sick leave they need to take care of themselves. They cannot get adequate health insurance—coverage isn’t what it used to be. The Family Medical Leave Act was a step in the right direction to deal with family values and health needs. It made sure that people could take the time they needed when they became seriously ill without losing their income. It was enacted with overwhelming bipartisan support in a 71 to 27 vote. But if Judge Alito were on the Supreme Court and he follows his own precedent, it would no longer protect State employees.

So I ask my colleagues who voted for the Family Medical Leave Act: didn’t we do exactly what we meant to do? Didn’t we need to protect all workers? So is it right, now, to put a person on
the Supreme Court who will undo the good that we did with that legislation?

Take another example. Many of us have talked on the floor about how Judge Alito routinely defers to excessive government power. And how he is willing to overlook clear fourth amendment violations in the process. This may seem abstract to a lot of people right now, but listen to the facts of this case.

A family of farmers, the Mellotts, fell on hard times. They had to declare bankruptcy and were ordered to leave their farm. They were ordered by the court then and there.

When Bonnie Mellott answered the front door, a deputy marshal entered, pointed his gun "right in her face," pushed her into a chair, and kept his gun aimed at her for the remainder of the eviction. Another deputy entered, "pumped a round into the barrel" of his sawed-off shotgun, pointed it at Wilkie Mellott, and told him "to sit still, not move and to keep his mouth shut. When he did this, the marshals knew Wilkie Mellott was recovering from heart surgery.

But that wasn't all. Another marshal ran into the kitchen where a guest was on the telephone with a local sheriff. He "pumped" his semi-automatic gun, "stuck it right in [her] face and . . ." When she continued talking, the marshal put his gun "to the back of her head" and repeated the order.

I won't go into further details, but you get the picture. Now obviously the Mellotts were in the wrong to stay in their farm. They were ordered by the court to leave, and they should have. We all understand that.

But there is no fact in evidence suggesting that once the marshals got in the house there was resistance—no facts suggesting there was need for force or intimidation. Nothing justified running into a house, waiving sawed-off shotguns and screaming at the occupants. These folks weren't criminals. They weren't armed. They weren't resisting arrest. You know what, it is tough enough to get kicked off your property; it is another thing to be treated like a felon, absent cause, with pumped shotguns shoved in your face.

Most reasonable people would conclude that the government's actions were excessive. But Judge Alito did not, and he wrote the majority opinion for two of the three judges hearing the case calling the law enforcement conduct reasonable. The dissenting judge disagreed. He said that once the marshals arrived, and that the Mellotts were neither armed nor dangerous, the use of force was "clearly not objectively reasonable."

Where do you come out on this? Which view do you want on our Supreme Court?

Let me also share another story this one about Beryl Bray. Beryl was an African-American female who worked her way up from a room attendant to a Housekeeper manager for Marriott Hotels in less than three years. When the position of Director of Services opened up, Beryl applied. A Caucasian woman got the job, and Beryl sued claiming discrimination.

Now, as a Housekeeper manager, Beryl probably did not make a lot of money. She probably used a lot of her resources to bring her discrimination claim. She wanted her day in court. If Judge Alito had his way, she wouldn't have gotten it. Critical facts were in dispute. Facts which, if resolved as Beryl claimed they should be, would establish a clear case of discrimination.

As the lawyers here know, the factual disputes should have been resolved by a jury. Judge Alito, however, did not agree. He would have resolved the facts on his own in favor of Marriott Hotels. He would have ended the case then and there.

Or let's talk about Harold Glass. Mr. Glass worked at Philadelphia Electric Company, of PECO as it is known, for 23 years before he retired. While working full-time, Harold attended school to improve his career opportunities. Over the years, he completed several degrees, a bachelor of science degree in industrial and management engineering and a bachelor of science degree in engineering.

In addition to his full-time work and continuing education, Harold was a long-time activist on behalf of PECO employees. In 1968, he helped organize the Black Grievance Committee to respond to problems of racial fairness, including inadequate representation of minority by minority in the labor organization. He served as an officer. He represented employees in handling routine individual grievances before management and negotiated with management about employee concerns. In addition, he took the lead in organizing witnesses in three legal actions against PECO concerning racially discriminatory employment practices.

Over the years, Harold applied for promotions to new positions, but each time he was rejected. In addition, he was not able to apply for positions he would have liked to have because they were never posted by the company. This despite the fact that, in 23 years of employment with PECO, Harold received only one performance evaluation which was less than fully satisfactory—when he was serving as a junior technical assistant. Harold claimed that racial harassment at that time from his coworkers and a hostile work environment had affected his job. But the trial judge did not allow him to demonstrate these facts.

On appeal, a divided three-judge panel reversed the trial judge's decision. Two of Judge Alito's colleagues believed that Mr. Glass should have been allowed to present the evidence of racial discrimination to the jury.

I believe that is the problem here: Judge Alito has demonstrated a pattern of looking at discrimination claims with a high degree of skepticism. In the dozens of employment discrimination cases involving race that Judge Alito has participated in, he has voted in favor of African Americans on the merits in only two instances. He has never authored a majority opinion favoring African Americans in such cases. He has dissented from rulings of the majority in cases involving African-American plaintiffs, and in doing so has required an unrealistic amount of evidence before he is willing to step in on behalf of wronged individuals. He is not willing to give them the benefit of the doubt even to just let a jury decide their case.

This is an unacceptable view of the way our country works. Americans know that what sets us apart from almost any other country is the right of any citizen no matter where they come from, what their lot in life is to have their day in court. That is what makes America special. This little guy can hold the big corporations accountable. Our nation is defined by the great struggle of individuals to earn and protect their rights—particularly the disadvantaged. We have worked hard to ensure that no one is denied their civil rights. Judge Alito's track record casts serious doubt on his commitment to that struggle. The American courts must protect individuals against discrimination requires the courts to fully enforce it. And we just don't keep faith with ourselves if we empower individuals to sue large corporations who act unlawfully and then have the courts refuse to hold them accountable.

Judge Alito's hostility to civil rights claims is not my observation alone. It is an observation shared by many people who have reviewed his record. Let's not forget that after reviewing more than 400 of Judge Alito's opinions, law professors at Yale Law School—Judge Alito's alma matter—concluded that:

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

That is the opinion of those who have studied his record. Similarly, Knight—
Ridder 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 . . . an employee alleging discrimination or coming forward to confess.”

Judge Alito may believe that it is his duty to keep these types of cases away from the jury. He may, and in fact probably does, believe that he is doing the right thing. That is his right. But, it is my right to judge the facts of these cases and to express my own views. It is my right to say that the record of his reaction and support to Congress should not be elevated to the Supreme Court.

A fair amount has been said about Judge Alito’s endorsement of the unitary executive theory. This is a complicated and somewhat abstract theory of constitutional interpretation, but it is one that is either endorsed by a majority of the Court, it will have a significant practical impact on our everyday lives. What is clear is that the President alone is responsible for enforcing the laws. At its most simplistic, it seems somewhat reasonable: Congress makes the laws, the President enforces the laws, and the judiciary interprets the laws. This, in fact, dates back to the administration of Franklin Roosevelt, and it has been championed by liberal and conservative scholars and as a way of asserting the President’s ability to retain control over independent agencies by the use of the theory in recent times has been changing.

During Judge Alito’s tenure, the Reagan administration developed new uses for the theory. It was used to support claims of limitless presidential power in the area of foreign affairs—including the actions that became the Iran-contra affair. And, this view of Presidential power has been carried on by the current Bush administration, claiming in Presidential signing statements, that the President can ignore antitorture legislation overwhelmingly passed here in Congress. Not only is the substance of that message incredible, but the idea that the President can somehow alter congressional intent—the meaning of legislation agreed upon by 100 Senators—with a single flick of a pen is absolutely ludicrous. It turns the meaning of legislative intent on its head.

In my view, Judge Alito attempted to downplay the significance of this theory by saying it did not address the scope of the power of the executive branch, but rather, addressed the question of who controls the executive branch. Don’t be fooled by that explanation. 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 consequence of this theory is dramatic.” It is just common sense that if the unitary executive theory means that the President can ignore laws that Congress passes, it necessarily expands the scope of Presidential power—and reduces the scope of Congress.

Judge Alito had numerous opportunities in the hearings to define the limits of the unitary executive, but he refused to answer many questions. He didn’t answer when Senator LEAHY asked him whether it would be constitutional for the Congress to prohibit Americans from using torture. He didn’t answer when Senator DURBIN asked him whether he shared Justice Thomas’s view that a wartime President has inherent powers—beyond those explicitly given to Congress. He didn’t answer when Senator FEINGOLD asked what, if anything, there are on the President’s power.

We all understand that under article II, the President has primary responsibility for the conduct of foreign affairs. But, the idea that the President can declare war at his discretion is one that I cannot accept. We need to know what limits Judge Alito would place on the executive branch. We needed him to go beyond simple recitations of Supreme Court case law. We needed to know what he actually thought.

Sadly, however, Judge Alito did not give us those answers. In fact, he failed to give us answers on many questions of critical importance. He refused to answer questions from Senator LEAHY, Senator KENNEDY, Senator FEINGOLD, and Senator RIDDLE on the question of the power of the presidency. He refused to answer questions from Senator SCHUMER, Senator DURBIN, and Senator FEINSTEIN on whether Roe v. Wade was settled law—an answer that even Chief Justice Rehnquist was unwilling to give. He refused to answer Senator LEAHY’s questions on court stripping; Senator LEAHY’s and Senator FEINSTEIN’s questions on congressional power and the commerce clause; Senator FEINGOLD’s questions on antitorture action and criminal law; Senator SCHUMER’s questions on immigration.

These are all questions about issues that routinely come before the Court. Judge Alito had an obligation to answer them. Why would he fail to explain and clarify the positions he took in his speeches, judicial opinions, and Justice Department memoranda? But he did not.

Why are we supposed to think that is OK? Since when is it acceptable to secure a lifetime appointment to the Supreme Court by hiding behind a smoke-screen of nonanswers? I understand that, for many, voting for cloture on a judicial nomination is a very difficult decision, particularly on this Supreme Court nominee. I also understand that, for some of you, a vote against cloture is different. I don’t believe it is. It is the only way that those of us in the minority have a voice in this debate. It is the only way we can fully complete our constitutional duty of advice and consent. It is the only way we can stop a confirmation that we feel will cause irreparable damage to our country.

I will oppose cloture on the nomination of Judge Alito. And, I sincerely hope my colleagues will join me.

The PRESIDING OFFICER. The assistant majority leader is recognized.

Mr. MCCONNELL. Mr. President, I rise today in support of the nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court. We are familiar with his academic and professional qualifications. He graduated from Princeton and Yale Law School, where he served as editor of its prestigious Law Journal. He spent his life serving his country as a captain in the Army Reserve, as an assistant, and then as U.S. attorney in New Jersey, and for the past 15 years as a distinguished judge on the Third Circuit Court of Appeals, to name a few of his qualifications with which we are all quite familiar at this point in the proceedings.

Equally important is his deserved reputation for fairness and for integrity and his measured approach to the
Judge Becker noted that Judge Alito is “very principled, very analytical, never decides more than he has to in a case. He does believe in judicial restraint in the way he writes opinions, with no ideological overtones.”

The Third Circuit’s current chief judge, Anthony Scirica, succinctly said: “...whatever quality you think a judge ought to have, whether it’s scholarship or an ability to deliberate, or fairness or temperament, Sam has each of those to the highest degree.

That is the current chief judge of the Third Circuit.

These reflections, which include three former or current chief judges of the Third Circuit, are echoed by Judge Alito’s former law clerks, many of whom are self-described committed Democrats. Jeff Wasserstein clerked for Judge Alito in 1996. Here is what he had to say:

I am a Democrat who always votes Democratic, except when I vote for a green candidate—but Judge Alito was not interested in the ideology of his clerks. He didn’t decide cases based on ideology.

Mr. Wasserstein recounts how in one criminal case the defense attorney had submitted a sloppy brief while the prosecutor had submitted a neat, presentable brief. Mr. Wasserstein says that in his youth and naivete he suggested to Judge Alito it would be easy to decide the case for the Government. But Judge Alito stopped him “cold by saying that was an unfair attitude to have before I had even read the briefs carefully and conducted the necessary additional research needed to ensure that the defendant had received a fair hearing.”

Mr. Wasserstein’s simple anecdote illustrates how Judge Alito approaches each case fairly and with an open mind. He observes that Judge Alito has a “restrained approach to the law.”

Another former law clerk, Kate Pringle, who worked for Senator Kerry, whom we heard speak a few moments ago, for his Presidential campaign, describes herself as a left-leaning Democrat and a big fan of Judge Alito’s. She rejects the notion that Judge Alito is an ideologue, stating he “pays attention to the facts of the cases and applies the law in a careful way. He is a conservative in that sense. His opinions don’t demonstrate an ideological slant.”

That is Kate Pringle, law clerk of Judge Alito and Kerry supporter for President in 2004.

In light of the accolades from those who know him best, in light of his brilliant character and professional achievement, in light of receiving the highest possible rating by America’s largest association of his peers, the ABA, I was hopeful the Senate would provide Judge Alito with a fair and dignified process. Sadly, this has not been the case.

In the Senate we have known for over 200 years, a judicial nominee with Judge Alito’s character, ability, and achievement would command a large bipartisan majority of support. Now it appears Judge Alito will not get that tomorrow. Why is that? It is because there has been a change in the standards by which the Senate considers qualified judicial nominees. In my view, it has not been a change for the better.

According to the New York Times, in early 2001, some of our Democratic colleagues attended a retreat where law professors such as Larry Tribe and Cass Sunstein implemented them to “change the ground rules” with respect to how the Senate considered judicial nominees by injecting a political ideology test into the confirmation process. Soon after that meeting, some of our friends initiated a premeditated and sustained effort of serial filibusters of circuit court nominees. We saw a lot them. Those most passionate for this tactic thereby wrote a new and sad chapter into the pages of Senate history.

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by watching Judge Alito perform in the face of the most absurd and baseless charges.

Despite the repeated efforts to caricature Judge Alito, the public’s support for him only increased. After the hearing, the only thing the American public was concerned about was respect to Judge Alito was the sometimes shabby treatment he received.

With Stephen Breyer and Ruth Bader Ginsburg, Republicans resisted playing base politics and instead measured those two nominees by the traditional confirmation standard of integrity and legal excellence and not a political ideology standard. We did not grandstand on the colorful—to put it delicately—statements Justice Ginsburg had made decades before her nomination such as possibly abolishing Mother’s Day and statements about Republican or Democrat voters. Nor did Republicans seek to disqualify Justice Ginsburg from further judicial service because of her long-standing leadership of the ACLU and the controversial positions it often takes.

And Republicans did not succumb to the idea of a reckless filibuster to gain the approbation of a newspaper or an interest group.

If Republicans had wanted to demagogue and defeat the Ginsburg nomination, we could have done the things to Justice Ginsburg that have been done to Judge Alito. In fact, with her highly controversial writings and advocacy for the ACLU, it would have been a lot easier to do so, but we exercised self-restraint and self-discipline for the good of the country.

In conclusion, I implore my Democratic friends to consider that to engage in these tactics is neither fair nor right. If this hyper politicization of the judicial confirmation process continues, I fear that this moment we will have institutionalized this behavior and some day we will be hard pressed not to employ political tests and tactics against a Supreme Court nominee of a Democratic President. In that case, no one—Republican or Democrat—will have won.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. CHAMBLISS. Mr. President, the Committee on the Judiciary has recommended that we consent to the President’s nomination of Samuel A. Alito, Jr. as Associate Justice of the Supreme Court of the United States. I concur in that recommendation. I am convinced that Judge Alito will make an outstanding addition to the Supreme Court and will be faithful to his judicial oath in neutrally applying the law without imposing his personal, political or ideological views to circumvent the law or the Constitution.

First, I wish to commend Chairman Specter and my former colleagues on the Judiciary Committee—including the Presiding Officer—for conducting nomination hearings which established clearly Judge Alito’s fitness to serve on the Nation’s highest Court. I followed closely Judge Alito’s responses to questions during the hearings. I was impressed by his profound patience, sincerity, and dedication to the ethical restraints which compel all nominees to refrain from prejudicing any matter pending before the court. Many of my colleagues have complained that Judge Alito “did not answer some questions.” Their real complaint rather, is that they simply didn’t like his answers. Judge Alito quite properly declined to answer some questions during the hearings. I was impressed by his profound patience, sincerity, and dedication to the ethical restraints which compel all nominees to refrain from prejudicing any matter pending before the court.

And so that vigilance now rests upon this body. Let us be vigilant in insisting that justices of the Supreme Court, and all other Federal judges who are presented to us, are sufficiently committed to the rule of law.

I noted during my remarks concerning the nomination of Chief Justice Roberts at a time when too many of those in the judicial branch have sought to use their lifetime tenured position to advance their own personal, ideological, or political preferences in deciding matters which come before them; at a time when too many within the legal, media and political elites have sought to recast the role of the judiciary into a superlegislature, and at a time when too many within the legal, media and political elites have sought to recast the role of the judiciary into a superlegislature.

I urge my colleagues to desist in this tactic of turning the confirmation process of a judge into the functional equivalent of a political campaign. It is shortsighted, and we will mourn the day this tactic becomes the norm.

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Mr. CHAMBLISS. Mr. President, the Committee on the Judiciary has recommended that we consent to the Founder’s, lest that unique status permit judges to impose their own views, without direct accountability to the American people. In a letter to Spencer Roan, March 9, 1821, Jefferson stated: ‘I regard the object of my Federal judicial selection as that body, like gravity, ever acting with noiseless foot and unalarmed advance, [is] gaining ground step by step. . . . Let us be vigilant of vigilance.”

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

Mr. CHAMBLISS. Mr. President, the Committee on the Judiciary has recommended that we consent to the
Senate. And tomorrow morning, when we consider the confirmation of Judge Alito, I certainly hope that once again we will see a strong bipartisan vote confirming Judge Alito as the next Associate Justice of the Supreme Court.

I yield.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. DOMENICI. Mr. President, how much time does the Senator from New Mexico have allotted?

The PRESIDING OFFICER. The majority controls the time until 2 p.m.

Mr. DOMENICI. I yield myself the time until 5 minutes of 2, and I ask unanimous consent that Senator ALEXANDER and I be permitted to use 5 minutes of that time to speak to an unrelated subject.

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

PROTECTING AMERICA’S COMPETITIVE EDGE

Mr. DOMENICI. Mr. President, today I rise to speak about a very important issue: the competitiveness of the United States and our future standard of living and whether we are going to remain preeminent as a superpower.
The report focuses on three themes.

There are three themes. We have only got to talk about three things. They are:

First, we have to figure out how to increase their standard of living, and it has to do with brainpower.

What I want to say today is, first, I congratulate Senator DOMENICI, without whose leadership this would not have gotten to first base. He encouraged Senator BINGAMAN and I to go to work right away with the President. It was he who presided over our homework sessions with the administration. It is he who has taken the leadership with Senator BINGAMAN on this bill to have 55 cosponsors prior to the President’s speech tomorrow night. So I thank him first.

Second, I reiterate where this idea came from. It came not from Senators, nor from lobbyists, nor from this or that clique. Senator BINGAMAN and I asked the people who should know—the experts at the National Academies—>the answer to this question: exactly what do we need to do to keep our advantage in science and technology over the next 10 years so we can keep our jobs? They answered that question with 20 specific recommendations involving kindergarten through the 12th grade education, higher education, basic research, maintaining an entrepreneurial environment. These are ideas that many Senators on both sides of the aisle have advocated for several years, but the fact that the National Academy of Sciences, the Institute of Medicine, and the National Academy of Engineering joined together to say “here is the blueprint” is the reason this idea is gone so far. What it does is help keep our edge in science and technology.

I am looking forward to the President’s remarks tomorrow night. It is my hope that he makes the Augustine report and the whole idea of keeping America on top and keeping our edge in science and technology a focus of his speech and of his next 3 years.

So it is my privilege today to ask unanimous consent on behalf of Senators DOMENICI, BINGAMAN, and myself to add the following:

Dr. BRUCE ALBERTS, President, National Academy of Sciences, Washington, DC.

Dear Dr. Alberts:
The Energy Subcommittee of the Senate Committee on Natural Resources Committee has been given the latitude by Chairman Pete Domenici to hold a series of hearings to identify specific steps our government should take, and to assure investors that America is the preferred site for investments in new or expanded businesses that create the best jobs and provide the best services.

What specific steps are needed to ensure that the United States maintains its leadership in science and engineering to enable us to successfully compete and be secure in the global community of the 21st century? How can we determine whether total federal research investment is adequate, whether it is properly balanced among research disciplines (considering both traditional research areas and new multidisciplinary fields such as nanotechnology), and between basic and applied research?

How do we ensure that the United States remains at the epicenter of the ongoing revolution in research and innovation that is driving 21st century economic growth? Can we assure investors that America is the preferred site for investments in new or expanded businesses that create the best jobs and provide the best services?

How can we encourage domestic firms to invest in invention and innovation to meet the most urgent challenges the United States faces in maintaining leadership in key areas of science and technology, particularly in the emerging fields of nanotechnology, biotechnology, information technology, advanced materials, and energy?

Dr. Alberts, we urge you to embrace the rapid pace of technological change.
Your answers to these questions will help Congress design effective programs to ensure that America remains at the forefront of scientific capability, thereby enhancing our ability to shape and improve our nation's future. We look forward to reviewing the results of your efforts.

Sincerely,

LAMAR ALEXANDER, Chairman, Energy and Natural Resources

PACE ACT: PROTECTING AMERICA'S COMPETITIVE EDGE

Focuses on keeping America's science and technology edge—as much as 85 percent of our per capita growth in incomes since World War II has come from science and technology.

Helps America continue to set the PACE in the competitive world marketplace.

Keeps our brainpower edge by strengthening K-12 science education, attracting bright college students to the sciences and investing in basic research.

In a package of three bills, the PACE Act implements 20 recommendations contained in an October report by the National Academy of Science titled "Rising Above the Gathering Storm."

Protecting America's Competitive Edge through Energy Act (PACE-Energy): Increasing our investment in energy research and in producing American scientists.

Protecting America's Competitive Edge through Education and Research (PACE-Education): Investing in current and future math and science teachers and K-12 students, attracting bright international students, and investing in non-energy related basic research.

Protecting America's Competitive Edge through Tax Incentives (PACE-Finance): Establishes a new tax credit to cover costs for middle and high school students at national labs and other technology and scientific research facilities.

Increasing the Talent Pool by Improving Higher Education

Scholarships and Fellowships for Future Scientists: Each year, up to 25,000 bright young Americans would receive a 4-year scholarship to earn a bachelor's degree in science, engineering, or math, while concurrently earning teacher certification for these scholarships, they would be expected to serve for at least four years as a math or science teacher.

Math & Science Teacher Training Programs: Funds part of the costs for new math and science teacher training programs based in math and science departments at universities across the country. These programs will stress a solid content knowledge of their subject while also providing the training necessary for teacher certification.

Summer Academies for Teachers: National laboratories and universities across the country would host 1-2 week academies each summer for up to 50,000 math and science teachers so they can get some hands-on experience and take back new, improved ideas for energizing their students.

Advanced Placement Courses in Math & Science: The federal government would provide funding to help establish non-profit organizations to promote Advanced Placement (AP) classes in math and science—tripling the number of students who could join these college-preparatory programs that consistently produce the highest achievers.

Specialty Math & Science High Schools: States would be eligible to apply for a grant from the federal government to help establish new high school specializing in math and science that students from across each state could attend.

Internships and Summer Programs for Middle and High School Students: Provides a unique internship and program opportunities for middle and high school students at national labs and other technology and scientific research facilities.

Doubling the Research & Development Tax Credit: Doubling the research & development tax credit and allowing a credit for employee education.

KEY PROVISIONS OF THE PACE ACTS

Strengthening the nation's traditional commitment to research

More research opportunities for scientists and engineers: Increases basic research spending by up to 10 percent per year for seven years at several federal agencies, including the national laboratories. This investment would generate hundreds, maybe thousands, of new inventions and high-tech companies.

Targeted research grants for early career scientists and engineers: Creates a special research fund for 200 outstanding young researchers across the nation each year.

New federal funds to buy equipment and upgrade research labs: Provides a special pool of funds for the nation's research infrastructure to purchase updated research equipment and upgrade lab capabilities.

A New Agency for Transformational Energy Research: Establishes a new research agency within the Department of Energy tasked with developing transformational energy technologies that bridge the gap between scientific discovery and new energy innovations. This agency would be patterned on the management practices of a Pentagon research agency (DARPA) that contributed to innovations like the Internet, stealth technology and global positioning systems.

High Tech Research Act gives federal research agencies to develop guide lines that allow eight percent of R&D budget to be devoted to high-risk, high-payoff research which falls outside the peer review and budget allocation process.

Improving K-12 Science/Math Education

Scholarships for Future Teachers of Math & Science: Establishes a pool of 3,000 bright students who would receive a 4-year scholarship to earn a bachelor's degree in science, engineering or math, while concurrently earning teacher certification for these scholarships, they would be expected to serve for at least four years as a math or science teacher.

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Scholarships and Fellowships for Future Scientists: Each year, up to 25,000 bright young Americans would receive a 4-year competitive scholarship to earn a bachelor's degree in science, engineering or math, so that our brightest students pursue studies in these fields which will propel our economic growth. Up to 5,000 students who have already earned their bachelor's degree, would compete to receive graduate research fellowships to cover education costs and provide a stipend.

Attracting the Brightest Foreign Students to our Universities: Provides an efficient student visa process for bright foreign students to come here to study math, technology, engineering and science and then to stay here—contributing to our economic growth rather than being forced by an outdated immigration system to go home and produce the best new technology in India or China.

Growing our Economy by Providing Incentives for Investments

Doubling the Research & Development Tax Credit to Encourage Innovation: Doubles the current R&D tax credit and makes it permanent—so companies conduct ground-breaking, job-producing innovations, rather than building new facilities overseas.

Creating a Tax Credit to Encourage Employees to Invest in Employees’ Education: Establishes a new tax credit to cover costs from providing continuing education to employees—so employees can learn cutting-edge skills.

Development of Science Parks: Supports the development of science parks through infrastructure planning grants and loan guarantees so that U.S. science parks are competitive with those throughout Asia.

Mr. DOMENICI, Mr. President, let me say what a privilege it is today to speak once again to the nomination of a Supreme Court Justice. The advice and consent function of the Senate is doing things these days, would have come close to getting those kinds of votes. As a matter of fact, for those who threaten filibuster, I believe there is a serious question.

Qualification was the question upon which we based our decisions; that has changed. Rancor has taken the place of reason. Pardishanship has taken the place of responsibility and fairness. At every step of the process with this nominee, the American people have seen what a confirmation process can turn into if it is not vested and fair, but is instead full of what can be considered as almost hatred, almost fire and brimstone. Our colleagues have focused on the negatives of everything, however small or irrelevant. Currently, the trend is not to do what we have done, which has resulted in some great judges, but rather to be fed by the flames of partisan special interests that want assurances—they want guarantees.

I personally believe this is a dangerous course, and I hope and pray that this will be the last time we follow such procedure. But I doubt that it will change. But that is wrong. Rejecting the judicial philosophy tests being urged by some is absolutely imperative.

When we apply the appropriate test of qualification, there is no doubt that Judge Alito is qualified. He is qualified to be a Supreme Court Justice. The American public realizes this and that is why they overwhelmingly indicate that we should get on with this and vote. It is clear that there has been no change in the other side, and the other side of the chair has seen many—that has spread before the eyes of the Congress and the public more about themselves, their record, their philosophy, their vote,
their rationale, and their ethics than this man.

The President, indeed, took a big chance with this nomination because to have that much of a record and have a vote and all that goes with it here was, in my view, a giant risk. But it paid off because Judge Alito is what he purported to be—a scholarly, terrific judge, who is without any question, distinguished.

My second point concerns “guarantees.” I believe some members of the Judiciary Committee questioned this judge in an effort to get some guarantees about how he would vote. It is amazing to consider some of the Supreme Court Justices who have been approved by the Senate based on their testimony and their record, which were presumed to be commitments or guarantees as to how they would vote. We can look back to Justice Warren from California as well as two or three members of the Court right now. Those who voted for those justices couldn’t read their minds, thought they were getting guarantees, and it has turned out not to be the case. Those judges’ philosophy, their votes, and everything else has been different on the Court than what they thought they were guaranteeing during the confirmation process.

There are no guarantees. Those who are making this a partisan fight won’t say: We don’t have any guarantees, on Roe v. Wade and many other issues, that those members who voted for Alito thought they were getting guarantees, and it has turned out not to be the case. Those judges’ philosophy, their votes, and everything else has been different on the Court than what they thought they were guaranteeing during the confirmation process.

Now, as to the cloture vote this afternoon—we are going to do that. I have never had to make that vote in 34 years—on 11 Supreme Court nominees. I never had to make that vote. Why? Because this Senate has not used the filibuster on Supreme Court Justices. Some say, well, he, you know what you want him to—wouldn’t they say they are doing that. They will use other words like “I am bothered,” but that is really their argument.

I have to take this route. I believe the process is headed in the wrong direction. To require cloture is not the way to do it. It is not in tune with the history of the Senate. It contradicts the Senate as a fair-minded, deliberative body. I regret to say that that is the way the Senate has been in the past year. We have had the hearings of Ginsburg and Breyer. Some say, oh, yes we have. No, we almost did. But we did not, and we surely didn’t when a majority was for the man or woman. That is the case here.

To have to take this route, I believe the process is headed in the wrong direction. To require cloture is not the way to do it. It is not in tune with the history of the Senate. It contradicts the Senate as a fair-minded, deliberative body. I regret to say that that is the way we have been going to do. I hope in the future we can do more of the same empty promises and partisanship that has weakened our country and divided Americans for the last 5 years.

If he takes the first approach, together, Democrats and Republicans can build a stronger America. If he gives us more of the same empty promises and Orwellian doublespeak, we know he intends to spend 2006 putting his political fortunes ahead of America’s fortunes. We need a fresh start, and I hope President Bush realizes that tomorrow night.

There is much more at stake in his speech than poll numbers. Empty promises will no longer work. We need a credible roadmap for our future, and we need the President to tell us how together we can achieve the better America we all deserve.

Our first signal that the President intends to move our country forward will come in his assessment of the state of our Union. It is not credible for the President to suggest the state of the Union is as strong as it should be. The fact is, America can do much better.

From health care to national security,
this Republican corruption in Washington has taken its toll on our country. We can see it in the state of our Union.

What is the state of our Union? The state of our Union is that we are less safe than we were 4 years ago because the White House has decided protecting its political power is more important than protecting the American people.

We are the wealthiest Nation in the history of the world. Shouldn't we be the healthiest? Frankly, we are not because this administration decided to take care of the big pharmaceutical companies, the drug companies, the HMOs, managed care, instead of 46 million uninsured.

We have a national debt climbing past $8 trillion. I have a letter I received a short time ago from the Secretary of the Treasury saying the debt is at $5.2 trillion and we need to raise it more. Over $9 trillion is what they are talking because the President squandered the strongest economy in the history of this country with reckless spending and irresponsible tax breaks for special interests and multimillionaires.

We have an addiction to foreign oil that has climbed steadily over the last 4 years and doubled the price of heat for our homes and gas for our cars because the Vice President let big oil companies write our energy policy. And while many middle-class families living literally on the financial cliff, all statistics show the rich are getting richer, the poor are getting poorer, and the middle class is squeezing smaller and smaller all the time.

The economic policies of this administration over 5 years has placed the needs of the wealthy and well-connected ahead of working Americans.

If President Bush is committed to making America stronger, he will acknowledge that on Tuesday night. He will admit the steep price Americans have paid for this corruption, and he will proceed to tell us how he can make our country stronger.

Our second clue that the President is committed to moving America forward will come in his remarks about national security. Tomorrow night, it is not credible for the President to tell us he has done all he can to keep Americans safe for the last 5 years. We know that he has not even made his way to the Senate floor to take care of our chemical plants, our nuclear power facilities, to check the cargo coming into this country, what is in the belly of that airplane in the cargo, and vote after vote, on a strictly party-line basis, we have lost, over and over, the votes needed to keep us safe.

For all of this tough talk, President Bush’s policies have made America less safe. His failed record speaks for itself.

Osama bin Laden, the man who attacked us on 9/11, remains on the loose because, in his rush to invade Iraq, the President took his eye off the ball when we had him cornered in a place called Tora Bora, Afghanistan.

As a result, he is gone. We don’t know where he is, and he continues to threaten us today in his taunting, vicious, evil manner.

Then there is the President’s “axis of evil.” Four years ago, the President declared our enemies as the “axis of evil” whose nuclear threats posed risk to the American people, and he was right. Well, mostly right. Instead of pursuing the correct policy to make it safer, he invaded Iraq. Now two members of the “axis of evil” — North Korea and Iran — are more dangerous, and after spending billions of dollars and losing 2,300 American lives, we found out that the third, Iraq, didn’t pose a nuclear threat at all.

Then there is what this President has done to our military. Not only has he failed to properly equip our troops for battle — we know the stories are all over the country about 80 percent of our people who have been injured — that is 18,000 and 2,300 dead — 80 percent of them could have been hurt less, many lives would have been saved had they had the body armor that was available.

According to the Pentagon’s independent studies, the Pentagon is stretched — stretched in a manner, as indicted today, having mass advancements in rank, which they have never done before, because they are trying to keep people in the military, among other things. Our forces are stretched entirely too thin.

The President’s poor and refusal to change course in Iraq has made progress in 2006 harder to achieve. He has made it more difficult to spread democracy around the world because he has been undermining it right here at home.

As Katrina made clear, he failed in the 4 years after 9/11 to prepare America for the threats we face. New Orleans could have been anyplace in America. The difference with Katrina is we had warning it was coming. But other threats, that won’t be the case.

America can do better. Tomorrow night, the President needs to provide a new way forward. Partisan attacks will only divide us. What we need is for the President to rally the country around our most important goal: protecting our people and our way of life.

Democrats have always been willing to work with President Bush to make America more secure. We know our nation has benefited from the set up all these accounts.

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Democrats have always been willing to work with President Bush to make America more secure. We know our nation has benefited from the Medicare and Medicaid drug accounts. That is classic Bush doublespeak.

Now he comes up with Health Savings Accounts. That is classic Bush doublespeak. It is a proposed solution to the health care crisis. This plan will force most Americans to spend more on health care while making it less available to millions of others. HSAs are nothing more than another giveaway to the wealthy, and President Bush has favored over hard-working Americans for the past 5 years. In fact, remember Social Security privatization? HSAs, or Health Savings Accounts, are a lot like that. They do nothing to solve the problem. They make the situation worse for the American people and they create a financial windfall for the President’s friends: HMOs, insurance companies and, of course, Wall Street, that will set up all these accounts.

We do not need the President to offer more of the same on health care. We saw with the President’s Medicare prescription drug plan that his policies put special interests ahead of the American people. Ask any senior citizen today about how the Medicare plan has helped them. Even if they could work a crossword puzzle out of the New York Times on Sunday, which isn’t the latest, day, they still couldn’t solve the Medicare Program of President Bush. It is impossible.

What we need is a new direction, one that puts families first. Democrats believe that the health care crisis is not just a moral imperative, but it is also vital to our economic security and leadership in the world.
Every day we go without reform is another day America takes another step backward from a position as global leader. For our families, we must make health care affordable and accessible. For our workers, we must remove the burden of skyrocketing costs that is holding our businesses, our economy, and our workers back in the global marketplace.

Our fourth clue that the President knows what America needs will come in his remarks about the economy. After all we have seen in the past 5 years, it will not be credible for the President to claim our economy is growing, that his plan to reduce his deficits—and I say his deficits—is working, and that Congress is to blame for spending and bad decisions. The truth is, the fiscal nightmare we see today belongs to President Bush and President Bush alone.

I love to watch golf on TV. I know I am not like a lot of people, I should be watching football or basketball or something. I love to watch golf on TV. It is a game of chess. Yesterday, Tiger Woods—this guy is fantastic. He is seven strokes behind after the first day, and yesterday he turns 30 and wins the tournament. He has a bad day and wins the tournament.

I mentioned records—he holds all kinds of records. That was the 47th tournament he won—quicker than anyone else. He has turned 30 years old. He won the Buick Open four times. That is what he won yesterday. He holds record after record. I mention these records because President Bush holds all the records. The highest deficit, he holds them all. There is not a close second. He has them all.

It is not a record the American people envy, such as that of Tiger Woods. It is not a record the American people would be proud of we are likely to hear tomorrow night. I am sure we are going to hear from Judge Alito. I mentioned records

We need the President to speak honestly about tax relief, about middle-class families and how they deal with these energy prices. The truth about the highest-income Americans stand, with his newest proposal, to get over $100,000 while the average working family will receive pennies on that. The President’s priorities are upside down. It is time for him to join us and bring fairness to our Tax Code. Democrats are ready to work with President Bush, but he needs to commit to policies that put the needs of hard-working Americans first. One final signal that President Bush is committed to strengthening America stronger will come on the issue of reform. Because of connections to the culture of corruption and stonewalling about Jack Abramoff, it is not credible for President Bush to claim the moral high ground on values as an honest government. President Bush needs to set an example, if he is going to lead our country forward tomorrow night. He needs to come clean about his connections to corruption, with Abramoff—as Republicans have called for Republican Senators have called for this. Too many Republicans have shown in recent days that we are going to obscure the facts and move on.

There is legislation pending. We do not need a task force. We need Senator LIEBERMAN and COLLINS to go ahead with the hearings and decide what needs to be done. Our legislation may not be perfect, but it is legislation we need to start with. It is the White House who control the White House where men are willing to break the law and ignore America’s best interests so they can protect their political power. Safavian, Libby, Rove—It is Republicans who control the Congress which sold its soul to special interests and a Republican right-wing base, a base that has its sights set on stacking our courts with extremist judges. They have acknowledged that. It has been K Street, the so-called K Street Project, that has conspired with Abramoff connected to the President, going so far as having them not hire Democrats to work as representaives.

We have a plan to reform Washington. We need to bring it to the Senate floor. We need to do that. President Bush has to join with us. Anything less, we will know the President has no interest in changing his ways and making America stronger.

The President faces a tremendous test tomorrow night. It is up to him to prove to the American people he intends to denote the culture of corruption that has continued to this very day since he arrived and change direction in 2006. Democrats are ready to work with President Bush in order to move our country forward because we believe that together, America can do better. So I hope that President Bush will join us in putting progress ahead of politics so we can have a State of the Union that is as honest and strong as the American people.

The PRESIDING OFFICER (Mr. SUNDUN). The Senator from New Jersey.

Mr. LAUTENBERG. Mr. President, I rise today to discuss the President’s nomination of Samuel A. Alito, Jr., to the Supreme Court of the United States. I am pleased to have an opportunity to discuss this and to present reasons why my conclusion is going to be as it is.

It is no secret that Judge Alito is from my home State and I was honored to introduce him to the Judiciary Committee. I talked with him privately in my office. He is an accomplished jurist from a distinguished family in New Jersey, and at that hearing our colleagues from Pennsylvania, Chairman Rove, Chairwoman SPECTER, asked me if I was endorsing Judge Alito for this position and I told him I was just presenting evidence to the committee and I will let the record speak for itself. I was not going to make any judgments. I wanted to hear from Judge Alito. I wanted to listen to his answers to my colleagues’ questions.

This nomination, as all are aware when it comes to the Supreme Court, is an incredibly important moment for our Nation—particularly because Judge Alito has been nominated to replace Justice Sandra Day O’Connor. Justice O’Connor, over the past 25 years, has proven she is not an ideologically conservative Justice or a liberal Justice. She has not brought an agenda to the Court. That is why Justice O’Connor has been such an important swing vote—because she always studied the facts and the law and tried to apply them fairly.

I did not always agree with her. But, like many Americans, I knew she came at these legal questions fairly and with an open mind. She showed respect for precedent. She put the law above her, and tried to apply it fairly. It is critical that we replace Justice O’Connor with someone who shares her open-minded approach of looking at the law and the facts with no political agenda. Even the mere threat of legal activism on this Supreme Court threatens the future of this country and the rights of our children, our grandchildren, and other generations.
Many legal experts—judges, lawyers, professors—have contacted me regarding this nomination. Some supported him, some opposed him. Many of these experts tried to convince me one way or the other. But when I listened to Judge Alito’s dissent in the Judiciary Committee, I listened with the faces of my grandchildren in my mind; with the thoughts of ordinary people who depend on the fairness of our society. I was applying Judge Alito’s philosophy to the real problems of everyday people—in New Jersey and across the Nation.

I often hear many concerns from my constituents about how powerless they feel in the face of insurance companies that are often indifferent to their plight, or as an employee unfairly treated in the workplace. What rights do everyday Americans have in the face of giant corporations or unchecked Government power? At the hearing, it was clear that Judge Alito almost always lined up against the little guy and with the big corporations and Government. That is the side he came out for. In fact, the Knight-Rider study of Judge Alito showed that he “routinely . . . cites employee alleging discrimination or consumers suing big business.”

The Washington Post analysis of all divided opinions on the Third Circuit involving Judge Alito found that he “has sided against three of every four people who claim to have been victims of discrimination” and “routinely . . . defers to government officials and others in a position of government authority.”

I don’t think that is what our Founders wanted when they designed the Constitution.

I want to give two examples. In Bray v. United Therapeutics, an American motel worker in Park Ridge, NJ, alleged discrimination against her employer. The Third Circuit ruled that she deserved her day in court because there was enough evidence of discrimination. Judge Alito dissented, citing concerns about the cost of trials to employers. Listen to that—citing concerns about the cost of trials to employers. I wonder if the Constitution makes any reference to that or does it say everybody should have equal rights when it comes to hearing their case in the courtroom?

The other judges in that case criticized Judge Alito’s dissent, saying that if it were law, then the employment discrimination laws would have no real effect.

In another case, Sheridan v. Dupont, Judge Alito was the only judge of 11 judges who heard the case to find against the claim of gender discrimination. Judge Alito stated that the alleged victim should not even get a trial. That is absolutely contrary to what our country is about. This is a nation of laws. The other judges were so distressed by Judge Alito’s decision that they said “the judicial system has little to gain by Judge Alito’s approach.”

So if he is confirmed to the Supreme Court we ask ourselves the question: Will Judge Alito make it more difficult for the everyday people to protect themselves and their families against the power of big business and unchecked Government? Do they need the help? Is that what we are talking about when we enact laws here? I hope not. Unfortunately, it appears almost certain.

Regarding individual rights, there was a very disturbing exchange in the hearing involving the Constitutional right to reproductive choice.

Senator DURBIN asked Judge Alito if he would agree with Chief Justice Roberts’ statement that the right to choose is “settled law.” It seems to me that it was a “no-brainer” —of course it is settled law. It has been on the books for 33 years and upheld 38 times. You don’t have to go to law school to figure that one out.

But Judge Alito refused to say it was “settled law.” To me it was a telling moment in the hearings. I am not a lawyer, but I understand this: The right to choose is settled law. That means that is the law it is seen by Judge Roberts, Chief Justice.

Judge Alito’s refusal to acknowledge that the right to choose is settled law indicates to me that, even before he sits on the Supreme Court, he intends to overturn Roe v. Wade.

That is the interpretation I make from that.

For everyday New Jerseyans, especially our State’s women, that would be the state’s nightmarish nightmare. We do not want to turn back the clock on women’s rights. Even if abortions become illegal, they will still happen—but largely in unsafe conditions. It’s a nightmare that I do not want to risk happening that way.

Then there is the issue of abuse of power and the power of the Presidency. Growing up in New Jersey, it is clear that our state is proud of our role in the American Revolution. More battles of the Revolutionary War were fought in New Jersey than in any other state. The most famous image of that war is George Washington crossing the Delaware River at Trenton.

New Jersey is a state of immigrants. Many New Jerseyans came to America to escape kings, despot and dictators. So we understand why we fought the War of Independence to get rid of King George. America doesn’t want a king or an “imperial President.” Neither does New Jersey. That’s why we have three co-equal branches of government.

So when Judge Alito talked about his theory of a “unitary executive”—a President above the other two branches of government—I found that very troubling.

The Father of our Nation, George Washington, warned the American people about allowing a leader to claim too much power. In his farewell address to the nation, Washington indicated his concern about the Presidency becoming too powerful.

He said we should avoid allowing: the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism.

Those are Washington’s words. But they have a real resonance today.

The current administration claims a power beyond the laws that Congress has set. It is an administration that believes it can spy on Americans without a warrant, despite specific laws to the contrary. These are the kinds of abuses that caused the citizens of New Jersey and the other American colonies to rise up against King George.

We don’t want a King. And we don’t want to create a Supreme Court that will crown this President—or any future President—Republican or Democratic.

In question before us is not a generic question of whether Judge Alito is qualified for the Supreme Court. The real question is whether Judge Alito is the right person for this seat on the Supreme Court. The seat at issue is the seat held by the middle of the road, balanced Justice.

As I noted during my testimony introducing Judge Alito to the Judiciary Committee, he is a young man. If the Senate confirms him for a lifetime appointment to the Supreme Court, he might serve for three decades—or even longer. His decisions would affect not only our rights, but also the rights of our grandchildren and other future generations.

That’s why, after careful consideration and deliberation, I have decided to vote no on the confirmation of Judge Alito. He is a good, decent man—an ethical man. I do not think he subscribes to any bigoted views. But I believe there is a grave risk that he carries a legal agenda with him, one that he will bring to the Supreme Court.

I am, of course, thinking of the black and white issue. I think it is a gray issue. If there is a gray issue, if there is doubt about where we are going to come out, I want to decide on protecting women’s rights and protecting ordinary people in fairness before a court of law.

While there will be law professors and others who will disagree with my analysis, as I said before, I am more concerned about the effect of this nomination on everyday people in New Jersey across the country.

I am proud that there is a Federal courthouse in Newark that carries my name. It was while I was absent from the Senate a while that that was done. But I fought hard to get an inscription put in the wall of that courthouse. I wrote it. It reads:

The true measure of a democracy is its dispensation of justice.

This Nation of laws has to continue to be just that, and people have to know that they are treated fairly and that their personal rights are protected and that they can bring courses of action if their rights are damaged.
I believe in that quote. It guides me today.

For the parents fighting an insurance company for access to health care for their child, for the blue-collar worker facing harassment in the workplace, for women who want government’s hand to help their families, for minority people, I will oppose this nomination. I yield the floor.

The PRESIDING OFFICER. The Senator from New Jersey is recognized.

Mr. MENENDEZ. Mr. President, I rise, for the first time in this body, to speak on the nomination of Samuel Alito to serve on the Supreme Court of the United States. No matter one’s political persuasion, we all take pride in the honor that has been bestowed on a fellow New Jerseyan.

Samuel Alito’s story is one that rings familiar to so many New Jerseyans, including myself. His parents came to this country in search of opportunity, worked hard to build a better life for their children. The son of immigrants, Judge Alito’s life is a story that demonstrates the power of seizing opportunity and working hard.

Frankly, it is a story close to my own heart. I, too, am the son of immigrants, having moved to New Jersey to seek a better life and greater opportunity. Thanks to their hard work, and my own, I was the first in my family to graduate from college and law school.

Yet home State pride is not a sufficient reason. I have a responsibility to vote to defend decades of progress in protecting basic rights, including privacy, women’s rights, and civil rights, at stake with this nomination. The burden was on Judge Alito to be forthright and unambiguous in his answers. Unfortunately, his testimony was not reassuring and his record makes clear what kind of justice Judge Alito would be. A justice who would vote to overturn a woman’s right to choose, a justice who would award corporations and against average Americans, a justice who would allow this administration to continue to stretch and potentially violate its legal and constitutional authority. Especially with a Nation facing today and will face tomorrow, America cannot afford that kind of justice.

We live in extraordinary times today. President Bush has sought the accumulation of unprecedented powers. He has asserted the authority to not only torture detainees and indefinitely detain American citizens as enemy combatants, but to also conduct warrantless wiretapping of American citizens.

At a time when dissent is needed, President Bush has consistently excused actions taken by the executive branch that infringe on the constitutional limits when he claimed the administration could ignore the new law banning torture whenever he sees fit. This undermines one of the coequal branches of our government, the people’s elected representatives of the United States Congress.

Judge Alito has found against congressional authority when he argued in dissent in United States v. Rybar against a ban on machine guns that five other appellate courts and the Third Circuit itself upheld. Judge Alito also authored the majority opinion in Corporate v. Department of Commerce, invalidating parts of the Family and Medical Leave Act for exceeding the bounds of congressional authority—a position the Supreme Court subsequently rejected.

Several in-depth reviews show Judge Alito’s rulings, especially his dissents, consistently excuse actions taken by the executive branch that infringe on the rights of average Americans. One study found that 84 percent of Judge Alito’s dissents favor the government over individual rights. Another, the Alito Project at Yale Law School conducted a comprehensive analysis of the Judge’s 15 years on the Federal bench. They found that “Judge Alito has permitted individuals to be deprived of property or liberty without actual notice or a prior hearing.”

During his hearings and in my meeting with him, Judge Alito did nothing to distance himself from these positions; in fact, by refusing to candidly answer questions where he has the power, he only strengthened my concerns about his views.

If it’s not where you come from that matters, but where you will take the
nation, does a Supreme Court with Justice Alito take the nation forward or move our Nation back?

Back to a time when a President suspended the writ of habeas corpus; back to a time when a President ordered the internment of individuals based upon their ethnicity; and back to a time when a President ordered the unlawful break-ins and wiretaps against his opponents.

Our next Supreme Court justice must be a check and balance against broad Presidential powers that are inconsistent with our Constitution.

With respect to reproductive rights, Judge Alito told the members of the Judiciary Committee that he would look at such cases with an "open mind." However, he has, throughout his career, written that the Constitution does not protect a woman's right to choose, worked to incrementally limit and eventually overturn Roe v. Wade, so narrowly interpreted the "undue burden" in one specific case as to basically outlaw this right for an entire group of women, and refused to state whether Roe is "settled law."

When asked by Judiciary Committee Chairman Specter whether he continues to believe that the Constitution does not protect the right to choose, as he wrote in his 1985 job application at the Department of Justice, Judge Alito acknowledged that it was his view in 1985, but refused to say whether or not he holds that view today. I found Judge Alito's refusal to answer this question extremely troubling.

Later, as an Assistant Solicitor General, Judge Alito wrote a memo outlining a new legal strategy that the Reagan administration could use to "advance the goals of bringing about the eventual overruling of Roe v. Wade and, in the meantime, of mitigating its effects."

As a judge on the Third Circuit Court of Appeals, Judge Alito alone concluded that all of the Pennsylvania restrictions, including the spousal notification provision, should be upheld as constitutional in Planned Parenthood v. Casey. Ultimately, the Supreme Court found 5-4 that the spousal notification provision was unconstitutional. Justice O'Connor, who wrote the opinion, rejected Judge Alito's arguments and wrote that the spousal notification provision violated an impermissible "undue burden" on reproductive rights. She concluded by saying "Women do not lose their constitutionally protected liberty when they marry."

During our meeting, when I asked Judge Alito, "Do you believe Roe v. Wade is the 'settled law' of the land," he was unwilling to say that it is settled law. During the Judiciary Committee hearing, he said multiple times in response to questions from three of my distinguished colleagues on the Committee that respect for precedent, is not an "inexorable command." While this is undoubtedly the case, this language is exactly what Justice Rehnquist used in his dissent in Planned Parenthood v. Casey when arguing that Roe should be overturned. Justice Rehnquist wrote, "In our view, authentic principles of stare decisis do not require that any portion of the reasoning in Roe be kept intact. 'Settled law' is a universal, inexorable command."

Because I was concerned that his approach to these issues is far different than Justice O'Connor's, I gave Judge Alito every opportunity in our meeting to allay the concerns expressed by many New Yorkers. I regret that he did not do so.

If it's not where you come from that matters, but where you will take the Nation, does a Supreme Court with Justice Alito take the nation forward or move our Nation back?

What does Morning in America look like after Judge Alito becomes a Supreme Court justice? Will it be an America where a woman's constitutional right to have an abortion is not acknowledged? Will it be an America where a woman does not have access to the best medical care? Will it be an America where women do not control their own bodies?

Our next Supreme Court justice must respect both the constitutional right to privacy and a woman's right to choose. Our Nation's civil rights are needed to provide equal rights in employment, voting, or disability, they are designed to eliminate discrimination from our society and to provide equal opportunity and access. These laws are often the direct result of our country's civil rights movement.

Unfortunately, Judge Alito has consistently applied a narrow interpretation of civil rights laws. Over his 15-year judicial career, he has more often than not sided with corporations and against individuals.

In five split decisions involving a claim of sex discrimination, Judge Alito has sided with the person accused of the sex discrimination every time. In Sheridan v. E.I DuPont de Nemours, a woman brought a gender discrimination lawsuit after being denied a promotion. A jury ruled in her favor, but the trial judge threw out the verdict. The full complement of the Third Circuit voted 10-1 to reverse the judge's decision in this sex discrimination case and remand the case for reconsideration. Justice Alito dissented, arguing that the case should be dismissed. If Judge Alito's view was the law of the land, virtually no woman who has been wrongfully denied a promotion based upon her gender would have her day in court.

In the area of race discrimination, Judge Alito voted in dissent against the plaintiff in both split decisions. The Third Circuit held that the plaintiff in Bray v. Marriot Hotels had shown enough evidence of possible racial discrimination to merit a trial before a jury. As in Sheridan, Judge Alito dissented, saying that the plaintiff had not produced enough evidence even to get to a trial of a jury of their peers. If Judge Alito's view was the law of the land, virtually no person of color would be able to pursue discrimination based on race in the courts of our nation.

From the bench, Judge Alito has participated in five split decisions in the area of disability rights law and he sided with the defendant four out of the five times. In Nathanson v. Medical College of Pennsylvania, relating to a college's knowledge of and response to the disability needs of a student, the majority held that neither the student nor a jury could hear her claims. Judge Alito disagreed with the majority, writing that Nathanson failed to prove that the college acted unreasonably in its responses to her requests for alternative seating arrangements. If Judge Alito's view was the law of the land, virtually no disabled person denied alternative accommodations could seek relief from the court.

These are only symbolic of the many cases where Judge Alito would say no to the average American citizen. If someone's daughter was seeking relief from discrimination based upon her gender, Judge Alito would say no. If an American of color was seeking relief from discrimination based upon their race, Judge Alito would say no. If someone's handicapped son was seeking relief from discrimination based upon his disability, Judge Alito would say no. Judge Alito would make it virtually impossible for an individual to go to court when his or her rights were violated, and have their day of judgment.

If it's not where you come from that matters, but where you will take the Nation, does a Supreme Court with Justice Alito take the nation forward or move our Nation back?

Back to a time when there was not equal access to schools and government programs, back to a time when employment would fire employees just for cause; and back to a time when all citizens were not guaranteed the right to vote.

Our next Supreme Court justice must truly subscribe to the inscription above the entrance to the United States Supreme Court—"Equal Justice under Law."

The confirmation of a Supreme Court justice is one of the two most important responsibilities that a Senator has. This is a decision on war and peace, which is also about life and death. The other is deciding who will have a lifetime appointment to the Court that decides the laws of the land.

Make no mistake about it, Judge Alito is a decent, accomplished, intelligent man. A man who is proud to call our shared State of New Jersey home. But it is not enough to come from New Jersey—the test is—will you represent the values of New Jersey and this Nation on the highest court in the land? In New Jersey we value creating opportunity, we cherish the idea of individual freedom and responsibility, and
I yield the floor.

The PRESIDING OFFICER (Mr. President).—With the unanimous consent of the Senate, the Senator from Missouri is given 5 minutes to make a statement.

Mr. BOND. Mr. President, on the question of the confirmation of Judge Samuel Alito, when you boil everything down and clear away all of the other issues, the most important thing each of us wants from a judge is fairness and impartiality. None of us would want a court of appeals to sit there and think our judge had already made up his mind before hearing our case. Whether we are rich or poor, weak or strong, it doesn’t matter. The public is entitled to an open and impartial court. That is what justice means—impartial and objective. That is the kind of judge we want hearing our case, and that is the kind of judge Sam Alito is.

Everything we have learned about Judge Alito from his testimony before the Senate Judiciary Committee, his lengthy record of decided cases, to the testimonials of his colleagues and peers, tells us that Judge Alito will be a fair, impartial, and objective Justice. Judge Alito has told us how he believes a judge cannot prejudge an issue, a judge cannot have an agenda, a judge cannot prejudge an issue, a fair, impartial, and objective Justice. That is the kind of judge we want hearing our case, and that is the kind of judge Sam Alito is.

I was so glad to see that during his confirmation hearings Judge Alito would not allow himself to be forced into prejudging any cases. Now, many tried. They went down their list of issues and asked whether Judge Alito agreed with their agenda. They wanted to know how he would rule on one kind of case or another. They wanted him to make up his mind before he even heard them. That would not be justice, and that would not be Judge Alito.

Not only does Judge Alito know justice, Judge Alito knows democracy. Democracy means that laws governing the people can only be made by those elected by the people to make laws. He knows the Members of Congress are elected to make laws. The citizens of Missouri elected their Representatives and Senators to represent them in Congress, the legislative body. I am honored to be one of those so chosen. Judge Alito is not.

The citizens of Missouri are not electing Judge Alito to make laws. Judge Alito knows he will not have the power to make laws. Judge Alito knows he is neither a Congressman nor a Senator who can pass his own legislation from the bench. That is not the role of a judge.

Judge Alito knows he is not a politician advocating a program. That is not what a judge should do. He is not a politician responding to a stakeholder, carrying out the agenda of his constituency, whether it be New Jersey or any other State in the Nation, taking the pulse of voters or watching the polls. That is not how to be a judge.

Judge Alito has told us he will look at the facts with an open mind and then apply the Constitution and the laws as written. He will not make up the law when he wants, he will not change the law when he needs. Judge Alito also knows the law, as many of my colleagues on the Senate Judiciary Committee have pointed out. At every stage of his life, he has excelled at knowing and applying the law. As a law clerk to a Federal judge, Department of Justice official, Federal prosecutor, and now a Federal appellate judge, he has had experience on the bench. Judge Alito is one of the most qualified ever nominated for the Supreme Court.

A very good friend of mine is an appellate judge, who in law school had the pleasure of supervising a legal document written by Judge Alito. He told me Judge Alito had the finest legal, judicial mind he had ever encountered. I trust his judgment.

Judge Alito’s peers and colleagues all agree Judge Alito is supremely qualified for the Supreme Court. He comes highly recommended by his colleagues and members of the legal profession because of his legal knowledge and experience. Even those who have worked with Judge Alito and disagree with him on the issues or the outcome of his rulings consider him fair-minded and evenhanded.

In short, Judge Alito will make a great Supreme Court Justice. Unfortunately, there are those who want to use Judge Alito as a political football. I, for one, believe very strongly our judges and our justice system should be above partisan politics. Justice deserves better than to have the nominees dragged through the political mud.

My focus is on the nominee himself and on his legal knowledge and experience. In that regard, Judge Alito should be on the Supreme Court, and I will proudly vote to place him on the Supreme Court.

Every case he hears, he will approach with an open mind. Every case he considers, he will apply the law and Constitution as written. Every case he decides, he will check his personal feelings at the door and weigh the scales of justice.

We can expect, and should expect, nothing more from a Justice, and justice deserves nothing less.

I urge my colleagues to put aside partisan politics, to set aside pressure from special interests, to vote to invoke cloture, and then to vote on a majority vote to confirm Justice Alito to the Supreme Court.

I thank the Chair and yield the floor.
Alito meets both of these important criteria. In his fifteen years as a Federal judge, he has demonstrated respect for the Constitution, for the rights of all Americans, for law, and for other judges. He has often found it very difficult to successfully assert their rights as employees. Judge Alito demonstrated his keen understanding of this in a case involving police officers in Newark, New Jersey (Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 1999). The Newark Police Department sought to force these officers to shave their beards, which they wore in accordance with their religious beliefs. Judge Alito ruled in favor of the officers in this case, correctly noting that the department’s policy unconstitutionally infringed upon their civil rights under the First Amendment.

The F.O.P. is also very supportive of Judge Alito’s decision in a 1993 decision filed by a coal miner seeking disability benefits under the Black Lung Benefits Act (Curt v. Director, Office of Workers’ Compensation Programs). Judge Alito ruled in favor of a coal miner, holding that the Benefits Review Board which denied the miner’s claim had misapplied the law regarding disability. He ordered that the case be remanded for an award of benefits, instructing that the Board could not consider any other grounds for denying benefits. Members of the F.O.P. and survivor families who have been forced to appeal decisions which denied benefits under the Black Lung Act know first-hand just how important it is to have a jurist with a working knowledge of applicable law and a strong understanding of controlling legal authority. The fact that each case after full and careful consideration of all relevant facts and legal arguments and experience with the Board has indicated that Judge Alito was guided by his profound respect for the Constitution and the limited role of the judicial branch. Where the Supreme Court or the Third Circuit has spoken on an issue, he applied that precedent faithfully and fairly. Where Congress had spoken, he gave the statute its commonsense reading, eschewing both rigid interpretations that undermined the statute’s clear purpose and attempts by litigants to distort the statute’s plain language to advance policy goals at odds with Congress’s intent. In short, the only result that Judge Alito ever tried to reach in a case was the result dictated by the applicable law and the relevant facts.

Our admiration for Judge Alito extends far beyond his legal acumen and commitment to principled judicial decision-making. As law clerks, we experienced Judge Alito’s willingness to consider and debate all points of view. We witnessed the way in which Judge Alito treated everyone he encountered—whether an attorney at oral argument, a clerk, an intern, a member of the court staff, or a fellow judge—with utmost courtesy and respect. We were touched by his humility and decency, and we saw his absolute devotion to his family.

In short, we urge that Judge Alito be confirmed as the next Associate Justice of the Supreme Court. Sincerely,

Signed by 51 former clerks.

Re Samuel A. Alito.
Hon. Samuel A. Alito, U.S. Senate, Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR LEAHY: We write in support of the nomination of Judge Samuel A. Alito, Jr. to the United States Supreme Court. Judge Alito has the attributes that we believe are essential to being an outstanding Supreme Court Justice and therefore should be confirmed. Thank you for considering our views.

Signed by 206 lawyers.

Mr. CORNYN. Mr. President, I also have in my other hand a series of editorials, starting with a Dallas Morning News editorial entitled “Confirm Alito.” These are all editorialists from newspapers around the country recommending that this body confirm Judge Alito. I ask unanimous consent that
these editorials be printed in the Record.

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

[From the Miami Herald, Jan. 24, 2006]
QUALIFIED TO SERVE ON THE SUPREME COURT

There is little doubt that in the coming days to confirm the nomination of Judge Samuel Alito to replace Justice Sandra Day O’Connor on the U.S. Supreme Court. He deserves to be confirmed. This is not an assessment of his judicial philosophy but of his undoubted qualifications for the job. He has the intellectual heft, judicial temperament and faculty to the U.S. Constitution and the precedent that undergirds the federal appellate bench. However, this is not a fair argument to raise against Judge Alito.

According to statistics compiled by the Court of Appeals for the Third Judicial Circuit, Judge Alito has dissented only 16 times in the last six years, fewer times than some of his colleagues. In several cases involving the death penalty, he has agreed with Judge Alito’s votes and written opinions 94 percent of the time. It is possible to take issue with some of his views in those instances, but this is not the record of a judge on the fringe of mainstream judicial thinking. During 18 hours of hearings—almost twice as long as his predecessor John Roberts—Judge Alito displayed a deep understanding of the legal issues the court is likely to confront and kept cool under fire. He displayed the judicial poise of a seasoned jurist, ably performing how he would rule on some of the controversial issues, but that is hardly surprising. Unfortunately, given the divisiveness in Washington today, most people can prove fatal to a nominee.

In nominating Judge Alito, President Bush fulfilled a campaign promise to appoint judges who shared the views of Justices Clarence Thomas and Antonin Scalia. Thus, he delivered a candidate with sound credentials but a conservative record that many find troubling.

This record includes a narrow view of abortion rights, apparent support for the expan-
sion of presidential powers into wartime and a narrow interpretation of the regulatory au-
thority of Congress. Judge Alito likely will help move the court rightward, some senators, notably liberals and conservatives, would have a compelling reason to vote against him.

No justice should be denied a seat on the court, however, solely on the basis of judicial philosophy, particularly someone of Judge Alito’s proven ability and experience. The best way for critics—Democrats, mostly—to prevail when it comes to selecting federal judges is to prevail at the ballot box.

[From the Milwaukee Journal Sentinel, Jan. 15, 2006]
SUPREME COURT; ALITO DESERVES CONFIRMATION

Samuel Alito should be confirmed to the U.S. Supreme Court.

And, barring any last-minute disqualifying revelations, the first step toward that goal should be yes votes in the Senate Judiciary Committee, including from Wisconsin’s two senators, both of whom sit on that committee.

Democrats are understandably concerned about Alito’s record but should nonetheless reject a filibuster. Nor should they move, as it appeared likely late last week they would, to delay the committee’s vote. Both would be antithetical to the democratic process in this specific case.

That’s because, though we would have preferred Alito to be more open about his judicial philosophy, he did make one case quite reassuring, almost twice that of the Supreme Court and settled law. He did assert that it is settled law. He did not risk-free, but it’s not risk-free, but it’s the right thing to do.

[From the Philadelphia Inquirer, Jan. 15, 2006]
CONFIRM JUDGE ALITO

The Senate should confirm Judge Samuel A. Alito Jr., President Bush’s nominee for the Supreme Court. Alito, a member of the Philadelphia-based Third Circuit Court of Appeals, demonstrated during three days of questioning by the Senate Judiciary Committee that he does not bring a preconceived agenda to the job.
He does bring a cast of mind that causes some legitimate concern. But Alito showed he has the experience, modest temperament, reverence for the law, and mastery of his profession to serve on the high court.

A common complaint about confirmations has been that nominees stonewall the committee. Alito tried to answer nearly every question. Democratic senators may not have liked his responses, but Alito dodged very few questions.

This endorsement is not enthusiastic. Alito did fail to allay some important concerns. On abortion, he rebuffed entreaties by Democrats to characterize Roe v. Wade as “settled law.” Chairman Arlen Specter (R., Pa.) commended Alito for discussing the issue in more depth than did Chief Justice John G. Roberts Jr. But this extra effort was less than encouraging. Alito, who wrote in 1985 that the Constitution doesn’t guarantee the right to abortion, would not say he is a pro-choice jurist.

Alito pledged to “keep an open mind” on abortion cases. But he also said Supreme Court precedent is not an “inexorable command” if it conflicts with the Constitution. He considers the Constitution a living document, as he testified, he should weigh carefully the expressed desire of a majority of Americans to preserve reproductive freedoms.

On the question of presidential power, concern linger that Alito would give undue deference to the executive branch. For all President Bush’s talk about “strict constructionism,” his freewheeling notions about his powers would have appalled many of the Constitution’s framers, who deeply feared an authoritarian executive.

At the hearings, Alito sought to temper the enthusiasm for presidential prerogatives he showed in earlier writings with the statement that the president is not above the law. At least he is on the record with this view now. Being on the high court has been known to focus minds on the value of the Constitution’s constitutional role as a check on the other two branches.

A distressing point was Alito’s membership in the now-defunct Concerned Alumni of Princeton, a group created in 1972 to oppose affirmative action. Princeton, a group created in 1972 to oppose affirmative action.

Judge Alito disagreed only 27 times in 1,050 cases he has decided. As a pragmatic Judge Edward Ripper of the Second Circuit said he feels differently today. Alito (U.S. v. Kithcart) in which Judge Alito stopped me cold by saying that the criminal defendant had submitted a sloppy brief, a very slip-shod affair. The prosecuting attorney had submitted a neat, presentable brief. I suggested (in my youth and naivete) that he had made an easy case to decide for the government.

Judge Alito stopped me cold by saying that was an unfair attitude to have before I had even read the briefs carefully and con- conducted the necessary additional research needed to ensure that the defendant received a fair hearing before the court.

Perhaps not what one would expect from a conservative ideologue (and former federal prosecutor), but it is indicative of the way Judge Alito approaches each case with an open mind, and it is a lesson I’ve never forgotten.

Another example, which reached a result that was perhaps not what one would expect from a conservative ideologue, was a case I worked on with Judge Alito (U.S. v. Kithcart) in which Judge Alito reversed a conviction of a black male, holding that the evidence was not sufficient to even charge a black man with a crime.

This is hardly the work of a conservative ideologue.

As a former clerk to Judge Alito, I can attest to the fact that he (and I) had gone out of our way not to get involved in the controversy of the day, and so did not participate in the controversy of the day. We did not participate in the controversy of the day.

Mr. CORNYN. Mr. President, I support the nomination of Alito to the U.S. Supreme Court. The American people, in public opinion polls we have seen reported in the newspapers, indicate they also want Judge Alito on the Supreme Court. Yet we are here today, after extended debate, because there are a handful of Senators who are de- termined to stop Judge Alito’s nomina- tion from even receiving an up-or-down vote. Hence, at 4:30 we will have a vote on cloture, whether to close debate. It is my sincere hope that at least 60 Sen- a tors will vote to cloture so to-morrow morning we can have that up-or-down vote that this nominee de- serves and that the Constitution re- quires.

There really is no pretense that this tactic of delay for delay’s sake is need- ed for extended debate. Judge Alito was nominated months ago, and we have been debating this nomination without interruption since last Wednesday. Not only has Judge Alito been investigated by the Senate Judiciary Committee, he has been investigated by the Senate Judiciary Committee.

Bar Association’s Standing Committee on the Federal Judiciary.

He has been investigated by the Senate Judiciary Committee, on which I am proud to serve, and been through extended tele- vised hearings. Indeed, even the most liberal, the Democrat leader, conceded “[t]here’s been adequate time for people to debate” this nomination.

So this is delay for delay’s sake. Fortunately, there is no indication this delay tactic will succeed. Judge Alito’s supporters are so numerous that everyone has conceded—even the minority, who is determined to try to filibuster this nomination, concedes
the filibuster attempt is futile and this nominee will be confirmed.

So what could possibly be the motivation? The Senator from Missouri, who just spoke before me, alluded to this. I think it is common knowledge that it really takes outside interest groups that are putting, as some say, insufferable pressure on Senators to oppose this nomination, even though they realize the delay and the potential filibuster are futile. These are groups that have declared—and I quote, in one instance, it, we’ll do whatever it takes to defeat Judge Alito. I am very sorry that some of my colleagues have fallen under the spell of some of these groups. In my view, it is wrong to place the wishes of these interest groups before the wishes of the American people.

I think it is also a mistake to waste the valuable time of the Senate, time we could be using to address other real and urgent needs that no doubt the President will address tomorrow night in his speech. Let me quote, "If we do not defeat the filibuster, we will prevail at the ballot box." The only way to defeat the filibuster is to vote against it. I urge all of my colleagues to stand up against these interest groups and to put the American people first by voting against the filibuster.

I also continue to be struck by the lengths some will go in order to defeat this good man and good judge. This raises the question of why? Why do liberal special interest groups and their allies in this body oppose Judge Alito so vehemently?

I believe, at bottom, the reason they oppose his nomination is because he has refused to do their bidding. After all, Judge Alito is a judge who believes in judicial restraint, who understands the differences between the roles judges and legislators—elected representatives of the people—are to play in our federal system. He believes judges should respect the legislative choices made by the American people through their representatives. And he believes, as I do, judges have no warrant to impose their own beliefs on the rest of us under the guise of interpreting the Constitution.

It is sad but true that the prospect of a Supreme Court Justice who will respect the legislative choices of the American people scares the living daylights out of these interest groups and their allies. Why? Because the legislative choices of the American people are not the legislative choices of these interest groups.

There are some in this country who are entitled to their opinion, whose views are so extreme they will never prevail at the ballot box. The only way they could possibly hope to get their views enacted into law would be to circumvent the Democratic process and pack the courts with judicial activists who will impose their views on the rest of us.

What are these views? Well, one organization I think makes the point. The American Civil Liberties Union is one example. They represent child pornography researchers because they believe that child pornography is free speech. Yet at the same time, they litigate against schoolchildren who want to recite the Pledge of Allegiance because it invokes "one nation under God." They believe the Constitution protects the right to end the life of a partially born child. Yet at the same time, they believe the Constitution does not protect marriage between only one man and one woman.

They seem to believe that criminals have more rights than victims. And they believe that terrorists should receive special rights never before afforded to enemy combatants during a time of war.

This is the hard left's version of America. It is a place where criminals and terrorists run free on technicalities, where pornography may speak but people of faith must keep quiet, where the truth is replaced by social experimentation.

The liberal special interest groups and those who agree with them in this body to oppose Judge Alito do so because Judge Alito's America is not the hard left's America.

What, then, is Judge Alito's America? Well, I found one of the best answers to that question in, of all places, the New York Times. On January 12, one of their columnists, David Brooks, wrote a column that captures perfectly the differences between Judge Alito's America and the America envisioned by some on the hard left.

He wrote:

If he'd been born a little earlier, Sam Alito probably would have been a Democrat. In the 1950s, the middle-class and lower-middle-class whites in places like Trenton, N.J., where Alito grew up, were the heart and soul of the Democratic party. But by the late 1960s, cultural politics replaced New Deal politics, and liberal democrats did not win over white ethnic voters. Big-city liberals launched crusades against police brutality, portraying working class cops as thuggish storm troopers for the establishment. The liberals were doves; the ethnic voters were hawks. The liberals had "Question Authority" bumper stickers; the ethnics had been taught in school to respect authority. The liberals thought that an unjust society caused poverty; the ethnics believed in working their way out of poverty.

Sam Alito emerged from his middle-class neighborhood about that time, made it to Princeton and found "very privileged people behaving irresponsibly." Alito wanted to learn; the richer liberals wanted to strike. He wanted to join the ROTC; the liberal Princetonians expelled that organization from campus. He was orderly and respectful; they were disorderly and disrespectful.

Mr. Brooks continues:

If there is one lesson from the Alito hearings, it is that the Democratic Party continues to represent (middle class white) voters just as vigorously as ever.

If you listened to the questions of Republicans, you heard (Senators) exercised by the terror law enforcement officials can inflict on a neighborhood.

If forced to choose, most Americans side with the party that errs on the side of the constitution.

If you listened to Republicans, you heard (Senators) alarmed by the threats posed by anti-American terrorists. If you listened to Democrats, you heard (Senators) alarmed by the threats posed by American counter-revolutionaries.

If forced to choose, most Americans want a party that will fight aggressively against the terrorists, not the NSA.

He concluded:

Alito is a paragon of the old-fashioned working-class ethic. In a culture of self-aggrandizement, Alito respects tradition, order and authority. I read a lengthy excerpt from Mr. Brooks' column because I could not have said it better. This is Judge Alito's America. It is a place where if you err at all, you err on the side of the law, not on the side of those who break the law, where we fight terrorists, not those who try to stop those terrorists, where we work hard to get ahead, where we are more interested in getting the job done than getting credit for it. In other words, these are the middle-class traditional values of America, Sam Alito's America, and, I believe, our America. They are now apparently so foreign to many in the Democratic Party, particularly the liberal special interest groups who want to agitate for delay for delay's sake and to block an up-or-down vote on this nomination, that they will stop at nothing to oppose someone such as Judge Alito who embodies those values. You name it, whether smears, distortions or even denying the decency of an up-or-down vote, and some will do it. Judge Alito's treatment by this hard core of left-leaning groups and their supporters seems more about them than it does Judge Alito.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. HATCH. Mr. President, the Senate is about to vote on a motion to invoke cloture on the nomination of Samuel Alito to be an Associate Justice of the U.S. Supreme Court. We should not even have to take this step but should be voting instead on whether to consent to Judge Alito's appointment. But since we are being forced to take this unnecessary step, let me explain why I believe the case for both cloture and for confirmation is compelling.

Deliberation and debate are hallmarks of the Senate. Our tradition has been that once a judicial nomination
has reached the Senate floor, we debate and then we vote on confirmation. There is no need to revisit all of the arguments regarding judicial nomination filibusters. Suffice it to say that American history contains but a single example of failing to invoke cloture on and then to confirm a Supreme Court nomination. The 1968 nomination of Abe Fortas to be Chief Justice, however, bears no relationship to the current situation.

First, while the Fortas nomination did not have majority support, the Alito nomination clearly does. Judge Alito enjoys majority bipartisan support. I realize his opponents are not happy that Judge Alito will be confirmed; no one likes to lose. But the correct response to failure is to pick yourself up and try another day, not to rig the process to get your way.

Second, opposition to cloture on the Fortas nomination was almost evenly bipartisan, with 23 Republicans and 19 Democrats. As we are about to see, opposition to cloture on the Alito nomination will be entirely partisan. The most important reason why the Fortas cloture vote is no precedent for this one is that there had not yet been full and complete debate on the Fortas nomination when the vote ending debate occurred. Senator Robert Griffin of Michigan stated clearly at the time that not all Senators had had a chance to speak and that the debate was being short circuited here. This floor has an opportunity to air their views about this nomination. Let us not forget that debate was wide open for debate. No one can suggest that the debate has not been a full and fair one.

To their credit, some of my Democratic colleagues who oppose the nomination itself have nonetheless said that this 11th-hour filibuster is not in the best interest of the Senate. The Senator from Illinois, Mr. Obama, said over the weekend that the better course for Democrats is to win elections and persuade on the merits, rather than what he called overreliance on procedural maneuvers such as the filibuster. I agree.

We should not have to take this cloture vote today. It only further politicizes and distorts an already damaged judicial debate. It is moving beyond that, it is clear that the case for Judge Alito's confirmation is compelling. Last week I outlined three reasons why Judge Alito should be confirmed. He is highly qualified. He is a man of character and integrity, and he understands and is committed to the properly limited role of the judiciary, judges.

During the debate on this nomination, other Senators have explored these matters as well, including the Senator from Texas, Mr. CORNYN, who preceded me here today. Senator CORNYN is a distinguished member of the Judiciary Committee and a former State supreme court justice. His perspective and insight on judicial matters has been and is extremely valuable.

I wish to explore one specific issue that relates to Judge Alito's judicial philosophy which, unfortunately, has been the subject of a disinformation campaign by Judge Alito's opponents. That issue is Judge Alito's view on precedent. In Judge Alito's view on the role of precedent or prior judicial decisions in deciding cases. Judges settle legal disputes by applying the law to the facts in the cases that come before them. The law that judges apply to settle legal disputes comes in two basic forms.

There is the written law itself in the form of constitutional provisions, statutes, regulations, cases, and decisions in which the courts have addressed the same issue. The Latin phrase for following precedent or prior decisions is stare decisis, which means "let the decision stand." Mr. President, every judge believes in the doctrine of stare decisis. Every judge believes that prior decisions play an important role in judicial decision-making. That includes Judge Alito.

As I will explain, Judge Alito's views on precedent are sound, traditional, and principled. When the Judiciary Committee hearing on this nomination opened, I outlined several rules which should guide the confirmation process.

The first was that we should take parts or elements of Judge Alito's record on their own terms, in their own context for what they really are. That certainly applies to Judge Alito's views regarding the issue of precedent.

Rather than acknowledging what Judge Alito said, however, some of his opponents have created a caricature of those views, which serves their political purposes but which misleads our fellow citizens about both Judge Alito's record and the very important role that precedent has in the American system of justice.

Let me start with Judge Alito's own words. No one expresses his view of precedent better than he does. On January 11, 2006, Judge Alito offered this summary of his views:

I have said that stare decisis is a very important legal doctrine and that there is a general presumption that decisions of the Court will not be overruled. There needs to be a special justification for doing so, but it is not an inexorable command. One of his points stood out, and I believe it is worth highlighting. Let me just refer to that point. He said:

I think the doctrine of stare decisis is a very important doctrine . . . It limits the power of the judiciary . . . it's not an inexorable command, but it is a presumption that courts are going to follow prior precedent.

This view has several elements. First, Judge Alito says plainly that stare decisis is a very important legal concept and doctrine. He described why he thinks precedent is so important.

Judge Alito believes giving precedent an important role in deciding cases limits the power of the judiciary. If his opponents believe instead that judges should have unlimited power and may disregard precedent at will, let them try to persuade the American people.

Let me refer again to Judge Alito's summary of his views on precedent. In addition to stare decisis being an important legal doctrine, Judge Alito also said that there is a general presumption that decisions of the Court will not be overruled. If that presumption did not exist, there would be little point in paying attention to prior decisions at all.

In January 2006, Judge Alito also said that overruling a prior decision requires a special justification. Some of Judge Alito's opponents suggest that he has taken a care-
Judge Alito would play fast and loose with Supreme Court precedent once he joins the Court. The suggestion is certainly false.

Judge Alito has voted to overrule his own court’s precedents only four times in the 15 years on the U.S. Court of Appeals—only four times. In each of those cases, in which all of the judges in the circuit participated, he was in the majority, and in two of them the decision was unanimous. Judge Alito has demonstrated that judges should not heedlessly overrule past decisions.

As he explained it, the factors helping judges to handle precedents, including ones to overrule or reaffirm them, include whether the precedent has actually been challenged and the Court has decided to retain it. This would, of course, not include cases in which the validity of a prior decision was neither challenged nor decided. It is, after all, another language, binding or not, of judicial restraint, which Judge Alito also endorsed, that courts should not decide constitutional questions unless absolutely necessary. That would include deciding whether prior decisions, especially constitutional issues, should be overruled or reaffirmed.

Obviously, a court does not decide an issue unless it actually addresses and decides it, and a court cannot be said to reaffirm or uphold a prior decision unless it actually addresses or decides that issue.

That said, a court strengthens the presumption that a precedent will be followed when the court actually does reaffirm a decision. At the same time, Judge Alito has said that adhering to prior decisions is not an inexorable command. Those are not his words. As he pointed out at his hearing, the Supreme Court has repeatedly used stare decisis as a flexible approach to precedent, at least until they get the one they want. Then they become the most rigid and doctrinaire defenders of precedent, insisting on keeping what they have. This all seems like a judicial version of “heads I win, tails you lose.”

Mr. President, I think it is a principle of policy and not a mechanical formula of adherence to the latest decision. This is particularly true in constitutional cases, because in such cases “connection through legislative action is practically impossible.”

As we have often noted, “[s]tare decisis is not an inexorable command.” That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or overruling prior decisions.


“Stare decisis is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision.” This is particularly true in constitutional cases, because in such cases “[c]orrection through legislative action is practically impossible.”

Many Senators and leftwing interest groups have demanded to know whether Judge Alito, if confirmed, would ever vote to overrule Roe v. Wade. I applaud their creativity in getting as close as possible to directly asking him that question. For most of Judge Alito’s opponents, Roe v. Wade was correctly decided and doesn’t matter. Whether it was a legitimate interpretation of the Constitution does not matter. No, abortion advocates take a fluidly flexible approach to precedent, at least until they get the one they want.

Then they become the most rigid and doctrinaire defenders of precedent, insisting on keeping what they have. This all seems like a judicial version of “heads I win, tails you lose.”

Mr. President, I think it is a principle of policy and not a mechanical formula of adherence to the latest decision.


“In constitutional questions, where correction depends upon amendment and not upon legislative action, this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions.”

The real issue for Judge Alito’s opponents is not that he rules too often for this group or that group, as if judges are supposed to make the numbers satisfy some political interest group rather than faithfully apply the law. It is not really about theories such as what has been called “judicial restraint,” to which Judge Alito apparently means nothing more unusual than that the head of the executive branch should be able to control and lead the executive branch. It is not about guilt-by-association tactics or affiliations with groups wanting to preserve Princeton’s all-male tradition made by Senators belonging to all-male clubs. No, Mr. President, this is about abortion. That is the be-all and end-all of our political goal is achieved. They do not really care about legal doctrines; they only care about political agendas. Here is where Judge Alito aspires to reaffirm or uphold a prior decision. At the same time, adherence to precedent is not an inexorable command. At the same time, adherence to precedent is not an inexorable command. And it is a principle of policy and not a mechanical formula of adherence to the latest decision.


“We have long recognized, of course, that the doctrine of stare decisis is less rigid in its application to constitutional precedents than in other areas of the law.”


“Throughout the history of the Court the stare decisis has had only a limited application in the field of constitutional law. And it is a wise policy which largely restricts it to those areas of the law where correction can be had by legislation. Otherwise the Constitution loses the flexibility necessary if it is to serve the needs of successive generations.”

It depends upon amendment and not upon legislative action. This Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions.”

STARE DECISIS IS WEAKEST IN CONSTITUTIONAL CASES


“... this Court’s considered practice not to apply stare decisis as rigidly in constitutional as in nonconstitutional cases. ...”

Justice Scalia.

“In constitutional questions, where correction depends upon amendment and not upon legislative action, this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions.”

St. Joseph Stock Yards Co. v. United States, 96 U.S. 38, 94 (1876)—Justices Stone and Clark, concurring in the result.

“The doctrine of stare decisis ... has only a limited application in the field of constitutional law.”


“[I]n cases involving the Federal Constitution, correction through legislative action is practically impossible, this court has often overruled its earlier decisions.”

Mr. HATCH. Mr. President, in some of these cases, the Justice whom Judge Alito would replace, Justice Sandra Day O’Connor, is the one repeating this principle.

Let me return once again to how Judge Alito summarized his own view
of precedent. It is a very important legal doctrine that serves to limit judicial power. There is a general presumption that past decisions will not be overruled, but this is not an inexorable command.

Judge Alito takes a sound, traditional, principled view of the role of precedent in judicial decisionmaking, and I hope my colleagues will consider Judge Alito’s view for what it actually is.

In closing, let me say that the debate over this nomination has been going on for about 3 months. It has been long and vigorous, both inside the Senate and across the country. I wish to note some of the opinions outside of this body on the nomination before us.

Some of my colleagues on other side of the aisle are fond of quoting liberal law professor Cass Sunstein’s statistical analysis about which sides have won or lost in different categories of cases before Judge Alito. They have often cited his dissents that they may find his true judicial philosophy. I wonder whether they will credit Professor Sunstein’s conclusions about Judge Alito’s dissents, published last November in the Washington Post.

He said on the contrary:

None of Alito’s opinions is reckless or irresponsible or even especially far-reaching. His disagreement is unflaggingly respectful. His dissent is lawyerly rather than bombastic. He does not berate his colleagues . . . Nor has Alito proclaimed an ambitious or controversial theory of interpretation. He avoids abstractions.

And Judge Alito is superbly qualified. His record on the bench is that of a thoughtful, careful attention to the record and doesn’t reach for the political outcomes he desires. His colleagues’ conclusions speak highly of him. His integrity, notwithstanding efforts to smear him, remains unimpeached.

Humility is called for when predicting how a Supreme Court justice may handle the work of the court, the details or even what these details will be, given how people and issues evolve. But it’s fair to guess that Judge Alito will favor a judicial philosophy that exercises restraint and does not 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 many members who are at best, little more than deadwood, with regard to their 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.

Alito’s integrity, professional competence and judicial temperament are of the highest standing.

...
do with Alito’s fitness to serve on the nation’s highest court.

Despite the spectacle of the hearings, we are convinced Alito, a New Jerseyan who sits on the 3rd Circuit Court of Appeals, is eminently qualified to serve as an associate justice of the U.S. Supreme Court and should be confirmed by the committee and ultimately the Senate and, yes, with the support of New Jersey’s two Democratic senators.

Our support is not an uncritical ode to homegrown talent. It is based, in part, on the respect and praise Alito has garnered from those who have worked with him throughout his distinguished and judicial career. Democrats and Republicans, conservatives and liberals, many of whom, perhaps, philosophically disagree with Alito, have consistently maintained he is well-suited for the court.

We think they make a compelling case. Among those who speak highly of him are Rutgers Law School Associate Dean Ronald Chen, an outspoken liberal who was just named by Gov.-elect Jon Corzine to be public advocate; retired Chief Judge John Gibbons of the Federal Circuit; and, since leaving the bench has worked aggressively to eliminate the death penalty; well-known Democratic lawyer Douglas Eakley, who works for President Bill Clinton to the board of directors of the Legal Services Corp.; Democratic criminal defense attorney and former New Jersey Attorney General Robert Del Tufo, who served in Democrat Jim Florio’s cabinet and worked with Alito in the U.S. Attorney’s Office.

None of these folks had to stand up for Alito, but they did.

Similarly, the judges who sit with Alito on the 3rd Circuit in Philadelphia came forth in an unprecedented show of support, insisting he was not an ideologue, had scrupulously adhered to precedent and had shown no signs of hostility toward a particular class of cases or litigants.

The American Bar Association declared Alito “well-qualified”—the highest approval rating given by the ABA.

This is not to say we like everything we heard from Alito in the hearings.

Given our strong and long-standing support for the 3rd Circuit Court of appeal, we worry that Alito’s refusal to describe Roe vs. Wade as settled law could mean he is going to be inclined to take positions that chip away at a woman’s right to choose and accord with his expansive view of executive restraint. He has proven that he seeks to apply restraints to the law and he also demonstrated his ability, intelligence, and his fitness to serve as a Justice on the Supreme Court.

As the Senate prepares for the confirmation process of Judge Alito, it is important to look beyond his life as a lawyer and focus on the judicial experience of this extremely well qualified nominee. Judge Alito has served the United States as an Assistant Solicitor General, as a United States Attorney, and for the past 15 years, as a Judge on the Third Circuit Court of Appeals. Judge Alito’s record on the Third Circuit Court of Appeals demonstrates judicial restraint. He has proven that he seeks to apply the law and does not legislate from the bench. Judge Alito’s judgments while on the bench have relied on legal precedent and current law, and he has a long-standing reputation for being both tough and fair. In short, he is the best of the federal bench and we believe he will be an excellent Supreme Court Justice.

We urge the Senate to hold an up or down vote and confirm Judge Alito.

Sincerely,

John W. Suthers, Attorney General of Colorado; Troy King, Attorney General of Alabama; Charlie Crist, Attorney General of Florida; Lawrence Warden, Attorney General of Idaho; Tom Corbett, Attorney General of Pennsylvania; David W. Márquez, Attorney General of Alaska; Mark J. Bennett, Attorney General of Hawaii; Stephen Carter, Attorney General of Indiana; Phill Kline, Attorney General of Kansas; Jon Bruning, Attorney General of Nebraska.
Mr. BROWNBACK. I thank the Chair.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator from Kansas.

Mr. BROWNBACK. Mr. President, I know there are a number of people who wish to speak on Judge Alito. I want to add a few comments of my own on this nomination. If I may inquire of the Chair, is there time that needs to be yielded?

The PRESIDING OFFICER. The Senator may speak up until 5 o’clock.

Mr. BROWNBACK. I thank the Chair. Mr. President, I sat in on the hearings for Judge Alito. I personally interviewed Judge Alito. I talked with him in my office. I sat through the hearings and was able to question him in the Judiciary Committee. I am on the Judiciary Committee, so I sat through those hearings to hear his testimony. I feel as if we had a good chance to take the measure of the man, and he is outstanding. I believe he is going to be an outstanding jurist.

He answered hundreds of questions, more than I believe any prior nominee has answered in the history of the Republic. He answered them deftly. He answered them with an encyclopedic knowledge of the law. It was amazing to me to see that he did not have a note in front of him the whole time, and if you asked him any constitutional question, he would answer here are the facts of that case, here is how the law was decided, this case is still in question or it isn’t. He is a brilliant jurist. He wasn’t particularly good on international law, government law, and I was particularly glad to hear he wasn’t good on law, on what would happen in other countries.

He has a long history on the bench which I think is important. For a series of years now, only so-called stealth candidates could be approved. Judge Alito is a man with years of experience on the Third Circuit Court of Appeals. He has written a number of opinions that we could dissect them and see. Judges people with background, trying to determine does he lean this way or that way, but he has hundreds of published opinions, and through them we can see which way he leans.

He is a known commodity—well known, well respected, and well regarded across the board. I do think where he is going to contribute to the country, the Republic, is in the areas of religious freedom and free expression. This is an issue I care deeply about, and we want you all to be here, have your say. He believes in a separation of church and state, and he also believes this is a country full of people of faith and that they should, under the free expression clause, be allowed to express and to live that faith and to be able to show it. I think he is very clear and thoughtful.

If there is an area of the law that needs clarity, it is this because we have rules and tests all over the country. I think he is going to contribute in this area. This is one of the areas that did not get much review, it did not get much comment, but I think he is going to make a clear impression, and I think he is going to make a very helpful impression for this Nation whose motto, as the Chair looks at it, is “In God We Trust.”

There is a reason for that. This is a nation of faith. It is one we seek to celebrate, not have an imprimatur from the state saying this is the religion or that is the religion, but rather saying we want you all to be here, have your own faith, be able to celebrate it, and be able to bring it forward in this Nation. I think he is going to contribute greatly in this particular category.

The area of abortion got the most review, and it is uniquely the only constitutional rule that Roe v. Wade or anything along that line. He did not state an opinion one way or the other. It is an area of open case law. It is an area, in my opinion, that is not in the Constitution. There is no constitutional right for a woman to abort her child. I believe it to be a matter that should be decided by bodies such as this, or in States around the country.

I remind my colleagues, as they all know, if Roe v. Wade or any portion of it were overturned, the issue goes back to the States. That is the group, that is the body that resolves this issue. It is not something where the ruling automatically shuts everything down. What happens is it goes back and California decides its rules and New York does its rules and Flor- ida, Kansas, Minnesota, and other States decide theirs.

I don’t see what is so untrustworthy about States resolving this issue. They did prior to 1973, and we didn’t have nearly the level of judicial activism in this country on those laws when the States were resolving these issues.

I strongly doubt all the States would resolve them the same. I doubt a State in a certain part of the country would be identical to another one. Yet, I do think it would reflect the will of the people. But we do not know how Judge Alito he will rule on this issue. The Democrats don’t know, the Republicans don’t know. I don’t know. This is an issue I care deeply about, and we don’t know. That is probably as it should be because it is an area of active case law and one that is going to come in front of us.

The other area he was challenged so much on was Executive rights and privileges. I believe this man will be very clear in standing up to the executive branch when the executive branch needs to be held in check. I have no doubt at all about that.

One area we talked about that has not again gotten much review, but needs a lot, is the area of judicial restraint. We need a judiciary that will restrain itself. There are three separate branches of Government, each having a separate role and not to take one another.

The judiciary has not restrained itself in the past. Judge Alito, along with John Roberts, previously coming before the committee and this body, both spoke significantly and clearly about the need for judicial restraint. I believe if we don’t start seeing a judiciary that shows some restraint and says it is not an all-powerful judiciary in every area, it cannot appropriate money, that is left to the Congress, that we will start seeing these bodies remove judicial review by the Congress imposed in the Constitution. It is not an area that has been used much, but I think we are going to start seeing it used much
The ABA

I believe Judge Alito will be an outstanding jurist if we are able to get closure in this body to end debate, to get the floor to vote in the Senate. He is one of the most qualified individuals we have had. He is a beautiful story of immigrant parents coming to the United States and working hard to get a good education.

He is one of a fighting character. Probably one of the saddest chapters that has taken place is the challenge to his character, which is nothing short of sterility. This is a gentleman who has worked all his life to uphold the traditions of his family, to make his family proud and see his dad pleased that his son stood for right against wrong.

At the end of the day, I believe he will exercise justice and righteousness, doing both what is just and what is right. That is what we need in this country, a country that is both just and right.

In the greatest traditions of this nation, we need to do what is right, and we need to be just to the strong, to the weak, and to those who cannot speak for themselves. We need to stand up and speak for their rights even if they cannot speak for their own.

I support the nomination and yield the floor.

The PRESIDING OFFICER. Under the previous order, the hour of 4 p.m. having arrived, the Democratic leader or his designee shall be recognized for 15 minutes.

Mr. KERRY. Mr. President, I yield myself 7 minutes.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KERRY. Mr. President, I have heard a lot of my colleagues rely on the ABA’s determination that Judge Alito is ‘‘well qualified’’ as a reason—sometimes as reason enough—to vote for his confirmation. But there is a reason why an ABA ranking alone is not all that is required to be confirmed to the bench, let alone the highest Court in the land.

With a decision as fundamental—as irrevocable—and as important to the American people as the confirmation of a Supreme Court Justice, it is important we tell the Americans the full story about the ABA and those rankings.

When making its determination, the ABA considers analytical skills. They consider knowledge of the law. They consider integrity, professional competence, and judicial temperament. But United States Senators must consider more than these criteria.

What the ABA does not look at is the balance of the Supreme Court. What they do not look at is judicial activism. What they do not look at is the consequences of a judge’s ideologically driven decisions for those who have been wronged and who just want to get their day in court. No matter how smart he may be, no matter how cleverly his opinions may be written, no matter how skilfully he manipulates the law, their standards don’t consider the impact of his decisions on average Americans. In short, they don’t measure whether he is a friend to the Americans if Judge Alito becomes Justice Alito. That is our job.

None of these measurements consider whether Judge Alito routinely cuts off access and stand for the disadvantaged Americans—those that need it the most. They don’t ask whether he consistently excuses excessive government force when it intrudes into the privacy of individuals. They don’t consider that the only statement he has ever made about a woman’s right to privacy is that she doesn’t have one.

These are things that we must consider here in the United States Senate. These are things that are on the line in this vote this afternoon. And these are the kinds of questions the Americans want us to consider. We have to consider whether a judge we confirm to a lifetime appointment to the Supreme Court will undermine the laws that we have already passed that benefit millions like the Family Medical Leave Act. We have to consider whether Judge Alito will place barriers in the way of addressing discrimination, whether he will serve as an effective check on the abuse of executive privilege, whether he will roll back women’s privacy rights or whether he will enforce the rights and liberties that generations of Americans have fought and bled and even died to protect.

None of the rights we are talking about came easily in this country. There were always those in positions of power who fought back and resisted. What we need in a Justice is somebody who is sensitive to that history. Senator after Senator has described specific cases and the way in which Judge Alito has had a negative impact in these areas—often standing alone, in dissent against mainstream beliefs.

This long record is a record that gave the extreme right wing cause for public celebration with his nomination. That just about tells you what you need to know. The vote today is whether we will take a stand against ideological court packing.

Nothing can erase Judge Alito’s record. We can never erase what he is getting. No one will be able to say, in 5 to 10 years, that they are surprised by the decisions Judge Alito makes from the bench. People who believe in privacy rights, who fight for the rights of the most disadvantaged, who believe in balancing the power between the President and Congress need to take a stand now.

I understand that, for many, voting for cloture on a judicial nomination is a very difficult decision, particularly when it is a Supreme Court nomination. I also understand that, for some, a nomination must be an extraordinary circumstance in order to justify that vote. Well, I believe this nomination is an extraordinary circumstance. What could possibly be more important than this—an entire shift in the direction of the Court?

This is a lifetime appointment to a Court where nine individuals determine what our Constitution protects and what our laws mean. Once Judge Alito is confirmed, we can never take back this vote. Not after he prevents many Americans from having their discriminations heard, not after he allows more government intrusions into our private lives. Not after he grants the President the power to ignore Federal law rather than protecting our system of checks and balances. The only way we can not make out of speculation. They do not arise out of mere statement. They arise out of the record the judge has carved for himself.

These issues and the threat that Judge Alito’s nomination poses to the Court have been the focus of the Supreme Court for all the years that Justice O’Connor has served there—all of this constitutes an extraordinary circumstance.

I understand that many Senators oppose this nomination, and I believe the vote tomorrow will indicate that if we are not successful today. They say that they understand the threat Judge Alito poses, but they argue that somehow a vote to extend debate, when there have been a mere 30 hours or so of debate, is different. I do not believe it is. I believe it is the only way that those of us in the minority have a real voice in the selection of this Justice or any Justice. That is a position that we can and we should defend anywhere, at any time.

I thank those who have stood to be counted in this effort and who will continue to take a stand with their vote. I particularly thank my senior colleague from Massachusetts, Senator Kennedy.

I think the remainder of the time Senator Kennedy will use.

Mr. KENNEDY. I have 7 1/2 minutes, am I correct in that?

The PRESIDING OFFICER. The Senator is correct.

Mr. KENNEDY. I will yield myself 7 minutes.

First of all, I thank my friend, Senator Kerry, for his strong commitment on this issue and his eloquence, passion, and support of this position. This is a time in the Senate that a battle needs to be fought. This vote that we are casting with regard to Judge Alito is going to have echoes for years and years to come. It is going to be a defining vote about the Constitution of the
United States, about our protections of our rights and our liberties in the Constitution of the United States.

People in my State at this particular time are concerned about the difficulties they are having with prescription drugs. They are concerned about what they hear about the corruption in Washington and are deeply troubled by what is happening in Iraq. They have not had a chance to focus on what is the meaning of this vote in the Senate this afternoon.

But all you have to do is look back into history. Look back into the history of the judiciary. Look back to the history of the Fifth Circuit that was making the decisions in the 1960s. Look at the record of Justice Wade. Judge Tuttle, Judge Johnson of Alabama and the courage they demonstrated that said at last we are going to break down the walls of discrimination in this country that have gripped this Nation for 25 years. The Americans with Disabilities Act is not going to be similar to Sandra Day O'Connor. This happens to be the wrong judge at the wrong time for the wrong Court.

This is a nomination that I fear threatens the fundamental rights and liberties of all Americans now and for generations to come. As astonishing as the facts may seem, it does not overstate them to point out that the President is in the midst of a radical realignment of the power of the government and of its intrusiveness into the private lives of Americans. This nomination is part and parcel of that plan.

I am concerned that if confirmed, this nominee will further erode the checks and balances that have protected our constitutional rights for more than 200 years. This is a critical nomination, one that can tip the balance on the Supreme Court radically away from constitutional checks and balances and the protection of Americans' fundamental rights.

The procedural vote just taken was in large measure symbolic. Its result was to foreclose Senate action on the other side of the aisle and on both sides of the question. The next vote the Senate takes on this critical nomination is not symbolic. It has real consequences in the lives of the 295 million Americans alive today and in the lives of generations to come. It will affect not only our rights but the fundamental rights and liberties of our children and our children's children. In short, it matters, and it matters greatly. The vote the Senate will take tomorrow will determine whether Samuel A. Alito, Jr., replaces Justice Sandra Day O'Connor on the Supreme Court of the United States.

I appreciate why Senators who voted against cloture believe this matter deserves more searching attention by Senators and the American people. Among Democratic Senators, each is voting his or her conscience and best judgment. There will be many Democratic Senators who, like the Democratic members of the Judiciary Committee who have closely studied the record of this nominee, will be voting against the nomination. There will be some Democratic Senators who will confirm that among those voting against, there are some who believe that it is not appropriate to withhold the Senate's consent by extending debate. The Senate debated Chief Justice Roberts' nomination during 8 days and over a 10-day calendar period. Although much more divisive and controversial, the Alito nomination will be debated for just 5 days over a 7-day calendar period by the time the vote is called tomorrow.

It is true that Democratic Senators do not vote in lockstep. Each Democratic Senator individually gives these questions serious consideration. They honor their constitutional duty. I am...
proud of the Democratic members of the Judiciary Committee for the statements they made last week when the committee considered this nomination and during the course of the last few days. Their hard work in preparing for the nomination hearing in the last few months is to be commended. I thank and commend the many Democratic Senators who came to the floor, who spoke, who set forth their concerns and their views. That includes Democratic Senators opposing the nomination and those in favor. It is quite a roster: Senators Kennedy, Durbin, Mikulski, Clinton, Kerry, Nelson of Florida, Reed, Murray, Feinstein, Inouye, Harkin, Bingaman, Lincoln, Lieberman, Salazar, Cardin, Levin, Obama, Dayton, Feingold, Johnson, Sarbanes, Stabenow, Lautenberg, Menendez, and, in addition, Senator Jeffords. These Senators approached the matter seriously, in contrast to those partisan cheerleaders who rallied behind the White House’s pick long before the first day of hearings.

I respect those Senators who are giving this critical nomination serious consideration but come to a different conclusion than I, just as I continue to respect the 22 Senators who voted against the Roberts nomination. I have candidly acknowledged that over the course of history, their judgment and vote may prove right. I took Judge Roberts at his word in the belief that his words and the philosophy he un- covered them to be creating had meaning. I continue to hope that as Chief Justice he will fulfill his promise and steer the Court to serve as an appropriate check on abuses of President power and protect the fundamental liberties and rights of all Americans.

Filibusters of judicial nominees—and, in particular, of Supreme Court nominees—are hardly something new. When his nomination was nominated by President Johnson to be the Chief Jus- tice, a filibuster led by Strom Thur- mond and the Republican leader re- sulted in an unsuccessful cloture vote and in that nomination being with- drawn. That was the most recent suc- cessful filibuster of a Supreme Court nominee. But that was not the first or last Supreme Court nomination to be defeated. President George Wash- ington, the Nation’s first and most popular president, saw the Senate reject his nomination of John Rutledge to the Supreme Court at the outset of our history. Over time approximately one-fifth of Presidents’ Supreme Court nominees have not been confirmed.

The last time the country was faced with the retirement of the pivotal vote on the Supreme Court was when Justice Lewis Powell resigned in 1987. A Republican President sought to use that opportunity to reshape the U.S. Supreme Court with his nomination of Judge Robert Bork. Bork had been a law professor, a partner in one of the Nation’s leading law firms, a judge on the DC Circuit for 5 years, and he had served as Solicitor General of the United States and even as the Act- ing Attorney General at a critical junction of our history.

Many myths have arisen about why the Senate rejected that nomination. I think it was due to the work of other Senators, both Republican and Demo- cratic, who voted to defeat that nomi- nation, I know that the nominee’s views were the decisive factor in his failure. His views were not constitutional to privacy was a large part in his own undoing. Soon thereafter, President Reagan announced and with- drew the nomination of Judge Ginsburg and then turned to a conservative Fed- eral appellate court judge from Cali- fornia named Anthony Kennedy. Jus- tice Kennedy, though conservative, was confirmed overwhelmingly and in bi- partisan fashion. He continues to serve as a respected Justice who has au- thorized personal philosophy is too -deerential to the government and too unprotective of the fundamental lib- erties and rights of ordinary Americans for his nomination by President Bush to be confirmed by the Senate as the replacement for O’Connor.

Judicial philosophy comes into play time and again as Supreme Court jus- tices wrestle with serious questions about which they do not all agree. These include fundamental questions about how far the government may in- trude into our personal lives. Senators need to assess whether a nominee will protect fundamental rights if con- firmed to be on the Supreme Court.

Several Republican Senators said that judicial philosophy and personal views do not matter because judges should just apply the rule of law as if it were some mechanical calculation. Senator Feinstein made this point ex- tensively in the debate. Personal views and judicial philosophy often come into play on close and con- troversial cases. We all know this to be true. Why else did Republican sup- porters for President Bush to with- draw his previous choice? If his first choice, Harriet Miers, before she even had a hearing? She failed their judicial philosophy litmus test.

Indeed, Harriet Miers is the most re- cent Supreme Court nominee not to have been confirmed. It was last Octo- ber that President Bush nominated his White House Counsel Harriet Miers to succeed Justice O’Connor. He did so after the death of the pivotal vote withdrawing his earlier nomination of Judge Roberts to succeed Justice O’Connor. The democratic leader of the Senate quickly endorsed the selection of Ms. Miers as the kind of person, with the kind of background, he found so appealing. Democratic Senators went about the serious business of preparing for hearings on the Miers nomination. But there were those from among the President’s supporters who castigated Ms. Miers and the President for the nomination. The President succumbed to the partisan pressure from the ex- treme rightwing of his own party by withdrawing his nomination of Harriet Miers to the Supreme Court after re- peatedly saying they would do so. In essence, he allowed his choice to be vetoed by an extreme faction within his party, before hearings or a vote. As Chairman SPECTER has often said, they ran her out of town on a rail. In fact, of course, she has remained in town as the President’s counsel. His intent is correct. Like the more than 60 mod- erate and qualified judicial nominees of President Clinton on whom Repub- licans would neither hold hearings or vote, the Miers nomination was killed by Republicans who—the by what was in essence a pocket filibuster. That eye-opening experience for the country demonstrated what a vocal faction of the Republican Party really wants. Their rightwing litmus test de- mands justice and judges who will guarantee the results that they want. They do not want an independent fed- eral judiciary. They want certain re- sults.

Instead of unifying the country through his third choice to succeed Justice O’Connor, the President has chosen to reward one faction of his party, at the risk of dividing the country. Those so critical of his choice of Harriet Miers as a nominee were the very people who rushed to endorse the nomination of Judge Alito. Instead of rewarding his most virulent sup- porters, the President should have re- warded the American people with a unifying choice that would have broad support. America could have done better through consultation to select one of the many consensus conservative Republican candidates who could have been overwhelmingly approved by the Senate. Instead, without consultation, the President withdrew the Miers nomi- nation and the next day announced that his third choice to succeed Justice O’Connor was Judge Alito.

At his hearing, Judge Alito began by asking how he got this critical nomination. Over the course of the hearings, I think we began to understand the real answer to that question. It has little to do with Judge Alito’s family story and a great deal to do with the pressures
that forced the President to withdraw the nomination of Harriet Miers and this President’s efforts to avoid any check on his expansive claims to power.

This is a President who has been conducting a secret and warrantless eavesdropping on Americans for more than 4 years. This President has made the most expansive claims of power since American patriots fought the war of independence to rid themselves of the overbearing power of King George III. He has done so to justify illegal spying on Americans, to justify actions that violate our values and laws against torture and protecting human rights, and in order to detain U.S. citizens and others on his say so without judicial review or due process. This is a time in our history when the protections of Americans’ liberties are at risk as are the checks and balances that have served to constrain abuses of power for more than 76 years.

Judge Alito’s opening statement skipped over the reasons he was chosen. He ignored his seeking political advancement and was committed to the official ease.

The Solicitor General of the United States? We know that he wanted political advancement and was committed to the radical legal theories of the Meese Justice Department. The job application that was the subject of some question at the hearing is most revealing. I will ask that a copy of that job application be attached to the conclusion of my statement so that the American people can see it.

This confirmation process is the opportunity for the American people to learn what Justice Alito thinks about their fundamental constitutional rights and whether he will serve to protect their liberty, their privacy and their autonomy from Government intrusion. The Supreme Court belongs to all Americans, not just the person occupying the White House, and not just to a narrow faction of a political party.

We have heard from Judge Alito’s supporters that those opposing this nomination were “smearing” him by asking substantive and probing questions. This is a nominating process addressing concerns about his record during this debate. The Republican leader opened the debate with that attack. He said this before a single minute of debate or opening statement by any Democratic Senator engaged in an attempt to question points ring hollow and are particularly inappropriate after President Bush was forced by an extreme faction in his own party to withdraw his nomination of Harriet Miers.

Democratic Senators should not be criticized for taking seriously their constitutional role in trying to assess whether Judge Alito is suitable for a lifetime position on the Supreme Court. Democrats also asked tough questions of Justices Ginsburg and Breyer during their confirmation hearings, which is in stark contrast to the free pass given to Judge Alito by Republican Senators during his hearing.

Those critical of the Democrats have a short memory. Republican Senators engaged in a party-line vote in committee against the nomination of Louis Brandeis to the Supreme Court. Republican Senators, in an unprecedented party-line vote, blocked the nomination in 1999 of Missouri Supreme Court Justice Ronnie White, an extremely qualified nominee for a Federal district court judgeship. In fact, Republicans pocket- filibustered more than 60 of President Clinton’s judicial nominees by holding them up in the Judiciary Committee.

This President continues to choose confrontation over consensus and to be a divider rather than being the uniter he promised to be. This is in stark contrast to President Clinton’s selection of Justices Ginsburg and Breyer after real consultation. In his book, “Square Peg,” Senator HATCH described how in 1993, as the ranking minority member of the Senate Judiciary Committee, he advised President Clinton to go with women nominees. Senator HATCH recounted that he warned President Clinton away from a nominee whose confirmation he believed “would not be easy.” He wrote that he then suggested the names of Stephen Breyer and Ruth Bader Ginsburg, both of whom were eventually nominated and confirmed “with relative ease.” President Bush, who had promised to be a uniter, not a divider, failed to live up to that promise.

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

This is a lifetime seat on the Nation’s highest Court that has often represented the decisive vote on constitutional issues. The Senate needs to make an informed decision about this nomination. This process is not about whether Judge Alito is suitable for all Americans and their representatives have to consider the suitability of the nominee to serve as a final arbiter of the meaning of Constitution and the law. Has he demonstrated a commitment to the fundamental rights of all Americans? Will he allow the government to intrude on Americans’ personal privacy and freedoms?

In a time when this administration seems intent on accumulating unchecked power, Judge Alito’s views on government power are especially important. It is important to know whether he would serve with judicial independence or as a surrogate for the President who nominated him. Based on a thorough review of his record and from his hearing, I have no confidence that he will act as an effective check on government overreaching and abuses of power.

As we began the hearings, I recalled the photograph that hangs in the National Constitution Center in Philadelphia, PA. It shows the first woman ever to serve on the Supreme Court of the United States taking the oath of office in 1981. Justice Sandra Day O’Connor is widely recognized as a model Supreme Court Justice.

She is widely recognized as a jurist with practical values and a sense of the consequences of the legal decisions being made by the Supreme Court. I regret that some on the extreme right have been so critical of Justice O’Connor and have adamantly opposed the naming of a successor who shares her judicial philosophy and qualities. Their criticism reflects poorly upon them. It does nothing to tarnish the record of the woman she designated as a successor. She is a Justice whose graciousness and sense of duty
fuels her continued service nearly 7 months after she announced her intention to retire.

As the Senate prepares to vote on President Bush’s current nomination—this third—for a successor to Justice O’Connor, she will be measured for her critical role on the Supreme Court. Her legacy is one of fairness that I want to see preserved. Justice O’Connor has been a guardian of the protections the Constitution provides the American people.

Of fundamental importance, she has come to provide balance and a check on government intrusion into our personal privacy and freedoms. In the Hamdi decision, she rejected the Bush administration’s claim that it could indefinitely detain a U.S. citizen. She upheld the fundamental principle of judicial review over the exercise of government power and wrote that even war “is not a blank check for the President when it comes to the rights of the Nation’s citizenry.” She held that even this President is not above the law.

Her judgment has also been crucial in protecting our environmental rights. She joined in 5-to-4 majorities affirming reproductive freedom, religious freedom, Voting Rights, and affirmative action. Each of these cases makes clear how important a single Supreme Court Justice is.

It is as the elected representatives of the American people—all of the people—one of my Senate colleagues endowed with the responsibility to examine whether to entrust their precious rights and liberties to this nominee. The Constitution is their document. It guarantees their rights from the heavy hand of government intrusion and their individual liberties to freedom of speech and religion, to equal treatment, to due process and to privacy.

The Federal judiciary is unlike the other branches of Government. Once confirmed, Federal judges serve for life. There is no court above the Supreme Court of the United States. The American people deserve a Supreme Court Justice who inspires confidence that he, or she, will not be beholden to the President but will be immune to pressures from the government or from partisan interests.

The stakes for the American people could not be higher. At this critical moment, Democratic Senators are performing their constitutional advice and consent responsibility with heightened vigilance. I urge all Senators—Republicans, Democrats and Independents—to join with us. The Supreme Court is the guarantor of the liberties of all Americans. The appointment of the next Supreme Court Justice should be made in the people’s interest and in the Nation’s interest, not to serve the special interests of a partisan faction.

I have voted for the vast majority of President Reagan’s, President Bush’s, and President Bush’s judicial nominees. I recommended a Republican to President Clinton to fill Vermont’s seat on the Second Circuit, Judge Fred Parker, and recommended another Republican to President Bush to fill that seat after Judge Parker’s death. Judge Peter Hall. 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 nomination of Chief Justice Roberts. In fact, I have voted for eight of the nine current Justices of the Supreme Court.

I want all Americans to know that the Supreme Court will protect their rights and will respect the authority of Congress to act in their interest. I want a Supreme Court that acts in its finest tradition as a source of justice. The Supreme Court must be an institution where the Bill or Rights and human dignity are honored. In good conscience, based on the record, I cannot vote for this nomination. I urge all Senators to use this last night of debate to weigh the consequences and their best judgment before casting their votes tomorrow. That vote will matter.

In my 30 years in the Senate, I have cast almost 12,000 votes here in the Senate. Few will be as important as the vote we cast tonight.

Mr. President, I now ask unanimous consent that the application to which I referred be printed in the RECORD.

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

RECORD, as follows:

PPP NON-CAREER APPOINTMENT FORM

From: Mark R. Levin.

To: Mark Sullivan. Associate Director, PPP.

Date Sent: 11/18/85

Candidate: Samuel A. Alito, Jr., General, Department of Justice.

Job Title: Deputy Assistant Attorney General.

Grade: ES-1.

Supervisor: Charles J. Cooper.

Sex: Male.

Race: White.

Home State: New Jersey.

Previous Government Service: Yes.


A complete Form 171, political and personal resumes, complete job description, and letters of references included for White House clearance to begin.

1980 Domicile (State): New Jersey.

Please provide any information that you regard pertinent to your philosophical commitment to the policies of this administration, or would show that you are qualified to effectively fill a position involved in the development, advocacy and vigorous implementation of those policies.

Have you ever served on a political committee or been identified in a public way with a particular political organization, candidate or issue?

If so, please specify and include contacts with telephone numbers.

I am also a lifelong personal contributor to a political campaign included for White House clearance.

Applicant Signature: Samuel A. Alito, Jr.

Date: Nov. 15, 1985

Case Officer Recommendation: Approved, Mark Sullivan.

Mr. DORGAN. We work on many important issues here in the Congress, but none more important than choosing a Justice to serve on the Supreme Court. Choosing a justice to sit on the U.S. Supreme Court is a very serious matter for both the President and the U.S. Senate. Our choice will impact
I am also concerned by Judge Alito’s view of what is referred to as the unitary executive. This is an issue about Presidential power in our form of government. The judicial branch of Government is designed to be a check and balance on the expansion of Presidential power. In Judge Alito’s answers in the Judiciary Committee to questions about the unitary executive, he has shown deference toward expanded and unchecked Presidential authority. His views on this issue concern me.

For all of these reasons, I have decided to cast my vote against the nomination of Justice Samuel Alito. I take no joy in opposing his nomination, but for the reasons I have mentioned above, I am not comfortable voting to confirm him for a lifetime appointment on our Nation’s highest Court.

Over the years, I have supported about 97 percent of the nominees for the Federal court sent to us by President Bush. My record has been one of substantial support for the President’s nominees. But for me, a nomination to the Supreme Court carries much more weight and greater potential consequences for the country.

Judge Alito is replacing Justice Sandra Day O’Connor on the Court. Justice O’Connor has been a key swing vote on so many issues that have been decided by a 5-4 vote in recent years. I believe that Judge Alito’s nomination, if approved by the Senate, would tilt that Court in a direction that will restrict personal freedoms, strengthen the role of government and corporations in our lives, and allow the expansion of power of the Presidency.

For those reasons, I have decided to vote no on this nomination.

Mr. ROCKEFELLER. Mr. President, I rise today to share my thoughts and concerns about the President’s nomination of Judge Alito to be an Associate Justice on the U.S. Supreme Court.

It goes without saying that the decision whether to confirm a nominee for a lifetime position on the Supreme Court is among the Senate’s most serious and solemn constitutional obligations.

My ultimate test for whether to support a nominee to the Supreme Court rests with two questions: will the nominee protect the best interests of West Virginians and will the nominee uphold the fundamental rights and freedoms of all Americans that are set out in the Constitution and in our laws. It is a high standard, as it must be for a lifetime appointment to the highest Court in the land.

In the last few weeks and months, through careful consideration, I have attempted to answer those two questions. I have concluded that Judge Alito’s judicial record, his writings, and his statements portray a man who will not do enough to stand up against the President when the checks and balances in our Constitution are on the line.

I will not support a filibuster because I see it as an attempt to delay his certain confirmation. But I will register my grave concerns about Judge Alito’s nomination to the Supreme Court by voting against confirmation when that final vote is before us.

My decision is the result of a long and deliberative process. As my record plainly shows, I have never applied a partisan or ideological litmus test to nominees. George W. Bush was elected as a conservative President, and I have supported his conservative choices at every level. On the judiciary alone, I have voted to confirm 203 out of 212 judges nominated by President Bush. Just 4 months ago, I voted in support of Chief Justice John Roberts, a true conservative, because I concluded that he would consider fully the lives of average people, the lives of those in need and those often are not heard. I believed on balance that he would be his own man in the face of inevitable outside pressures.

In recent weeks and months, I have heard from hundreds of West Virginians through letters, telephone calls, and personal conversations. Many have expressed strong opposition to Judge Alito, and many have expressed strong support for him. I have weighed all of their views carefully. I have also labored over Judge Alito’s record—his early writings, his rulings, his speeches, and his Senate testimony—and I met personally with Judge Alito. I wanted to hear directly from him, in his own words, what kind of an Associate Justice he would be.

There is no question he is an intelligent man with a deep knowledge of our legal system. During our conversations, he was a gentleman in every sense of the word. But for me these important character traits are not enough to warrant elevation to the U.S. Supreme Court.

I have concluded that although Judge Alito is a well-qualified jurist, I cannot in good conscience support a nominee whose core beliefs and judicial record exhibit simply too much deference to power at the expense of the individual. Particularly in the committee hearings, when pressed on issues such as individual rights and Presidential powers, Judge Alito’s answers troubled me—they were limited and perfunctory. I was left with a strong sense of his ability to recite and analyze the law as it stands but with very little sense of his appreciation for the principles and the real people behind those laws.

Unfortunately, Judge Alito’s record does not allay those concerns. As a government lawyer, a Federal prosecutor, and a 15-year Federal judge on the Third Circuit, with lifetime tenure, Judge Alito has repeatedly sided against people with few or no resources. The average person up against a big corporation, an employer, or even
the government itself, all too often comes out on the short end of the stick in front of Judge Alito. I am particularly troubled by one case, RNS Services v. Secretary of Labor. In RNS Services, Judge Alito arguably demonstrated a willingness to undercut the constitutional authority of the executive branch and a willingness to protect the rights of workers at the expense of the government itself, all too often at the expense of the workers.

Outside the courtroom, Judge Alito has at various times in his career suggested, directly and indirectly, that he supports a disproportionately powerful executive branch and a willingness to protect the rights of workers at the expense of the government itself, all too often at the expense of the workers. He has supported a system of checks and balances that would allow the President to act in contravention of the laws passed by Congress, which overturns the courts and balances among the judicial, executive, and legislative branches of Government. The interaction between the President and the Congress on matters of national security, classified and unclassified, is no less important to our safety and our future.

Today there is a serious legal and constitutional debate going on in our country about whether the President, who already has enormous inherent powers as the leader of our country, has exceeded his authority and reach beyond the bounds of the law and the Constitution. The fact is the President does not write the laws, nor is he charged with interpreting them—the Constitution is unequivocally clear that lawmaking resides with the Congress and interpretation resides with the courts—yet this President, on many fronts, is attempting to do both. This alarming trend has been exacerbated by the fact that we have a single party controlling both the White House and the Congress, resulting in minimal congressional oversight of an overreaching executive branch.

The Supreme Court, in the coming months, will be forced to rule on any cases related to expansion of Executive power. This nominee will play a pivotal role in settling the legal questions of today and charting a course for the legal questions of our children’s and grandchildren’s generations.

These are core questions: What is the scope of presidential power under the Constitution? What is the appropriate balance between the President and the Congress? When must the constitutionally protected rights of average Americans—workers’ rights, families’ rights, and individuals’ rights—prevail? At the end of the day, I am left with the fear that Judge Alito brings to the Court a longstanding bias in favor of an all-powerful presidency and against West Virginians’ basic needs and interests.

Mr. LEVIN. Mr. President, while I had expected that the Senate would move directly to an up-or-down vote on Judge Alito’s nomination to the Supreme Court without a vote on cloture, because I strongly oppose this nomination, as I explained in my remarks last week, and because the filibuster has been a time-honored and accepted part of the checks and balances on the President’s appointment powers, I will vote against cloture on this nomination.

Mr. GREGG. Mr. President, I rise today to speak on the nomination of Judge Samuel A. Alito, Jr., to become an Associate Justice of the Supreme Court. After following the confirmation process and reviewing Judge Alito’s qualifications, I was pleased to support this nomination and congratulate President Bush on another outstanding pick for our Nation’s highest Court. Although there are no guarantees about how any judicial nominee will carry out his or her responsibilities once confirmed, I believe that Judge Alito will serve our country well as Justice Sandra Day O’Connor has done for almost a quarter of a century on the Supreme Court.

To explain why I support the nomination of Judge Alito, let me first begin my remarks by referring to article II of the U.S. Constitution—in particular, section 2, which states that it is up to the President to appoint individuals to his highest Court. As he pleads to the voters who elected him, President Bush has exercised his appointment powers to pick someone who firmly believes in the rule of law, the importance of protecting the rights of all Americans, and the Founding Fathers’ wisdom of leaving policy decisions to the elected branches of Government. The President has followed through on his promise to the American people by choosing Judge Alito.

With that said, Judge Alito is not simply the fulfillment of a campaign promise—he is also one of the sharpest legal minds in the Federal appellate ranks and a dedicated public servant. A former editor of the Yale Law Journal and Army reservist, Judge Alito has served as a law clerk for Judge Leonard Garth of the Third Circuit, an assistant U.S. attorney for New Jersey, an Assistant to the Solicitor General, Deputy Assistant Attorney General in the Department of Justice, the Office of Legal Counsel at the U.S. Department of Justice, and Army reservist, Judge Alito has served as a law clerk for Judge Leonard Garth of the Third Circuit, an assistant U.S. attorney for New Jersey, an Assistant to the Solicitor General, Deputy Assistant Attorney General in the Department of Justice, the Office of Legal Counsel at the U.S. Department of Justice, and Army reservist, Judge Alito has served as an Associate Justice of the Supreme Court in Florida.

As someone who supported both of President Clinton’s nominations to the Supreme Court, I find this type of partisanship appalling. Instead of accepting the obvious fact that Judge Alito is more than well qualified to serve on the Supreme Court, some of my colleagues want to cherry-pick and distort a few opinions out of the hundreds that he has written, hype up his alleged relationship with a university organization, or huff and puff about the Vanguard recusal matter even though the American Bar Association and most well regarded legal ethics experts have found nothing unethical. As opposed to qualifications, some of my colleagues across the aisle want to focus solely on these petty matters that are borne out of personal vendettas or for the echo chamber of liberal blogs. They now want the Senate and the American people to forget everything else and base this important vote on a few dubious claims.

None of this is healthy for the Senate or for our Nation. It does not take a genius to realize that most Americans are tired of this petty partisanship, and the personal attacks on Judge Alito and the distortion of his record will only further discourage, not encourage, future nominees who have lengthy records of public service and judicial experience. This troubling, and I hope that the previous few months are
not more evidence of a trend towards partisanship at all costs. Whether some may like it or not, President Bush was elected by the American people. His nominees therefore deserve fair and dignified consideration by the Senate, even by those who opposed the President’s election or his views on certain issues.

Perhaps these past few months should not have been a surprise to people like me who believe that the Senate should not let politics or ideology stand in the way of qualified nominees. After all, maybe all of this was foreseen by the Founding Fathers when they established the nomination process in article II, section 2 of the Constitution and gave the Senate only a limited advice and consent role. As Edmund Randolph noted, “Appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications, not politics. They include the majority leader and the chairman of the Judiciary Committee, who would both demand a commendable job of moving this nomination forward and giving us the opportunity to have an up-or-down vote. I congratulate them on their efforts and look forward to casting my vote in support of Judge Alito. He certainly deserves it, as well as the support of the rest of the Senate.”

Ms. COLLINS. Mr. President, I rise today to speak in favor of the nomination of Samuel Alito to serve as Associate Justice of the Supreme Court.

The Senate is entrusted with an enormous power—the power to interpret the Constitution, to say what the law is, to guard one branch against the encroachments of another, and to defend our most sacred rights and liberties.

The decision of whether to confirm a nominee to the Supreme Court is a solemn responsibility of the Senate and one that I approach with the utmost care. It is a duty that we must perform despite the fact that nominees are constrained in the information they can provide us.

Some interest groups, and even some of my colleagues, have called on nominees to promise a particular way: they demand allegiance to a particular view of the law or a guarantee in the outcome of cases involving high-profile issues. These efforts are misguided.

To avoid prejudging and to ensure impartiality, a nominee should not discuss his or her views on current law. As Justice Ginsberg stated during her hearing that a nominee may provide “no hints, no forecasts, no previews” on issues likely to come before the Court. Justice Ginsberg’s statement underscores, the Justices should reach a conclusion only after extensive briefing, argument, research, and discussion with their colleagues on the Court.

We must also recognize that there are limits to our ability to anticipate the issues that will face the Court in the future. Twenty years ago, few would have expected that the Court would hear cases related to a President’s national security, privacy, and surveillance. Yet at the time, we did not try to make sense of copyright laws in an electronic age, or would face constitutional issues related to the war on terrorism.

While we cannot know with certainty how a nominee will rule on the future cases that will come before him or her, we are not without information on which to base our judgement. We must engage in a rigorous assessment of the nominee’s legal qualifications, integrity, and temperament, as well as the principles that will guide the nominee’s decisionmaking. In fact, in Judge Alito’s case, I note that we have significantly more information on which to base our judgement than with other nominees, given his long tenure as a judge on the Third Circuit Court of Appeals.

The excellence of Judge Alito’s legal qualifications is beyond question. Even his fiercest critics acknowledge that he is an exceptional jurist with an impressive knowledge of the law, a conclusion also reached by the American Bar Association, ABA.

The ABA Standing Committee on the Judiciary conducted an exhaustive review of his qualifications. During this process, the Committee contacted 2,000 individuals throughout the Nation, conducted more than 300 interviews with Federal judges, State judges, colleagues, cocounsel, and opposing counsel, and formed reading groups to review his published opinions, and other materials. Based on its review, the committee found Judge Alito’s integrity, his professional competence, and his judicial temperament to be of the highest standard, and decided unanimously to rate him “well qualified”—the highest possible rating.

When asked at his hearing what type of Justice he would be, Judge Alito directed Senators to his record as a judge on the Third Circuit. I agree this is the appropriate focus.

During his 15 years of service on the Third Circuit, Judge Alito has voted in more than 4,800 cases and has written more than 350 opinions. His record on the bench is one of steady, cautious, and disciplined decisionmaking. He is careful to limit the reach of his decisions to the particular issues and facts before him, and he avoids inflammatory or politically charged rhetoric. And despite this extensive record, there is no evidence that his decisions are results-oriented. For example, in the area of reproductive rights, I note that he has reached decisions favoring competing sides of the debate.

After reviewing Judge Alito’s dissenting opinions, Cass Sunstein, a well-known liberal law professor from the University of Chicago, reached the following conclusion: “None of Alito’s opinions is reckless or irresponsible or even especially far-reaching. His disagreement is unfailingly respectful. His dissent is lawyerly rather than bombastic. . . . Alito does not place political ideology in the forefront.”

During his hearing, the committee heard the testimony of seven judges from the U.S. Court of Appeals for the Third Circuit, the court on which Judge Alito currently serves. The panel was comprised of current and retired judges, appointed by both Democratic and Republican Presidents, and holding views ranging across the political spectrum.

Who better to know how Judge Alito thinks, reasons, and approaches the law, than those with whom he worked so closely over the past 15 years? And it is significant that these colleagues were unanimous in their praise of Judge Alito—in his legal skills, his integrity, his evenhandedness, and his dedication to precedent and the rule of law.

As Judge Becker commented, “The great Cardozo taught us long ago that I have sat with for 15 years is not an ideologue. He’s a movement person. He’s a real judge deciding each case on the facts and the law, not on his personal views, whatever they may be. He scrupulously adheres to precedent. I have never seen him exhibit a bias against any class of litigation or litigants.”

Judge Aldisert, who was appointed by President Johnson, had this to say: “The great Cardozo taught us long ago the judge, even when he is free, is not wholly free. He is not free to innovate at pleasure. This means that the crucial values of predictability, reliance and fundamental fairness must be honored. . . . And as his judicial record makes plain, Judge Alito has taken this teaching to heart.”

Judge Lewis, a committed human rights and civil rights activist who described himself as “openly and unapologetic pro-choice,” said: “I cannot recall one instance during conference or during any other experience that I had with Judge Alito . . . when he has taken a view resembling an ideological bent. . . . 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.’”

Judge Alito’s colleagues provided compelling testimony of his deep and abiding commitment to the rule of law, the limited role of a judge, and his obligation to decide the case based on the facts and the record before him. They also testified that Judge Alito’s decisions have been constrained by established legal rules and specifically by a respect for the rules of precedent. The weight of that synonymy is substantial—they know far more about Judge Alito’s judicial philosophy than we could hope to learn in a few days of public hearings.

A nominee’s judicial philosophy matters to me. When I met with Judge Alito, I specifically asked him about his views on the importance of precedent and stare decisis—the principle that courts should adhere to the law set forth in previously decided cases.

During our meeting last Wednesday, at his hearing, Judge Alito evidenced a strong commitment to the principle of stare decisis. Judge Alito acknowledged the importance of this principle to reliance, stability, and settled expectations.

At his hearing, Judge Alito, referring to the landmark Roe v. Wade decision, testified as follows: “It is a precedent that is protected, entitled to respect under the doctrine of stare decisis.’’

Similarly, Chief Justice Roberts, who was confirmed with a strong bipartisan support, made a nearly identical statement at his hearing. He said that Roe is “a precedent of the court, entitled to respect under the doctrine of stare decisis.’’

After a careful comparison of these statements and others, I find that on substance, there is little that distinguishes the two nominees’ statements on this issue. Both nominees clearly acknowledged the importance of precedent, the value of stare decisis, and the factors involved in analyzing whether a prior holding should be revisited. Both agreed that the Constitution protects the right to privacy, and that the analysis of future cases involving reproductive rights begins not with Roe but with the Casey decision, which reaffirmed Roe’s central holding. And both testified that when a case has been reaffirmed multiple times, as Roe has, this increases its precedential value.

Despite the strong testimony of both Chief Justice Roberts and Judge Alito, the reality is that no one can know for certain how a Justice will rule in the future. History has shown us that many predictions about how other Justices would decide cases have proven wrong.

At her hearing in 1981, Justice O’Connor vigorously defended her colleague that abortion was wrong and stated that she found it “offensive” and “repugnant.” Justice Souter once filed a brief as a State attorney general opposing the use of public funds to finance what was referred to in the brief as the “killing of unborn children.” Justice Kennedy once denounced the Roe decision as the “Dred Scott of our time.”

Yet, in 1992, all three of these Justices, including the dissenting opinion in Casey reaffirming Roe based on the “precedential force” of its central holding.

Based on my review of his past decisions, I doubt that I will agree with every decision Judge Alito reaches on the Court, just as I do not agree with all of his previous decisions. I anticipate, however, that his legal analysis will be sound, and that his decision-making will be limited by the principle of stare decisis and the particulars of the case before him.

Judge Alito has demonstrated his fitness for this appointment with his clear dedication to the rule of law. After an exhaustive review process, the ABA has given him its highest possible rating. His colleagues on the Third Circuit, both Republican and Democrat appointees alike, have been unqualified in their praise of his nomination.

Based on the record before me, I believe that Judge Alito will be a Justice who will transcend his judicial duties to guided not by personal views, but based on what the facts, the law, and the Constitution command.

For these reasons, I will vote to confirm Judge Alito. I hope and expect that he will demonstrate during his tenure on the Third Circuit.

Mr. KYL. Mr. President, I explained last Wednesday that I would support the nomination of Judge Alito. Since then, I have been somewhat frustrated at having spent a year and a half that his record on the Supreme Court will show the same deference to precedent, respect for the limited role of a judge, and freedom from ideologically driven decisionmaking that he has demonstrated during his tenure on the Third Circuit.

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Alito based his dissent in part, on the fact that Congress made no explicit findings regarding the link between the intrastate activity regulated by these laws, the mere possession of a machine gun, and interstate commerce. Rather, it was a careful application of the then-recent decision in United States v. Lopez, which reminded courts to take seriously the limits of Congress’s powers under the commerce clause. In Lopez, the Supreme Court had held that Congress’s power to regulate interstate commerce among the several States did not include the power to regulate possession of a gun near a school where the gun never crossed State lines. It was for the Third Circuit to decide whether Congress’s power to regulate interstate commerce included the power to regulate possession of a machine gun where the machine gun never crossed State lines. In Judge Alito’s view, the Supreme Court’s decision “require[d] [the court] to invalidate the statutory provision at issue.” He relied on and cited Lopez at least 28 times in his 8-page dissenting opinion.

Again, this is the job of an appeals court judge: to interpret Supreme Court precedent and apply it to new cases. I should also point out that Judge Alito’s dissenting opinion provided a virtual roadmap for how Congress could regulate the possession of guns in a way consistent with the Constitution and Supreme Court case law. This is hardly the behavior of someone bent on imposing a “policy preference” against regulating machine guns. According to Judge Alito, all Congress had to do was make findings as to the link between the possession of firearms and interstate commerce, add a requirement that the government prove that the firearm moved across State lines.

Let me add one last word on the Rybar case. It is often said that Judge Alito always sides with the government. Well, this case was called to power to regulate possession of a gun near a school where the gun never crossed State lines. It was for the Third Circuit to decide whether Congress’s power to regulate interstate commerce included the power to regulate possession of a machine gun where the machine gun never crossed State lines. In Judge Alito’s view, the Supreme Court’s decision “require[d] [the court] to invalidate the statutory provision at issue.” He relied on and cited Lopez at least 28 times in his 8-page dissenting opinion.

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The does sued the police officers personally and the police department. The issue was how to read the warrant in light of the affidavit. And the legal question was whether a reasonable officer could have believed that the search warrant allowed the officers to search everyone in the house. Two judges on the panel said no, while Judge Alito said yes.

Why did Judge Alito believe that the police officers should not be liable personally? He concluded that a reasonable police officer could think that the search warrant authorized a search of all occupants of the premises. Judge Alito found that the only case on point was United States v. Igbonwa. In that case involving an employer and employee or a criminal defendant. To demonstrate the inaccuracy of that claim, consider the case of United States v. Igbonwa. There, a criminal defendant argued that the prosecutor had failed to honor his plea agreement. The majority of the court voted against the defendant and in favor of the prosecutor. Clearly, Judge Alito did not do the same. Instead, Judge Alito issued a lone dissent arguing that the prosecutor was required to fulfill this promise to the defendant.

In yet another example, in Crews v. Horn, Judge Alito ruled that a prisoner was entitled to more time to bring his habeas petition. Again, the Supreme Court and Third Circuit had never decided the question, and the statute was unclear. Judge Alito could have ruled either way, yet he ruled in favor of the prisoner’s claim.

This is a good time to remind the Senate what Third Circuit Judge Edward Becker, who served with Judge Alito for 15 years, had to say on this point. He testified, “The Sam Alito that I have sat with for 15 years is not an ideologue. He’s not a movement person. He’s a real judge deciding each case on the facts and the law, not on his personal views or his personal philosophy.” As Judge Becker summarized Judge Alito’s career, “His credo has always been his personal views, whatever they may be. He scrupulously adheres to precedent. I have never seen him exhibit a bias against any class of litigation or litigants.” As Judge Becker summarized Judge Alito’s career, “His credo has always been his personal views, whatever they may be. He scrupulously adheres to precedent. I have never seen him exhibit a bias against any class of litigation or litigants.”

In her January 23 speech, the junior Senator from New York said that Judge Alito had written that “in his estimation it is not the role of the federal government to protect the health, safety, and welfare of the American people.” As best I can tell, the Senator is referring to a 1986 document addressing the Truth in Mileage Act, a bill to require States to change their automobile registration forms to include the mileage every time it was sold. That document did not, as the Senator said, offer Alito’s “estimation” on anything. Judge Alito was drafting a veto message for President Reagan. Accordingly, he drafted that message in President Reagan’s voice and restated President Reagan’s policy on federalism. The first-person pronoun in that message is President Reagan, not Alito.

It is also worth noting that Judge Alito did not challenge Congress’s powers. His cover memo acknowledged that “Congress may have the authority to pass such legislation.” He did point out that the legislation was “in large part a response to the need to ensure that States and the District of Columbia do not already have” title forms that meet this requirement.

Let’s move to another statement from the Senator from New York. She stated that Judge Alito’s “stance on the bench shows an apologetic effort to undermine the right to privacy and a woman’s right to choose.”

In fact, Judge Alito’s record confirms that he is not an ideologue on a crusade to curtail Roe v. Wade. In his 15 years on the bench, he has confronted seven restrictions on abortion, and he struck down all but one. Judge Alito has upheld a woman’s right to choose even though he has the discretion to limit abortion rights.

For example, in the 1995 case of Elizabeth Blackwell Health Center for Women v. Knoll, Judge Alito struck down two abortion restrictions by the State of Pennsylvania. The first provided that a woman who became pregnant due to rape or incest could not obtain Medicaid funding for her abortion unless she reported the crime to the police. The second provided that if a woman needed an abortion to save her life, she had to obtain a second opinion from a doctor who had no financial interest in the abortion. The question was whether these laws conflicted with a Federal regulation issued by the Secretary of Health and Human Services. There was no binding Supreme Court precedent on point, and Judge Alito easily could have upheld the abortion restrictions if he had such a preset agenda. But Judge Alito voted to strike down both laws in favor of a woman’s right to choose. This is not the behavior of someone bent on chippering away at Roe v. Wade. This is the behavior of a jurist who understands the importance of precedent.

The junior Senator from New Jersey came to the floor earlier today and criticized the work Judge Alito had done on behalf of the Reagan Justice Department on abortion cases. He suggested that those efforts showed a bias against Roe v. Wade that would matter in the future. But the record shows just the opposite, as discussed above. How else to explain the Knoll case? Moreover, the Senator said that Judge Alito would not describe Roe v. Wade as, quote, “settled law.” Judge Alito described this question during the hearing. A judge cannot call an area of law “settled” when it is likely that cases dealing with that area will come before him. This demand to say that Roe is settled is little more than a desire to prejudge all those cases, including cases pending before the Supreme Court today. Judge Alito simply cannot do that without violating his judicial ethics and depriving those litigants of their fair day in court.

I will move on. Earlier today, the junior Senator from Michigan said that Judge Alito had “been criticized by his colleagues for trying to legislate from the bench in order to reach the result that he desires.” I am not aware of a single example of any member of the Third Circuit, or of any other court in the Nation, claiming that Judge Alito had any tendency toward quote, “legislating from the bench.”
Would seven current and former Third Circuit judges testify for Judge Alito if they believed he was a judicial activist or otherwise unqualified for the bench? Those listening now or reading the Congressional Record in future years should go to the Judiciary Committee records on the Internet and read what those judges had to say when they testified on January 12. When I spoke last week, I entered in the Record a series of excerpts from that testimony that the Senate Republican Policy Committee, of which I am chairman and had compiled. The complete testimony is worth reviewing, too. Again, I am not aware of a single time that any judge has accused Judge Alito of legislating from the bench.

As one last point, I must address this unitary executive issue. The senior Senator from New Jersey and others have said that Judge Alito somehow believes in making the executive more powerful than the legislative and judicial branches. One wonders how many times this misstatement has to be corrected. Judge Alito made clear during his testimony that his past comments regarding the unitary executive theory only—only, Mr. President—dealt with who has the power to control executive agencies. As he said repeatedly, this theory deals with the scope of Presidential power, he does not—repeat, does not—subscribe to it. What else can he say? He has made this extremely clear. He has said it repeatedly.

Mr. President, there have been other misstatements and mischaracterizations of Judge Alito's record. I can only respond to so many. I will simply encourage future students of this debate to look at the cases in question, and to carefully review the Committee record, before reaching conclusions based on floor debate. I look forward to Samuel Alito serving on the Supreme Court for many years to come.

The PRESIDING OFFICER. Under the previous order, the majority leader or his designee will be recognized for the final 15 minutes prior to the vote on the motion to invoke cloture.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded.

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

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

Mr. SPECTER. Mr. President, I urge my colleagues to invoke cloture on the nomination of Judge Alito to the Supreme Court and to support him on the final vote.

As the chairman of the Judiciary Committee, I sat through each committee of the processes, reviewed in advance some 250 cases of Judge Alito's, his work in the Justice Department, his work as U.S. Attorney, as Assistant U.S. Attorney, his academic record, and I found him to be eminently well qualified.

The objections which have been raised to the nomination turn on those who think he should have been more specific on his analytical considerations and the factors which would guide his decisions. When it came to Executive power, again he discussed the considerations which would guide him on his decisions but necessarily stopped short of how he would decide a specific case.

He disagreed with the Supreme Court of the United States, which has declared acts of Congress unconstitutional because of our method of reasoning. His method of reasoning somehow was defective compared to the Court's method of reasoning. Judge Alito rejected that. Perhaps most importantly in evaluating the prospects as to how Judge Alito will rule, we have to bear in mind that history shows the rule to be that there isn't a rule. Justice Sandra Day O'Connor, Justice Anthony Kennedy, Justice David Souter before coming to Court all expressed their sharp divergent views. As the President, their nominee, had expected.

We heard enormously powerful testimony coming from seven circuit judges, some past, some senior, and some currently active who have worked with Judge Alito. There were precedents for other judges coming forward to testify on behalf of a nominee—but not quite in this number, not quite in this magnitude. The seven judges were uniform in their assessment that Judge Alito has no agenda and has an open mind. These are jurists who know his work well, jurists who go with him after oral arguments into a closed room—no clerks, no secretaries, no assistants—they know how he thinks and how he considers cases.

I think two judges were especially significant. The first was Judge Edward R. Becker, the winner of the Devitt Award as the outstanding Federal jurist a couple of years ago. Judge Becker has sat with Judge Alito on more than 1,000 cases. He is well known as a centrist and is a highly respected judge. He testified that Judge Alito and he had disagreed on a very small number of cases, about 25. The second was Judge Timothy Lewis, an African American who identifies himself as being very strongly pro-choice, very strong for civil rights. He was seated on the left-hand side of the panel—he did not specify where his position lay on his own philosophical spectrum—and testified very strongly on Judge Alito's behalf, saying that if he did not have every confidence in Judge Alito he would not have appeared as a witness in the proceedings.

The prepared statement which I filed in the record last week details a great many cases where Judge Alito has decided in favor of the so-called little guys.

In the context of the hundreds of decisions that Judge Alito has written and the thousands of cases where he has sat, you could pick out a few and put him with any position on the philosophical spectrum of the Court.

Candidly, it is a heavy responsibility to cast a vote on a Supreme Court nominee, especially one who is taking the place of Justice O'Connor, a swing vote. But when we look at the traditional standard of character, again he is an A plus. When you look at the standard of experience and public service, he is an A plus. When you look at his analytical style as a jurist, again he is an A plus.

Some have objected to nominees because, as some have put it, there is no guarantee. Guarantees are for used cars and washing machines, not for Supreme Court nominees.

I believe Judge Alito is well qualified to receive an affirmative vote by the Senate and be confirmed as an Associate Justice of the Supreme Court.
Before we vote, I want to take a minute to reflect just a bit on the progress that we have made in this overall judicial confirmation process over the last 12 months.

In the Senate, I really wear three hats. I wear the majority leader; second, the Republican whip; and third, majority leader. Wearing the third hat as majority leader, I have become a steward of our institution, steward in the sense of its rules and its precedents, its practices and traditions of this Senate.

My job is to bring Senators together, both sides of the aisle, to govern. That is why we are here, to govern with meaning. We are here to solve both sides of the aisle, to govern. That is why we are here, to govern. That is why we are here, to govern. That is why we are here, to govern. That is why we are here, to govern. That is why we are here, to govern. That is why we are here, to govern.

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To justify this unprecedented obstruction, Democratic leaders unfairly attacked the character of these nominees, trying to paint them as extremists and radicals and threats to our society and our institutions. But the American people saw through the attacks. They saw them for what they were, purely partisan.

Finally, early this year the Republican leadership said: Enough is enough; enough obstruction, enough partisanship, enough disrespect to these good, decent, and accomplished professionals. We put forward a very simple, straightforward principle. A nominee for a seat on the Supreme Court deserves a fair up-or-down vote. And we led on that principle. Because we did that, seven nominees who had been previously filibustered, or blocked, obstructed in the last Congress—and we were told at the time would be blocked in this Congress—got fair up-or-down votes and were confirmed and now sit on our circuit courts. A new Chief Justice of the United States, Clarence Thomas, now sits at the helm of the High Court.

If we had not led on principle, there would have been no Gang of 14. Filibusters would have become even more routine and to led to more obstruction. However, there has been sheathed because we are placing principle before politics, results before rhetoric.

With the nomination of Sam Alito before the Senate, this Senate must again choose principle or partisanship. Should we choose to lead on the principle that judicial nominees, whether nominated by a Republican or a Democrat, deserve an up-or-down vote, or should we revert to the partisan obstructionism and to lead on that simple principle that every judicial nominee, with majority support, deserves a fair up-or-down vote.

Put that in perspective, Chief Justice John Roberts’ confirmation took 72 days, even including an extra week’s delay to pay respects to his predecessor, Chief Justice Rehnquist. Justice O’Connor, who Judge Alito will replace, was confirmed in 76 days. President Clinton’s two Supreme Court nominees, Justices Ginsburg and Breyer, got a fair up-or-down vote in an average of 62 days. Judge Alito today is at 91 days.

During this 3-month period since Judge Alito was nominated, Members have had an abundance of his written materials, documents, and opinions to review. They have had over 4,000 opinions from his tenure on the Third Circuit Court of Appeals spanning 27,000 pages; another 1,000 pages of documents from Judge Alito’s service at the Department of Justice; numerous speeches and news articles. The list goes on and on.

Members have had 30 hours of testimony from Judge Alito’s judicial committee hearings; statements of 22 witnesses, including 7 nominees; 78 letters from Judge Alito’s colleagues on the Third Circuit; Judge Alito’s answer to over 650 questions, doubling the number of questions that either of President Clinton’s Supreme Court nominees answered; and 4 days of debate in the Senate.

Despite all this, some Members have launched a partisan campaign to filibuster this nominee and have forced the Senate to file cloture which we will be voting on. Certainly, it is any Senator’s right to force this vote, but it sets an unwelcome precedent for the Senate.

As a reminder to my colleagues, the Senate did not have a cloture vote on the nine Justices currently sitting on the Supreme Court. Judge Alito has majority support. A bipartisan majority of Senators stands ready to confirm him and have announced their support. Judge Alito deserves a fair up-or-down vote. He has the professional qualifications, the judge temperament and integrity our highest Court deserves.

Whether Members agree with me, whether Members support him, we should not prevent Judge Alito from getting a vote. I urge my colleagues to join me in voting for cloture. It is our constitutional obligation of advise and consent, because it is fair and because it is the right thing to do.

A vote today for cloture is a vote to support all we have done over the past 3 years to repair what was broken. True, it is a vote to bring Sam Alito’s nomination to a fair up-or-down vote, but it is also a vote that is so much more. It is a vote to demonstrate Members working together to end partisan obstructionism and to lead on that simple principle that every judicial nominee, with majority support, deserves a fair up-or-down vote.

In closing, if I may borrow the words of my good friend Senator Kennedy from 1998:

We owe it to Americans across the country to give these nominees a vote. If our colleagues don’t like them, vote against them. But give them a vote.

I agree with Senator Kennedy’s statement. I say to my colleagues, if you do not like Judge Alito, vote against him. That is your right. But let’s give him a vote. That is our constitutional duty.

The PRESIDING OFFICER. The Democratic leader.

Mr. REID. Mr. President, I will use leader time. I want the record spread with the fact that Senator Exon will miss the vote today. The Senate is very fortunate. He was in a head-on collision in Las Vegas going to the airport to return to Washington, DC. I spoke to him from the hospital. He is going to be fine. He has no head injuries. The bags I am carrying are great. Bodily pain. I talked to him. He was under some medication. He said he is sore but he is going to be fine.
With all the travel we do, we all live on the edge of something happening. I am so happy Senator Ensign is fine. He is a wonderful man. He has great faith. He is a good friend of mine and to all of the Senate. I know all of our thoughts and prayers will be with him. I am confident he is going to be fine.

As indicated, I spoke with him. I want Darlene, especially, to know our thoughts and prayers will be with her and the children.

The PRESIDING OFFICER. Under the previous order, the hour of 4:30 having arrived, the Senate will proceed to a vote on the motion to invoke cloture on Executive Calendar No. 490.

Under the previous order, the clerk will report the motion to invoke cloture.

The legislative clerk read as follows:

The question is, Is it the sense of the Senate that debate on Executive Calendar No. 490, the nomination of Samuel A. Alito, Jr., of New Jersey, to be an Associate Justice of the Supreme Court of the United States.


The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on Executive Calendar No. 490, the nomination of Samuel A. Alito, Jr., of New Jersey, to be an Associate Justice of the Supreme Court of the United States, shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The assistant legislative clerk procured the unanimous consent of the Senate.

Mr. McCONNELL. The following Senators were necessarily absent: the Senator from Iowa (Mr. Bayh).

The assistant legislative clerk reported as follows:

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to a vote on the motion to invoke cloture on Executive Calendar No. 490.

Under the previous order, the clerk will report the motion to invoke cloture.

The legislative clerk read as follows:

The question is, Is it the sense of the Senate that debate on Executive Calendar No. 490, the nomination of Samuel A. Alito, Jr., of New Jersey, to be an Associate Justice of the Supreme Court of the United States, shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The assistant legislative clerk procured the unanimous consent of the Senate.

Mr. McCONNELL. The following Senators were necessarily absent: the Senator from Nevada (Mr. Ensign) and the Senator from Nebraska (Mr. HAGEL).

Mr. DURBIN. I announce that the Senator from Iowa (Mr. HARKIN) is necessarily absent.

I further announce that if present and voting, the Senator from Iowa (Mr. HARKIN) would vote "nay."

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 72, nays 25, as follows:

Rollecall Vote No. 1 Ex.

YEAS—72

Yeas—72

NAYS—25

The PRESIDING OFFICER. On this vote, yeas are 72, the nays are 25. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

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

Mr. DEMINT. Mr. President, I ask unanimous consent to speak for 15 minutes.

Mrs. BOXER. Mr. President, reserving the right to object, and I will not object, would my friend extend his unanimous consent request to include the following Democratic Members: Senator BOXER for 20 minutes, Senator DODD for 20 minutes, Senator BACUS for 20 minutes, Senator DODD for 20 minutes, and Senator BIDEN for 5 minutes.

Mr. DEMINT. Mr. President, I do add that to the request.

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

The Senator from South Carolina is recognized.

STATE OF THE UNION ADDRESS

Mr. DEMINT. Mr. President, today the Democratic leader, HARRY REID, gave what was billed as a "prebuttal" to the President’s upcoming State of the Union Address.

I am, frankly, astounded that he would criticize a speech so harshly that has not even been given yet.

I will let the President speak for himself when he addresses the Nation tomorrow night, but this misleading partisan rhetoric put forth on this floor by the Senator from Nevada cannot go un answered, rhetoric which, unfortunately, further proves Democrats will say anything but do nothing.

Today, he applied some tired cliches from the minority leader. He talks about a credibility gap. Well, the largest credibility gap in American politics is between what Democrats say and what they do. Democrats promised months ago to bring forth their own legislative agenda, but the Nation is still waiting.

Day after day, the Democrats launch attack after attack on Republicans and our agenda, but how are we to take them seriously when they cannot articulate a clear plan of their own?

They have anything but get a media sound bite, but when it comes to solving today’s challenges, Democrats do nothing.

It has been 4 years since 9/11, and after all their rock-throwing, Democrats still have no plan for victory in the war on terror. In fact, they have undermined the war effort with partisan attacks on the President.

Democrats have complained about the economy since President Bush took office, but almost everything they do makes it harder for American businesses to compete.

Democrats spent the last year criticizing Republican efforts to strengthen Social Security but still offer nothing to fix this system in crisis. They even refuse to guarantee benefits for today’s seniors and blocked a bill that would have stopped Congress from spending Social Security dollars on other Government programs.

They have decired looming deficits but offer no map to a balanced budget, instead calling for higher taxes and more spending programs.

How are we to take seriously a party that has no legislative agenda, that has no solutions or ideas to solve America’s greatest challenges?

In stark contrast to the Democrats’ invisible agenda, Republicans have clearly articulated and delivered a bold agenda to secure America.

And while we have had some victories in recent years, the truth is that Democrats have fought bitterly to block progress for America every step of the way.

These same Democrats come to this floor and blame inaction on Republicans.

To give just one example, Republicans have been working for decades to secure America’s energy independence.

However, Democrats, at the behest of extreme environmental activists, oppose real solutions to high energy prices such as increasing production of domestic oil and natural gas supplies and removing barriers to oil refinery investment such as onerous permitting requirements and the proliferation of boutique fuel blends.

Just last month, Democrats blocked energy exploration and production on the Coastal Plain of the Arctic National Wildlife Refuge which would provide millions of barrels of oil a day, or about 4.5 percent of the current U.S. consumption, with no significant environmental impact.

It is not just in Alaska where Democrats oppose efforts to access our Nation’s energy resources. It has been estimated that enough natural gas lies under the Outer Continental Shelf and in the interior Western States to supply 27 years’ worth of natural gas consumption, the primary fuel used to heat America’s homes. Yet Democrats support policies that have closed these areas to exploration and production.

The administration has attempted to cut regulatory redtape, reduce regulatory costs, and streamline regulatory processes to allow more sensible use of our Nation’s resources while maintaining environmental standards—efforts that have been largely rebuffed by Democrats in Congress.
The obstacle to America’s energy independence is clear: it is the blockade formed by the Democratic Party. In seeking to appease far-left interest groups, Democrats have blocked Republican efforts to reduce our dependence on foreign oil and have needlessly allowed oil prices to climb higher and higher for America’s families.

Senator Reid likes to say Democrats can do better. I think he is right. Democrats should do better. They have been conducting a war of rhetoric for years, allowing any idea that is not attractive to the public debate. Americans are rightly frustrated with a Democratic Party that will say anything but do nothing.

Now let me address what has become the favorite sound bite of the Democratic Party. Senator Reid said it today and many times over the last week, what he likes to call the “culture of corruption.” Apparently, Democrats believe this media strategy will carry them to a sweeping electoral victory in November. I have news for my Democratic colleagues: The problem of outside influence on Congress is not a partisan issue. This is a bipartisan problem and requires a bipartisan solution.

For those hoping to usher in a new Democratic majority in Congress on a media sound bite, history teaches us that elections are won on ideas, not rhetoric. Americans are far too smart and good at separating fact from fantasy for Democrats to expect they can coast to a victory in November with no solutions and no ideas.

Republicans learned this lesson long ago from one of our greatest teachers, Ronald Reagan. President Reagan always talked about ideas that still resonate with Americans today: limited government, personal freedom and responsibility, and peace through strength.

Republicans did not win on rhetoric in 1994. We won because Americans agreed with our solutions: lower taxes, fiscal responsibility, traditional values, and strong national defense.

President Bush has connected with the American people because he has run his campaigns on ideas. He promised to lower taxes, and he has. He promised to aggressively fight the war on terror to protect American families, and he has. He promised to nominate judges who will follow the law instead of creating it, and he has.

Yet, as Senator Reid demonstrated today, Democrats still do not understand that Americans want solutions, not more partisan rhetoric. I know there are some Democrats who do have some good ideas and desire to work together to improve the lives of Americans. I have talked to many of my colleagues on the other side of the aisle who do seem to understand the reality, but their leadership refuses to allow them to break the Senate’s gridlock and work together to improve the lives of Americans. I have spoken to many of my colleagues on the other side of the aisle who do seem to understand the reality, but their leadership refuses to allow them to break the Senate’s gridlock and work together to improve the lives of Americans. I have spoken to many of my colleagues on the other side of the aisle who do seem to understand the reality, but their leadership refuses to allow them to break the Senate’s gridlock and work together to improve the lives of Americans.

I urge the Democratic Party to think long and hard about the war of rhetoric they are waging. It is poisoning the atmosphere in the Senate, and it is turning off Americans from the public debate. The consequences of these actions will be fewer and fewer Democrats returning next year. This has been proved out during the last elections, as I and my fellow freshman Republican Senator from California have been doing.

If Democrats sincerely want the opportunity to govern again, they need to abandon this “say anything, do nothing” stance and put forward some ideas and solutions. Regardless, the Republican Party should continue to lead the country. We will continue to secure America’s future with a bold, positive agenda.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Mr. President, I wish to amend the unanimous consent agreement to add an additional 10 minutes for Senator Baucus, which will give him 30 minutes.

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

The Senator from California.

Mrs. BOXER. Mr. President, I was listening to the Senator from South Carolina. I thought he was going to make some comments about the vote that just took place on one of the most important issues facing the Senate. Instead, he launched into an attack on Senator Harry Reid.

Shakespeare once said something to this effect: When someone acts that way, he is protesting too much. So Senator Graham has hit a chord with the Senator from South Carolina, and there are reasons for it.

Senator Reid speaks straight from the heart, straight from the shoulder. He is fighting for the American people. He wants us to fix the mess this President and this Congress made in the Medicare prescription drug benefit. He wants us to fix the mess this President and this Congress made in the Medicare prescription drug benefit. He wants us to fix the mess this President and this Congress made in the Medicare prescription drug benefit.

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Mrs. BOXER. Mr. President, I wish to amend the unanimous consent agreement to add an additional 10 minutes for Senator Baucus, which will give him 30 minutes.

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

Mr. President. Every judicial nomination is important, but rarely are the stakes as high for the Nation as they are in the case of the nomination of Samuel Alito to be an Associate Justice of the Supreme Court.

We now have a divided Court, a divided Congress, and a divided electorate, as evidenced in the last two Presidential elections. Unfortunately, we also have a President who failed to remember his promise, which he made in the campaign of 2000: to govern from the center—to be “a uniter, not a divider.” If he had kept that promise, he would not have nominated Samuel Alito.

Judge Alito was nominated to take the seat of Justice Sandra Day O’Connor, the first woman on the Court. She has long been the swing vote, and a commonsense voice of moderation, in some of the most important cases to come before the Court, including a number of cases involving civil rights, civil liberties, and freedom of religion.

The right thing to do for the court and for the Nation would have been to nominate someone 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 is experienced, intelligent, and capable. His
family should be proud of him, and all Americans should be proud that the American dream was there for him and for the Alito family.

But these facts do not outweigh my deep conviction that Judge Alito’s extreme views of the law make him the wrong person for this job.

As a Senator, I have no more solemn duty than to vote on a nomination for the Supreme Court of the United States. These are lifetime appointments, with extraordinary power to shape the law of the land, and to affect the lives of Americans, not just those living now, but for generations to come.

In the 218 years since our Constitution was adopted, our Nation has made great strides toward achieving the more perfect Union that the Founding Fathers dreamed of. Women were given civil rights. A right to personal privacy has been recognized for women and families. The accused have a right to confront their accusers. The Constitution was adopted, our Nation has made great strides toward achieving the American dream was there for him and for the Alito family.

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When asked about this analogy during the confirmation hearing, Mr. Alito said that the jury in a courtroom where the prosecutor is an left-handed lawyer and the judge is a right-handed one, would be like a situation where the defendant is a left-handed person. He went on to say that the jury's decision would be based on the evidence presented, and not on any assumptions about the defendant's handedness.

I worry about the tears of a woman who is forced by law to leave her home by police who have no valid warrant. I worry about the tears of a worker who is strip searched in the 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.

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.

I review his prior writings and cases, and I have come to the conclusion 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 Nation's history.

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judge on the Third Circuit Court of Appeals. In fact, he has served more years on the bench than many nominees to the Supreme Court.

Mr. Alito’s work prior to his judicial appointment focused exclusively on representing one client, the U.S. Government. Some have raised questions about Judge Alito’s experience protecting the rights of individuals rather than the Government. I conclude that Judge Alito is professionally competent to serve as a Supreme Court Justice.

Second, personal integrity. Several issues arise from Judge Alito’s promise to avoid conflicts of interest as a judge. Some raised questions about Judge Alito’s sensitivity to the avoidance of conflicts of interest, and some raised questions about how steadfastly Judge Alito keeps his commitments to the Senate.

In 1990, Judge Alito told the Senate Judiciary Committee that he would disqualify himself from any cases involving five matters with which he had personal connections. Those matters were the Vanguard Companies, the brokerage firm of Smith Barney, the First Federal Loan of Rockerfeller New York, his sister’s law firm, and matters that he worked on or supervised at the United States Attorney’s Office in New Jersey. In the period of 1995 to 2002, however, Judge Alito heard cases involving those matters.

Judge Alito initially blamed the conflicts of interest on a computer glitch. In subsequent correspondence with Senators on the Judiciary Committee, Judge Alito argued that his promise during his 1990 confirmation hearings referred to only his “initial service.” He argued that as his service continued, he found unduly restrictive his 1990 promise to recuse himself from cases involving entities in which he had a personal interest. And he argued that the mutual funds in which he was invested were not at issue in the case that he heard.

In his responses to questions concerning Vanguard, Judge Alito testified:

I think that once the facts are set out, I think that everyone will realize that in this instance I not only complied with the ethical rules that are binding on federal judges—and they are very strict—but also that I did what I’ve tried to do throughout my career as a judge, and that is to go beyond the letter of the ethics rules and to avoid any situation where there might be an ethical question raised.

But Judge Alito also admitted to Senator Kennedy that “if I had to do it all over again, I would have handled this differently.”

Judiciary Committee members also asked about Judge Alito’s membership in an organization called Concerned Alumni of Princeton. In his 1985 job application to the Reagan Justice Department, Judge Alito listed Concerned Alumni of Princeton as one of his extracurricular activities. Concerned Alumni of Princeton is an alumni group that took the extreme position of arguing against letting women and minorities attend Princeton. When questioned about Concerned Alumni of Princeton, Judge Alito claimed that he had no recollection of ever having been a member of the group.

Judge Alito testified:

I really have no specific recollection of that organization. But since I put it down on that statement, then I certainly must have been a member at that time. . . . I have tried to think of what might have caused me to sign up for membership, and if I did, it must have been around that time. And the issue that had rankled me about Princeton for some time was ROTC. I was in ROTC when I was at Princeton and then until it was expelled from campus, and I thought that was very wrong.

Judge Alito’s responses about Concerned Alumni of Princeton raises concerns. In 1985, he apparently thought that his membership in this discriminatory organization was important enough to put on his page-and-a-half job application. His failure of memory now about the inconvenient position then raises questions about his credibility.

I am also disappointed that the White House has chosen not to release Judge Alito’s tax returns for review by the Joint Committee on Taxation. On December 13 of last year, I introduced a bill that would require all Supreme Court nominees to submit 3 years of tax returns to the nonpartisan Joint Committee on Taxation for review on a confidential basis. The Joint Committee would report its findings on the nominee’s tax compliance to the Finance and Judiciary Committee.

I might add that all nominees who are referred to the Finance Committee—from Cabinet Secretaries to the nominee’s integrity.

I understand the administration does a “tax check” for all Supreme Court nominees. They say they already do one. But I believe it is important for Congress to do its own due diligence on a nominee’s tax returns. After all, this is a person who serves on the judiciary. That is a separate branch, not the executive, not the judicial. Both entities—namely both the Executive and the Judicial—are invested with a stake in making sure that the nominee’s tax returns comply with the law.

I might also say, as I mentioned earlier, many so-called tax checks the administration has taken on other nominees have been inadequate, full of mistakes, and we have had to correct them.

The Finance Committee views proof of the nominee’s tax compliance as a testament to the nominee’s integrity. What individuals do on their tax returns is a window on their ethical decision making. It is a good test of integrity and character.

The American people expect their national leaders to comply faithfully with the tax laws. A showing that leaders in the Federal Government faithfully comply with the tax laws sends an important message to people who may consider cheating on their taxes.

On January 19, President Bush appeared to agree. He told small business leaders in Sterling, VA, that public officials’ tax returns should be public, because public officials have a “high responsibility to uphold the integrity of the process.”

When I met with Judge Alito, I asked him to release his tax returns for such a review. He initially agreed to do so. But the White House official present at the meeting immediately intervened to block the release saying that he cannot do so.

The President was right when he said in Virginia that the release of public officials’ tax returns contributes to the integrity of our whole tax system. And his White House was wrong to withhold that information on Judge Alito. I will continue to press future nominees to allow this kind of neutral review of their tax returns because I think it is the right thing to do.

Let me turn now to judicial philosophy.

I do not believe that a Senator should oppose a nominee just because the nominee does not share that Senator’s particular judicial philosophy. But the Senate must determine whether a nominee is in the broad mainstream of judicial thought. Is this a wise person, not an ideologue of the far left or the far right. The Senate must determine whether a nominee is committed to the protection of the basic Constitutional values of the American people.

What are those values?

One is the separation of powers of our Federal Government—including the independence of the Supreme Court itself.

Another is freedom of speech. Another is freedom of religion. Another is equal opportunity. Another is personal autonomy—the right to be left alone. And yet another is an understanding of the basic powers of the Congress to pass important laws like those providing for protection of the environment.

These are not unimportant matters. They are hugely difficult—all of these are.

The stakes are high. The Senate has a duty to ensure that the nominee will defend America’s mainstream Constitutional values.

Judge Alito’s record calls into question his ability to act as a check on executive power. Recently, many have noted with concern the National Security Agency’s surveillance of American citizens. At the Judiciary Committee’s hearing, a number of questions focused on Judge Alito’s interpretation of executive power, and how he envisions the role of the court’s role as an effective check on unrestrained presidential power and on government intrusion.
Judge Alito responded that "no person is above the law." But he did not provide assurances that he would act on the Court to balance executive authority. His prior statements and court rulings indicate that he has an expansive view of the scope of executive power, and he has written praise of Congress's authority to legislate.

In a 1984 memorandum, Mr. Alito argued that the Attorney General serves blanket protection from lawsuits when acting in the name of national security, even when those actions involve the illegal wiretapping of American citizens.

In a 2000 speech to the Federalist Society, Judge Alito said that "the theory of a unitary executive...best captures the meaning of the Constitution's text and structure." Judge Alito said: "The President has not just some executive powers, but the executive power—the whole thing." Some have thus interpreted the theory of a unitary executive as his 1985 job application, Mr. Alito argued that he would not provide great detail about specific precedents such as Roe v. Wade. Senator Feinstein pushed

Judge Alito has narrowly construed constitutional criminal procedure protections, such as the fourth amendment restrictions on search and seizure. In the case of Doe v. Grody, for example, Judge Alito wrote a dissent. He argued that the strip search of a little girl and her 10-year-old mother without a proper search warrant did not violate their constitutional rights. That is his dissent, that is his view.

Judge Alito also refused to agree that Congress cannot take away the Supreme Court's ability to protect Americans' First Amendment rights. In contrast, both Chief Justice Roberts and former Chief Justice Rehnquist supported the position that the Constitution protects an individual's ability, extremely important, it is no academic matter, basically it is that the Congress can say to the Supreme Court that it does not have jurisdiction to hear any cases with respect to, say, the first amendment brought by an individual citizen; that is, Congress can take away the Court's ability to interpret the Constitution with respect to the first amendment. That is what that view held. I think it is an outrageous view. I don't understand how anybody can tentatively hold that view.

Judge Alito defended his viewpoint, saying this is an academic debate on which scholars are divided. I am astounded at that answer.

Judge Alito's rulings on civil rights cases appear to set a high bar for proving unlawful racial discrimination. A review of his published and unpublished opinions. They concluded that:

although Judge Alito's opinions are rarely written with obvious ideology, he's seldom sided with a criminal defendant, a foreign national facing deportation, an employee alleging discrimination or consumers suing big business.

I am also concerned by Judge Alito's responses to privacy questions at the Judiciary Committee hearings which conflict with his past statements. In his 1985 job application, Mr. Alito wrote:

it has been an honor and a source of personal satisfaction for me to serve in the office of the Solicitor General during President Reagan's administration and to help to advance legal positions in which I personally believe very strongly. I am particularly proud of my contributions in recent cases in which the government asked the Supreme Court that the Constitution does not protect a right to an abortion.

In June 1985, Mr. Alito wrote a 17-page memo providing a strategy for using the Government in the case of Thornburgh v. American College of Obstetricians and Gynecologists as an "opportunity to advance the goal of bringing the eventual overruling of Roe v. Wade, and in the meantime, of undermining its effect." He advocated a strategy of creating a series of burdens on a woman's right to choose.

In the hearings, however, Judge Alito responded to Senator Feinstein that he "did not advocate in the memo that an argument be made that Roe be overruled."

In his hearings, Judge Alito acknowledged that the Constitution protects a right to privacy generally. He agreed with the premise in the Griswold case, which protects the right to use contraceptives. It is unclear, however, how widely the right to privacy extends for Judge Alito.

When pressed, Judge Alito refused to acknowledge that the Constitution protects a woman's right to choose. Judge Alito explained that he would approach privacy cases with an open mind.

On the Third Circuit Court of Appeals, Judge Alito also wrote a dissent in the case of Planned Parenthood of Southeastern Pennsylvania v. Casey. In that dissent, he argued that upholding Pennsylvania's restrictive spousal notification requirement did not place an undue burden on women.

In his 1985 job application, Mr. Alito explained that he would approach privacy cases with an open mind. But he also said that this principle is not "an inexorable command."

Here again, Judge Alito's statements contrast with then-Judge Roberts' views during their Senate confirmation hearings.

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Here again, Judge Alito's statements contrast with then-Judge Roberts' views during their Senate confirmation hearings. Judge Roberts said in his hearings that Roe v. Wade was settled law. When Senators asked Judge Alito about Judge Roberts' statements, Judge Alito responded that "I think it depends on what one means by the term 'settled.'"
Judge Alito to clarify the discrepancy between answering cases about one-person one-vote, but not responding to questions about abortion and precedent. Judge Alito did not give a clear answer.

Judge Alito appears to support deference to the Framers’ original intent. Judge Alito testified:

I think we should look to the text of the Constitution, as we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption.

That is called originalism. Judge Alito’s judicial philosophy of original intent raises concerns about whether the Court could adapt to a changing society. And his philosophy indicates that he may not take an active role in extending Constitutional protections to new situations in the 21st century.

I have some concern about one ruling that Judge Alito issued related to the environment. In 2001, in the case of W.R. Grace & Company v. United States Environmental Protection Agency, Judge Alito threw out the Environmental Protection Agency order under the Safe Drinking Water Act for an asbestos cleanup near Libby, MT. Judge Alito concluded that the government cleanup standard was “arbitrary and capricious.” He explained that the reason for not upholding the order was that the EPA lacked a rational basis for imposing the clean-up standards on the company. This case raises sensitivities for me, because in my home state, W.R. Grace has acted with complete disregard of the health effects for Montanans in Libby, where illness from tremolite asbestos caused by W.R. Grace has hit the community hard.

In 1988, Judge Alito commented that Robert Bork “was one of the most outstanding nominees of this century.” When I asked Judge Alito about that, he did not provide an adequate response. He ducked the question.

He did not respond adequately to many of my questions. He evaded my questions, questions I asked in good faith, intended to elicit what kind of Justice he might be.

He was vague. He seemed not to want to talk to me. He seemed not to want to have an honest discussion about what kind of person he is. That is why I find it very difficult to support this nominee.

I supported Judge Roberts for Chief Justice in large part because of Judge Roberts’ hearing testimony and responses when he met with me personally.

Judge Alito does not meet my standards for a Supreme Court Justice. Judge Alito has explained that he will be “the same person that I was on the Court of Appeals.” Judge Alito’s record demonstrates that he is a very conservative judge who rules often in favor of expanding executive authority and of limiting civil rights and civil liberties. If the Senate confirms Judge Alito to Justice O’Connor’s seat, he could change the balance of the Court, tipping it in a direction that could reverse or restrict important constitutional protections.

Based on all this information, I will vote against Judge Alito. I believe that Judge Alito is out of the mainstream. He is not the right choice for our country.

On a corollary on the first floor of this Capitol building appear the words of former Supreme Court Justice Lewis D. Brandeis, who said:

‘The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.’

I shall thus vote against this nomination to carry out seriously my responsibility as a Senator to Advise and Consent on nominations to that honorable Court. I shall vote against this nomination because I believe the nominee is well-meaning, but without sufficient understanding of the importance of our rights and liberties. And I shall vote against this nomination to help keep this great country the world’s beacon of freedom.

The PRESIDING OFFICER (Mr. CORNYN). The Senator from Oklahoma, the-r-presiding Officer. Under the previous order, the Senator from Connecticut is now recognized for up to 20 minutes.

Mr. DODD. Mr. President, I wish to commend my colleague, Senator MAX BAUCUS from Montana, before he leaves the Floor, for a very fine statement. I appreciate his thoughts and comments.

I rise today to discuss my vote on the nomination of Judge Samuel Alito to the United States Supreme Court. First of all, I wish to briefly comment on the cloture vote that occurred this afternoon. I voted not to invoke cloture on the nomination. I want to explain why.

As many of my colleagues know, I went through minor surgery to have a knee replacement before the holidays and I have been home in Connecticut recuperating. I looked forward to coming back to participate in the debate on the Judge Alito nomination and I followed the confirmation process closely from home. For this reason, I was somewhat stunned to learn that Senator Feingold filed a cloture motion on the nomination a day after it was voted out of the Judiciary Committee. I do not believe the body for a quarter of a century and I have voted to confirm the majority of the judicial nominations that have come before this Senate. I, too, like my colleague from Montana, voted with enthusiasm for the nomination of Chief Justice Roberts only a few months ago. The majority leader’s action was surprising to me. It is exceedingly rare that a cloture motion is filed on debate regarding a Supreme Court nomination. In my experience, cloture motions have very rarely been filed. I got frustrated with the minority for insisting upon extending debate—beyond a reasonable period of time. In this case, I feel strongly that there has been not a reasonable period of debate, let alone an extended debate.

But I am only one Member. Certainly, this institution cannot wait for one Member. I was allocated only 5 minutes of time today to make a comment on this nomination. However, my flight was canceled out of Hartford, CT, and thus, I lost that small window of 5 minutes to be heard. I consider the matter of confirmation of a Supreme Court Justice with great seriousness and solemnity. In my view, some of the most important votes that we make in the Senate are to fill vacancies in the Judicial Branch, second only to declarations of war. Constitutional amendments are not far behind. Therefore, to be notified that I would have only 5 minutes to comment on the nomination of a Supreme Court Justice who will serve for life, far beyond the tenure of the Chairman of the Federal Reserve Board, far beyond the tenure of the President of the United States, far beyond the tenure of a Senator or Congressman, I found rather disturbing.

We have always respected one another here, at least we try to, and to recognize this is the Senate, different from the House of Representatives. We are a bicameral body for good reason. This is the place where we spend a little more time evaluating issues that come before the Senate. To ask for a few more days to have discussion about the nomination of this person is not serious controversy in the country, seems little to ask.

Put aside the nominee for a second, put aside your decision to vote for or against the nominee, we should respect one another’s desire to be heard on these matters. Tomorrow is the State of the Union, and there will be a photo opportunity for the President. I am deeply disturbed that this Senate may have made a decision to rush this nomination through, in order to provide a photo opportunity for a swearing-in ceremony prior to this President’s State of the Union Message.

I note the presence of my good friend and colleague from Texas in the chair of the Presiding Officer. He serves on the Judiciary Committee. He watched the gavel-to-gavel hearing proceedings. While I was at home rehabilitating this knee, I had a chance to watch my colleagues do their job. The circumstances around this nomination have been complicated. The nomination came up after Harriet Miers withdrew. We had the Thanksgiving holiday and the recession coming up. In fact, the Judiciary Committee met when we were out of town. Obviously, the desire was to move this along. I have no objection to that. That seems to be a reasonable request to have the committee meet when it did. Certainly, we all had an opportunity to watch those proceedings.

The majority leader stated earlier than we have consumed an excessive amount of time on this nomination.
I, like many of my colleagues, have supported the overwhelming majority of the current President’s judicial nominees. Of the current President’s 230 judicial nominees, only 5 have failed to be confirmed, a rather remarkable record.

In the course of my Senate career, I have never imposed a litmus test while reviewing Supreme Court nominees. But, due to the nature of a lifetime appointment, they are entitled to a higher level of scrutiny than other judicial nominees for the Federal bench.

I have three specific criteria that a Supreme Court must satisfy: First, I require that he possess the technical and legal skills which we must demand of all Federal judges. Second, the nominee, in my view, must be of the highest character and credibility. And, finally, I rigorously examine the nominee’s record to see whether he or she displays a commitment to equal justice for all under the law, in order to protect the individual rights and liberties guaranteed by the Constitution of the United States.

Now, I turn to character and credibility. The question is: Does Judge Alito possess the qualities of mind and character necessary to serve as a Supreme Court Justice? I do not question whether Judge Alito is personally decent or if he has integrity. I was impressed by the diverse group of former clerks and colleagues who testified before the Judiciary Committee who could not have given him higher praise.

Let me also say I know there were questions raised. I listened carefully regarding those concerns including those regarding the Concerned Alumni of Princeton and the recusal issues that were raised by a number of committee members on the Judiciary Committee. These questions, while relevant, and certainly need to be explored, would not have decided my vote on this nominee. I do not minimize it. But, if my decision were to be based solely on the recusal question or Judge Alito’s membership in the Concerned Alumni of Princeton issue, I would be here supporting this nomination.

Those are not the most important issues to this Member. But what is important, are other issues that were raised during this nomination. Indeed, I am troubled that throughout Judge Alito’s hearings, Judge Alito failed to provide clear and germane responses to legitimate questions.

A few examples. For instance, when Senator SCHUMER, from New York, asked Judge Alito if he still believed his statement from the 1985 memo that said the “Constitution does not protect the right to an abortion,” rather than reply with a simple yes or no answer, Judge Alito deflected the question and instead replied, “The answer to the question is that I would address the issue in accordance with the judicial process as I understand it and as I have practiced it.”

When Senator FEINSTEIN of California asked Judge Alito if Roe v. Wade was the settled law of the land—not an unpredictable question, a fair one, one might ask about Brown v. Board of

I waited to make my decision because I felt that Judge Alito deserved a hearing before the Judiciary Committee. The members who, unfortunately, were not on the committee should have an opportunity to review the transcripts of that hearing and then engage, as nonmembers of the committee, in a discussion of the merits and demerits of that nominee. There has been denigration of this Member because of the cloture motion filed by the majority leader, provoking what I deeply regret that occurred only a few hours ago, and that was actually to have to vote on a cloture motion.

I did not like casting that vote. I did not want to vote for it, but I felt I deserved the opportunity to be heard. So I do not regret at all that I am a part of the Senate, that I am a part of the cloture motion, which provoked the exact scene we saw unfold here again.

Now, there is little question in my mind as to Judge Alito’s intellectual competence and legal experience, and all of that. If this were the only criteria, I would be for him.

Judge Alito received his legal education from Yale University School of Law in my home State of Connecticut. He served as a Government attorney in a number of positions including: Assistant Solicitor General, Deputy Attorney General, Associate Attorney General, and U.S. Attorney for the District of New Jersey under President Reagan. In 1990, Judge Alito was nominated by George H.W. Bush to U.S. 3rd Circuit Court of Appeals. In the course of his hearing before the Federal bench, Judge Alito has heard more than 3,000 cases. Furthermore, the American Bar Association has twice unanimously awarded Judge Alito with their highest rating of ‘well qualified.’ I have great respect and admiration for his intellect, legal experience, and service to the American people as part of the Judicial Branch.

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Education. Griswold v. Connecticut, and there is a long list of cases that are considered established law, settled law—when she asked the nominee whether Roe v. Wade—one in that litany of cases—is settled law, instead of answering it directly one way or the other, Justice Roberts did, in very unequivocal terms—others might have said absolutely not; that would have been a very straightforward answer—what did we hear? He said—this is reminiscent of some comments that were ascribed to Justice Scalia—"the answer is, but he did not have the courage, in my view, to say that, which I would have respected. I might have disagreed with it, but I would have respected it. That is troublesome to me. Finally, I think we should vigorously examine the nominee to see whether he or she is capable of and committed to upholding the Constitution of the United States and its promise of freedom and equality for all. Protecting the constitutional rights of all Americans is perhaps the most fundamental duty of a Supreme Court Justice. His interest in constitutional law was particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment."

That is a fairly sophisticated answer in 1985. Many of these decisions, of course, compromise the cornerstone of the 18th century fundamental democratic principle of one person, one vote, in preventing the violation of an individual's privacy by the state—a matter that concerns everybody in this country; we seem to talk a lot about it going on today—in ensuring fair treatment in criminal trials. To wholeheartedly reject this legacy is also to reject the continued pursuit of the constitutional ideals of liberty and equality, in my view. Before the Senate Judiciary Committee, Judge Alito defended himself by saying he wrote the comments 20 years ago. Twenty years ago, he was well into his thirties. This is not some 18-year-old who is writing these thoughts. Of course, before becoming a judge, in that case, he was merely outlining the development of his thinking about constitutional law at the time and pledged to keep to it. He was confirmed to the Supreme Court. Well, that is something to know. I am glad to hear he is going to have an open mind.

The seven current and former members of the Third Circuit Court of Appeals stated, "no post-ideologue," "has no agenda," and "is attentive and respectful of all views and is keenly aware that judicial decisions are not academic exercises but have far-reaching consequences on people's lives." I think those were certainly worthwhile comments to make, and certainly the comments of his fellow peers on the court I found to be compelling arguments on his behalf. However, I must say, having said all of that—I hope they are not going to protest evidence that the college had failed to make reasonable accommodation for her disability. Alito dissented, and again the majority reacted strongly to Alito's analysis: "few if any Rehabilitation Act cases would survive summary judgment if such an analysis were applied to each handicapped individual's request for accommodations."

But, I am especially troubled about Judge Alito's dissent in the Third Circuit Case of Chittester v. Department of Health and Rehabilitation Services, in which he writes: "the primary objective of the act is to ensure that both male and female workers have equal access to the program; they were not punished or discriminated against because of their family responsibilities. However, Judge Alito found that the law was not a valid exercise of Congressional power to enforce the Equal Protection Clause. He said:

Unlike the Equal Protection Clause, which the Family Medical Leave Act is said to enforce, the Family Medical Leave Act does much more than require nondiscriminatory sick leave practices. It creates a substantive entitlement to sick leave.

The decision reflects a prescriptively narrow conception of what "equal protection" required. Real equality cannot be achieved, and the very real effects of discrimination cannot be successfully combated, without meaningful, substantive action. This is precisely why Congress enacted the Family and Medical Leave Act. The Supreme Court recognized this in Nevada Department of Human Resources v. Hibbs. In a 6-3 decision authored by Chief Justice Rehnquist, the Court held that contrary to what Judge Alito said in Chittester, a worker can sue a State employer who fired
him for taking family leave to care for his sick wife. This finding is critical to ensure that workers and their families can continue to take leave without fearing for their job. This right might be jeopardized if Judge Alito is confirmed, as during the hearing Judge Alito failed to provide evidence of discrimination in personal sick leave even though there is compelling evidence in the legislative history of this law.

In these cases, the very judges who talked about our nominee as being fair and not being an ideologue, in their majorities, had very different things to say about their colleagues on some very critical cases on which this Appellate Court Judge reached different opinions, such as I have cited here, as well as in several others that came before that circuit.

I am also concerned about Judge Alito’s ruling regarding the Family and Medical Leave Act, which I authored. That decision provided meaningful relief to millions of Americans. Judge Alito would have made significant changes, if not eliminated the law altogether, a great setback, in my view. The Supreme Court has provided only tepid support for the unitary executive theory of Presidential power. In a November 2000 speech to the Federalist Society, Judge Alito expressed strong support for the unitary executive theory calling it “Gospel according to the Office of Legal Counsel” referring to the position he held in the Reagan Justice Department. Proponents of this theory believe that the Constitution vests the President with complete authority over the administrative and regulatory branches. Judge Alito’s failure to shed any light on his professed support for a powerful, unitary executive is troubling. In Hamdi v. Rumsfeld, Justice O’Connor acknowledged that the executive power must have reasonable limits, asserting 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 refused to comment on his mentor’s statement and instead remarked that “no person is above the law, and that includes the President.” Unlike Chief Justice Roberts at his confirmation hearing, Judge Alito did not identify an affirmative obligation of the courts to block an executive action if the Executive acts in a manner that contravenes constitutionally. Judge Alito’s answer fails to adequately explain in any substantial way, his views on limitations to executive power.

This failure is a particular significance given the current political landscape. President Bush and his lawyers adopted an expansive interpretation in their view of executive power, particularly in relation to the War on Terror and the conflict in Iraq. In fact, President Bush has cited the “unitary executive” theory in several recent instances to override congressional provisions he finds objectionable. I am disturbed that Judge Alito has claimed, for himself, the authority to override the will of the Congress in passing its antitorture legislation—legislation which received the overwhelming support of congressional Members. This undermines the separation of powers and democratic principles. I am further troubled that in the course of the Judiciary Committee hearing, Judge Alito did not adequately distance himself from the current administration’s belief that this theory provides justification for the NSA to engage in the warrantless wiretapping of U.S. citizens in defiance of the Foreign Intelligence Surveillance Act, and for the detention of U.S. citizens accused of being enemy combatants. Defining permissible boundaries of Presidential power is among the most pressing of today’s constitutional questions, and will almost inevitably arrive before the Supreme Court in the years to come. It is for this reason that I am troubled at a candidate’s unwillingness to shed any light on his past comments and his current beliefs is so significant. These failures call into question whether Judge Alito has sufficiently demonstrated that his jurisprudential philosophy allows for a degree of respect for democratic checks and balances, and the protection of individual rights and freedoms that the Constitution—and the public—demands.

A Supreme Court Justice influences the most critical issues facing this and future generations of Americans. I believe that the Court may now be at a pivotal point in which the future direction of our law is at stake. Judge Alito, if confirmed, will take the seat of Justice Sandra Day O’Connor of the Supreme Court. While all Supreme Court Justices have the same unique obligations—to serve as the ultimate guardians of the Constitution, the rule of law, and the rights and liberties of every individual citizen—Justice O’Connor has long provided a voice of reason and open-mindedness as she has carried out this weighty responsibility. With a moderate temperament and judicial independence, Justice O’Connor has shown an ability to bridge the political divide and to protect fundamental American rights and freedoms. We cannot underestimate how much is at stake in filling this critical seat on the Court.

When I spoke on this floor regarding the nomination of Chief Justice John Roberts, I stated that for those of us concerned about keeping America strong, free and just, his confirmation was no easy matter. However, I ultimately concluded that although he was a conservative nominee, Judge Roberts was within the mainstream of judicial thinking—in his judicial philosophy, his respect for precedent and his belief that the Constitution cannot be read as a document frozen in time. While his responses to questions in the Judiciary Committee may not have been as open as I had hoped, I decided that there was sufficient evidence to believe that he would honor and protect the individual rights and freedoms enshrined in our Constitution.

I regret to say that by reviewing his judicial record and his responses to the committee, I cannot be convinced that Judge Alito falls within the judicial mainstream. His evasiveness in the face of questioning by the committee, his established record on the bench of taking a restrictive view of individual rights, and his inability to explain his past comments on executive power all lead me to harbor significant concern.

Determining whether to confirm a nominee to the Supreme Court is never an easy decision. Whether a nominee is sufficiently within the mainstream of judicial thinking is often a question of degree. While Judge Alito is clearly intellectually qualified and legally experienced, I am not convinced that Judge Alito’s judicial philosophy will allow for the faithfulness to the constitutional rights and freedoms, and the protection of equality before the law we have come to expect from a Supreme Court Justice.

After a review of Judge Alito’s extensive record, his decisions as a judge on the Third Circuit, and his testimony before the Senate Judiciary Committee, I must oppose this nomination. I have concluded that Judge Alito’s judicial temperament is out of step with our fundamental constitutional values and that his confirmation would not be in the best interests of the United States.

The PRESIDING OFFICER. The Senator’s time has expired.

Mr. DODD. So, Mr. President, for the reasons I have stated, I will oppose this nomination. I say this with regret because it will only be the fourth occasion in 25 years I will have voted against a nominee for the Supreme Court. I will do so tomorrow at 11 a.m.

I deeply regret that I didn’t have the opportunity to engage in a fuller discussion. It is somewhat disturbing, that I was only allocated 20 minutes. Because of the constraints on time, there is all this Senator can say about a lifetime appointment to a coequal branch of Government, a nominee that will have a huge impact on the course of America in the 21st century.

I yield the floor.

The PRESIDING OFFICER. The Senator from Oklahoma is recognized for up to 1 hour.

Mr. INHOFE. Mr. President, I say to my good friend from Connecticut, I was surprised to find out he was not a member of the conservative caucus. Now I know. But I would agree with him insofar as the significance of the confirmation vote that will take place.
tomorrow. There is nothing more solen, nothing more significant that we have to deal with than confirming judges, whether they are nominated by Democrats or by Republicans.

However, I respectfully disagree with the home minister. I look forward to voting for the successful confirmation of Judge Alito. I have had a chance to talk about him. I believe he will be a strict constructionist and will do a good job for the United States, specifically for my 20 kids and grandkids.

NATIONAL SECURITY

Mr. INHOFE, Mr. President, I am not here, people will be glad to know, to talk about Judge Alito. I am here as an assignment. Serving on the Senate Armed Services Committee, as is the keeper of the chair, I have been there for quite a number of years. I have taken the assignment of giving you, as to what President Bush, prior to his State of the Union Message tomorrow night, has done in the way of national security and national defense. I am proud to say that I am very proud of the job he has done. In doing this, what I would like to do is break it down into three segments.

First, I want to talk about the problems President inherited when he became President in terms of our national security; second, the solutions, the very solutions you brought to these problems; and third, the challenges he has for the future, for the next 2 or 3 years. In doing this, I know I will come across as being very partisan. Quite frankly, when we are dealing with national defense, I am quite partisan. I think the most important thing we have to do here is to keep America strong, make sure that we have a strong national defense system. I hate to say it, but that becomes a partisan issue. However, it is too serious of an issue to try to be diplomatic, so I will not attempt to be diplomatic tonight. I will be dealing with the truth.

Winston Churchill said: Truth is incontroversiable. Panic may resent it, ignorance may deride it, malice may denounce it, but there it is. First, in dealing with the problems that he inherited, I would like to outline seven huge problems that this President inherited when he became President. The first is, when he was inaugurated he received a military structure that was in total disarray. During the Clinton administration in the 1990s, I will show you in terms of dollars what happened to our system. There was an euphoric attitude everyone had that somehow the Cold War was over and we did not need a military anymore.

This is what the Clinton administration thought. If you take this line right here, this is kind of the baseline solution only increased by inflation. So by doing this, we would say that if President had taken the baseline, the appropriations that he came in with and just applied the inflationary rate, it would be that top line, the black line. However, he didn’t do it. Instead, with his budget, this yellow line is what he requested.

Fortunately, we in Congress were able to get this up to what I see as a green line here. So this is actually what happened right here. This is what was actually appropriated. This would have been a static system. This is what the President wanted.

What does that mean? It means that during the years he was President, he decreased spending from the level where it was by $313 billion. If we had not raised the amount that was in his budget, his budget called for a decrease of $412 billion. We are talking about the difference between the black line and the red line. It means that the Clinton-Gore administration cut the budget by 40 percent, reducing it to the lowest percentage of gross national product since before World War II.

The first 2 years of the Clinton administration, I was in the House of Representatives. I was on the House Armed Services Committee. I knew what he was going to be doing to our military. I knew about the budget cuts. I was there during this period. I was there during the first 2 years of his administration. Then as I saw it taking place, we were on the floor at least every week or two talking about what this President was doing to our military.

When they say the Cold War is over, we don’t need a military anymore, I look wistfully back to the days of the Cold War. During the Cold War, we knew we had one superpower out there. It was the Soviet Union. We knew what they had. They were predictable. Their attitudes were predictable. They represented a great country, the U.S.S.R. We knew pretty much where we were. We had a policy that was in place. It was called the Containment Policy. It was in place to an Eastern Bloc type of mentality. It was one that was working quite well.

During the time of the 1990s, during the Clinton drawdown of the military, one particular general comes to mind. I considered him to be a hero because it took courage. It is hard to explain to real people, as I go back to Oklahoma, how much courage it takes for someone to stand up against his own President if he is in the military. These are real people. General John Jumper was an Air Force General who later became the Chief of the Air Force, stood up in 1998 or 1999 and said: This insane drawdown of our military is something we cannot continue.

Not only were we drawing down to almost 60 percent, in terms of Army divisions, of our tactical air wings, our ships were coming down from 600 to 300, but also our modernization program.

So General Jumper, with all the credibility that he had, and there is no one in America more credible than he is—was able to say that we have a very serious problem and we now are sending our kids out in strike vehicles where the prospective enemy has better equipment than we do.

People don’t realize it. When I go back to Oklahoma, I say: Do you realize some countries make better fighting equipment. For instance, five countries make better artillery piece than the very best one that we have, which is the Paladin.

John Jumper said: Our best strike vehicles are the F-15 and F-16. The Russians are now making the SU-27, the SU-30s, and are preparing to make the SU-35. Those vehicles are better than the best ones we have in terms of jammers and radar.

I could get more specific in how they were better, but they were better. I agreed with him at the time and said so and applauded him when he made the statement that we need to move on with the FA-22 so we can get back and be competitive again.

People wonder why the liberals and, I say, the Democrats do not support a strong national defense. There are some reasons for this. One of the things we have in this country, which people don’t stop and really think through, is the convention system. It is kind of a miracle. In a living room in Broken Arrow, Oklahoma, Republicans and Democrats decide what they decide what we stand for. We stand for a strong national defense, we are pro-life, all that stuff. At the same time, across the street you have the Democrats meeting. They are talking about gay rights and abortion and all the things they stand for. They decide what delegates go to the county convention. So the most activist of each side, liberals and conservatives, become the people who end up going to the conventions. Then they go to the district convention, the State convention, and then the national convention.

The bottom line is, if any Republican wants to run for the Senate or for the House or for a higher position, that person has to be in the party, has to be a member of the party, and that is adopted by his party in the national convention of the Republican Party. It is a conserving agenda. For the Democratic Party, it is liberal agenda. That is a long way around the barn, but it kind of explains as to why these Members of the Senate from the Democratic side are not strong in terms of a national defense.

It is because if you really look at a list of people, they don’t think you need a military to start with. Liberals believe that if all countries would stand in a circle and hold hands and unilaterally disarm, all threats would go away. They don’t say that, but that is what they really think. So we have these people running for President on the Democratic side, and they don’t want to perform in terms of what the needs are from a national security standpoint.

So you said at the outset, there are two things unique to America. The other one is, we are so privileged in this country. If people at home want to know how Jim Inhofe, as a Member of